Case No: 2408404/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr D Chow

Respondent: NHS Cheshire and Merseyside Integrated Care Board (Amended from NHS Halton Clinical Commissioning Group)

Heard at: Manchester Employment Tribunal

On: 20, 21, 22, 23 and 24 March 2023

Before: Employment Judge Mark Butler
Ms L Heath
Dr B Tirohl

Representation
Claimant: Mr A Effiong (Lay Representative)
Respondent: Mr D Tinkler (of Counsel)

JUDGMENT

1. The claim of a failure by the respondent to make reasonable adjustments does not succeed and is dismissed.

2. The claim of indirect disability discrimination does not succeed and is dismissed.

3. The claim of harassment related to race does not succeed and is dismissed.

4. The claim of victimisation does not succeed and is dismissed.

5. The claim of being subjected to a detriment on the grounds of having made a protected disclosure does not succeed and is dismissed

6. The claimant has been found not to have been constructively dismissed. His claim for unfair constructive dismissal does not succeed and is dismissed.

7. For the avoidance of doubt, all claims in this case have failed and are dismissed.

REASONS

INTRODUCTION

8. The claimant presented his claim form 10 July 2021. He brought complaints of constructive unfair dismissal, whistleblowing complaints, and disability discrimination complaints.

9. There is a preliminary issue that I record here. During the hearing the parties agreed to amend the respondent's name to NHS Cheshire and Merseyside Integrated Care Board. This is the Care Board that has now taken over from NHS Halton Clinical Commissioning Group. The name has been amended on this judgment.

10. The tribunal was provided with a file of evidence that man to 1080 pages.

11. The tribunal heard evidence from the claimant. The claimant called no further witnesses.

12. The respondent called:

    a. Ms Austin, who was the line manager of the claimant and subject to several of the complaints raised by the claimant,
    b. Dr Davies and Ms Thompson, both of whom were named in the harassment complaints, and
    c. Mr Merrill, who heard the claimant's appeal against grievant outcome and conducted a separate investigation into allegations raised by the claimant in relation to social media use of senior persons of the respondent.

13. The tribunal was mindful of some of the symptoms of the claimant's disability and agreed an adjustment to the process of a break every 45 minutes. However, the claimant was reminded that he could request additional breaks in proceedings should he require them. The tribunal tried to incorporate breaks in between witnesses and ensured that the claimant and his lay representative had time between the final witness giving their evidence and the commencement of closing submissions.

14. The tribunal also try to assist the claimant and his lay representative wary considered it appropriate to do so. This included giving some guidance in terms of areas for questioning of witnesses. And putting some questions to the respondent witnesses on the claimant's behalf. However, the tribunal had to ensure that it did not step into the arena and act as a representative for the claimant. There are limits in terms of what the tribunal can do to assist non-legally represented parties.

LIST OF ISSUES

15. There was an agreed list of issues in the evidence file at pages 105-110. The parties agreed at the outset of the hearing that these were the issues to be determined in this case, subject to a few matters recorded below.

16. It was explained to the tribunal that the respondent had conceded that the claimant's impairment satisfied the definition of disability under the Equality Act, and that the respondent had knowledge of the disability throughout the material times. The respondent also accepted that the grievance raised by the claimant in November 2018 was a protected act for the purposes of victimisation. There was some discussion with the claimant as to what was the final act that he says caused him to resign from the respondent. The claimant explained that it was the three

detriments on which he relied on in his whistleblowing complaint.

17. I have attached a full copy of the list of issues to the back of this judgment.

LAW

A failure in the duty to make reasonable adjustments

18. The relevant statutory provisions of EqA, in respect of a failure to make reasonable adjustments complaint are as follows:

> **20. Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. ...
>
> **21. Failure to comply with duty**
>
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Harassment

19. Protection against harassment is provided for at s.26 of the Equality Act 2010:

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

Victimisation

20. Victimisation protection is provided for at s.27 of the Equality Act 2010.

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

21. We reminded ourselves of the burden of proof in discrimination cases, with reference to section 136 of the Equality Act 2010:

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

Detriment on the grounds of a Protected Disclosure

22. It is at s.43B of the Employment Rights Act 1996 where it is set out what is meant by a qualifying disclosure:

> **43B Disclosures qualifying for protection.**
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [F2 is made in the public interest and] tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with

any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

23. Whilst protection from being subject to a detriment on the grounds of having made a qualifying disclosure is contained at s.47B of the Employment Rights Act 1996:

> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

Unfair constructive dismissal

24. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed where they terminate their contract of employment "…with or without notice in circumstances in which he is entitled to terminate the contract without notice by reason of the employee's conduct". In short this is the legal principle of constructive dismissal.

25. What this is referring to is the entitlement to bring a contract of employment to an end without notice by an employee where the employer is in fundamental breach of that contract. The leading case in relation to this is Western Excavating v Sharp [1978] 1 All ER 713.

26. In Western Excavating v Sharp it is explained that a fundamental breach of contract occurs where the claimant commits a significant breach, which go to the root of the contract of employment, or which shows that the employer no longer intend to be bound by one or more the central terms of that contract. In such a case the employee is entitled to treat himself as discharged from any further performance and resign.

27. This test is an objective test, and it is not sufficient that the employee subjectively perceives that there is a fundamental breach.

28. It is further clear from this case, that an employee relying on a breach of contract in this way must make up their mind and resign soon after the breach, or otherwise it may be held at the contract has been affirmed. The burden is on the employee to show that a dismissal has occurred.

29. A constructive dismissal may result from a breach of an express term or from a breach of an implied term in the contract of employment.

30. Lord Steyn in Malik v Bank of Credit; Mahmud v Bank of Credit [1998] AC 20 gave guidance for determining if there has been a breach of trust and confidence, when he said that an employer shall not:

> '…without reasonable and proper cause, conduct itself in a matter calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

31. Whilst conduct of the employer must be more than unreasonable, breach of trust and confidence will invariably be a fundamental breach.

32. A constructive dismissal may result from either a single act, or from the cumulative effect of a series of acts. Where it is brought on cumulative effect of a series of acts, the last act, often referred to as the last straw, need not be a breach of contract in itself but it must be capable of contributing something to the cumulative breach of contract. And this is a principle that is well developed in case law. For example, Dyson LJ in London Borough of Waltham Forest v Omilaju [2005] All ER 75 described the last straw in the following terms:

> "*I see no need to characterise the final straw as unreasonable or blameworthy conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and perhaps even blameworthy. But, viewed in isolation the final straw may not always be unreasonable, still less blameworthy. Nor do I see why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however, slightly to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*

CLOSING SUBMISSIONS

33. A written document was presented on behalf of the claimant. And oral closing submissions were made on behalf of both the respondent and the claimant. These are not repeated here but have been considered in reaching this decision.

FINDINGS OF FACT

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

34. The claimant commenced employment with the respondent on 1 August 2012.

35. The claimant had been assessed through Access to Work in 2010, 2011 and in September 2014. The assessment that took place on 25 September 2014 is at pp.111-124. He recommendations contained within these two assessments were fully implemented.

36. Ms Austin became the claimant's line manager formally with effect from 01 June 2018.

37. The claimant had his first 1-1 meeting with Ms Austin, as his new line manager, in

June 2018 (see pp.155-161). It was confirmed by the claimant to Ms Austin in this meeting that the respondent had actioned all of the recommendations from the earlier Access to Work Assessments. This was in terms of equipment and software. However, the claimant raised with Ms Austin that he had not yet completed all the training that was provided as part of the support package. The clamant was given an action point of contacting the training provider and completing the outstanding training. Ms Austin also required the claimant to ascertain whether any of the software needed updating or licences needed reviewing (see p.158).

38. The claimant attended a one-to-one meeting with MS Austin on 11 July 2018 (see pp.181-183).

39. The claimant attended at a one-to-one meeting with Ms Austin on 20 August 2018. At this meeting the claimant's workload was discussed. It was recorded that his workload was okay, but that the claimant had not met the deadline for the Hale Village consultation outcome report. At this meeting Ms Austin discussed with the claimant and agreed that a new access to work assessment should take place (see pp.193-194).

40. The claimant underwent a further Access to Work assessment on 18 September 2018. This assessment recommended that the claimant be provided with support in the form of Coping Strategy Training, Disability Awareness Training, and special aides and equipment in the form of a Livescribe Smartpen alongside training and Dragon Software alongside Training, approval of which was sent to the claimant by letter dated 08 October 2018 (see p.205). The claimant signed the declaration on the Access to Work form on 15 October 2018 (see p.129).

41. The claimant had a one-to-one meeting with Ms Austin on 20 September 2018. The claimant's current workload was discussed, and the claimant confirmed that his workload was manageable but that he needed to plan ahead better in order to avoid missing deadlines. Ms Austin advised the claimant to use his diary for planning ahead. The claimant's recent access to work assessment was also discussed. It is recorded that both Ms Austin and the claimant found the assessment to be beneficial. The assessment identified that the claimant would need an updated version of the Dragon software, with a further recommendation for a new device. Ms Austin agreed that these could be provided. The claimant, in line with recommendations within the assessment, was to be moved to a desk which was in a quieter spot (see pp.198-200).

42. The claimant had a one-to-one meeting with Ms Austin on 17 October 2018 (see p.201). At this meeting the claimant's Access to Work Assessment of 18 September 2018 was discussed. Ms Austin agreed to implement all the recommendations contained within the report and told the claimant that it had all been signed off for processing. The issue of training was discussed, with the claimant being told to book onto all training with view to completing by end of year. It is recorded in this meeting that the claimant had moved desks to help him with his concentration levels. Ms Austin asked the claimant whether there was any further support that could be given to him. The claimant explained that no further support was needed (see p.203). The claimant did raise some concerns with feeling overwhelmed with his role and that he was struggling to perform the actions that he was being asked to complete. Ms Austin advised the claimant on using planning tools to help him manage better. Ms Austin agreed to progress an Occupational Health referral (see p.204).

43. The claimant attended an Occupational Health appointment on 05 November 2018, the report of which was at pp.224-226 of the bundle. This notes that the claimant perceives there to have been a breakdown in his relationship with his manager and that he feels unsupported and 'bullied'. It is also recorded that the

claimant did not foresee himself returning to his current role due to this.

44. The claimant went on sick leave on 18 October 2018. He was absent from work until his return on 24 April 2019.

45. On 21 November 2018, the claimant raised a grievance about Ms Austin (see pp.227-231).

46. The claimant's grievance was supplemented by a Grievance Report Form, which was submitted on 14 January 2019 (see pp232-237). Mr Downing undertook investigations into the allegations.

47. The claimant returned to work on 24 April 2019 with a reduced workload which is restricted to a small number of manageable tasks for which he had extended deadlines to help him complete them.

48. On 12 July 2019, Mr Maurice Bowness contacted Ms Austin to provide an update on the claimant's training progress. He expressed that the claimant's progress on Dragon voice recognition software training had been hampered by a slow running laptop computer, which was making the software unusable. Mr Bowness advised Ms Austin that the claimant would benefit from this equipment being upgraded.

49. Ms Austin replied to Mr Bowness on 23 July 2019 and explained that she had spoken with the IT lead and that a new laptop was ready for the claimant at Warrington in line with the spec that he had detailed to her. The claimant was copied into this email.

50. As the claimant had not improved his performance sufficiently, Ms Austin placed the claimant on a performance action plan with effect from 25 July 2019 (see p.376). This action plan was presented in a format in line with that which the claimant had advised Ms Austin would help him understand the information. The performance action plan formed part of the 1-1 discussions from 25 July 2018 onwards.

51. The claimant was expected to undertake Dragon software training on 19 August 2019; however, this could not take place as the new laptop had not yet arrived.

52. By 10 October 2019, the claimant had received the new laptop. This was the date of the next Dragon software training. This training was completed successfully.

53. The claimant was assessed by occupational health on 28 October 2019 (the report starts at p.408). It is recorded in the report that the claimant had again contacted access to work who had agreed to come and reassess him. It is also noted that the claimant was looking into having a further in-depth dyslexia assessment.

54. The claimant met with Ms Austin for a 1-1 on 31 October 2019. At this meeting it was agreed that the claimant would arrange a new access to work assessment, and this was booked for 04 December 2019. This assessment did take place on 4 December 2019.

55. On 06 December 2019, Ms Austin approved additional support having contacted Access to Work following a further assessment (see p.465).

56. On 19 December 2019, the claimant attended a capability review meeting with Ms Austin, and he was accompanied by a trade union representative, Ms Holliday. The claimant was sent a letter summarising the discussion of this meeting on 24 December 2019 (see pp.487-494). It was explained that although there had been some improvements in performance, the claimant had failed to meet the objectives agreed in the performance action plan. And this was despite the adjustments that were in place. However, Ms Austin decided to extend the Stage 1 Review period

until 23 January 2020, to allow a final adjustment to be implemented, namely engaging a support worker.

57. The support worker support was put in place by 10 January 2020.

58. The claimant met with the Ms Austin on 23 January 2020, for a stage 1 final review meeting. A letter recording the contents of the meeting was sent to the claimant on 23 January 2020 (see pp.498-502). It was decided that the claimant had not improved sufficiently and he was being moved to stage 2 of the process.

59. The claimant attended a Stage 2 meeting with Mr Armstrong on 16 March 2020. Considering the mitigation presented by the claimant, Mr Armstrong decided to further extend stage 1 by a further 8 weeks.

60. The process was never completed as the claimant went off sick on 01 April 2020 and never returned before he left the employ of the respondent.

Harassment related to race

61. The claimant had a good relationship with both Dr Davies and Ms Thompson.

62. At no point before 06 February 2019 did the claimant hear or see Dr Davies say or do anything inappropriate, from a discriminatory perspective.

63. On 06 February 2019, towards the end of the day, the claimant and Dr Davies had a conversation. During this conversation, a range of matters were discussed:

    a. The claimant explained to Dr Davies that when he attended at a market that people had looked at him differently
    b. There was a general conversation between the two concerning the origin and progression of the pandemic. Both engaged in this conversation.
    c. The claimant explained that he found some of the right-wing theories disgraceful. At that time there was discussion in the public domain, and likely amongst staff of the respondent, of a link between Chinese food and the spread of coronavirus. This had been covered in local media reports.
    d. It is more likely than not that when the two discussed the origin of the virus and various right-wing theories that there was some mention of 'wet-markets' and eating 'bat soup' as being the source of the virus. This is because these were two of the more common misinformed theories that was circulating the public domain at the time.

64. At no point did Dr Davies state to the claimant that there had been racist comments in a staff meeting and that "senior people made comments about bat soup and said don't eat Chinese food" before stating that "it was racist, but it was done in humour". Although this is a disputed fact between the parties, the tribunal concluded that it was more likely that these specific comments were not said. In reaching this conclusion we did consider the inconsistencies in the claimant's evidence. The claimant's evidence under cross examination that the conversation ended on good terms, which would have been unlikely if such a comment was made. And that the claimant is an individual who does raise concerns when he considers it necessary but did not do so in relation to a conversation with Dr Davies until some 9 months later.

65. The conversation between the claimant and Dr Davies ended on good terms.

66. The claimant did not raise any issues about the conversation with Dr Davies at the time with anybody.

67. At no point before 10 February 2019 did the claimant hear or see Ms Thompson

say or do anything inappropriate, from a discriminatory perspective.

68. On 10 February 2020, Ms Thompson chaired a "stand-up" meeting with staff of the respondent. There was around 15 to 20 people present at this meeting, including the claimant. The claimant was the only member of staff of Chinese heritage present in this meeting. The expectation was that the information provided to those present at these meetings would be cascaded outwards to the staff population.

69. The purpose of these meetings at the time was to inform staff of issues that were current. There was no formal agenda. The meeting on 10 February 2020 was used to inform staff of issues pertaining to the spread of coronavirus and to debunk myths that were circulating amongst the staff population.

70. Ms Thompson relied on information provided to her from various sources, including from the respondent's Directors of Public Health.

71. Ms Thompson, as part of myth-busting, likely explained that there was no evidence to link the spread of coronavirus to Chinese people or Chinese food.

72. The claimant did not raise any concerns around 10 February 2020 about the content of MS Thompson's stand-up meeting.

73. The first time the claimant complained about the conversation with Dr Davies and the meeting held by Ms Thompson was on 28 October 2019.

Victimisation

74. By 02 December 2019, the only outstanding adjustment that was present in the Access to Work Assessments and/or raised as part of discussions with Ms Austin was the final training session with respect Dragon Software. And this was the claimant's evidence when pressed on this matter under cross examination.

75. As of 07 November 2019, the claimant had completed all but one of the training sessions for using the Dragon Software (this is recorded in the 07 November 2019 one-to-one meeting between the claimant and Ms Austin, see p.441).

76. The final training session for the Dragon software was due to be completed on 26 November 2019.

77. On 25 November 2019, Adrienne Bowness wrote to the claimant to explain that unfortunately Maurice, the person responsible for the Dragon Software training was off sick. And that the training would be rearranged once he had returned to work (see p.460).

78. On 02 December 2019, Adrienne Bowness again wrote an email to the claimant. This was to explain that Maurice had now returned to work. The training that had been missed was rescheduled to take place on 12 December 2019 at 2pm (see p.459).

79. The Dragon software training was completed on 12 December 2019 (see p.495, the date of 12 December 2019 was confirmed by the claimant under cross examination).

80. On 20 March 2020, there was a complaint made against the claimant in respect of some of his social media postings. This was described by the complainant as being either misjudged or cruel and highly inappropriate/offensive (p.508).

81. The claimant accepts that where there is a complaint from the public about an employee of the respondent about inappropriate use of social media in

circumstances where the employer can be identified, then it would be reasonable for the employer to investigate the matter.

82. Ms Austin had a TEAMS meeting with the claimant on 24 March 2020. It was explained to the claimant in this meeting that there had been a complaint from a member of the public concerning inappropriate social media activity, that this would be investigated in line with the CCG Disciplinary Policy. It was explained to the claimant that David Newton would be commissioning a formal fact-finding investigation and that the investigating officer would not be Ms Austin (pp.509-510).

83. As a direct consequence of the complaint against the claimant, Ms Austin decided to periodically monitor the claimant's social media postings.

84. The claimant commenced a period of sick leave on 01 April 2020. This was following him having contracted coronavirus. The clamant did not return to work from this sick leave before he left the employ of the respondent on 31 May 2021.

85. On 06 May 2020, advice from Occupational Health was that the claimant was unfit for work in any capacity.

86. The claimant had a welfare meeting on 16 June 2020. At this meeting, it was explained to the claimant that Ms Austin had agreed to a support plan to be implemented on his return to work that included undertaking a risk assessment (see p.527).

87. On 27 July 2020 there was further welfare meeting with the claimant. In this meeting the claimant explained that he was getting better but had had a dip that week. He explained that he could not walk up stairs without feeling out of breath. And that he could not walk 300 yards without having to stop for a rest. At this meeting it was explained to the claimant that due to his absence the disciplinary investigation had been paused. It was reiterated to the claimant that Ms Austin was not investigating the compliant, and that an independent investigating officer has been appointed (see p.530).

88. The claimant informed Ms Austin on 18 August 2020 that he was planning to take his family on holiday on 24-28 August 2020.

89. On 01 September 2020, the claimant contacted Ms Austin and explained that he had had a dip in his condition and that he was still not fit enough to attend work. And that he had had to attend out of hours at the medical centre on 28 and 30 August 2020. In this call he also explained that he had been on holiday to Wales but had not undertaken any strenuous activity. This was the unchallenged evidence of Ms Austin (see para 53 of Ms Austin's witness statement).

90. At some point between 25 August and 08 September 2020, Ms Austin became aware of the claimant's social media posting relating to his holiday in Wales. In this post, the claimant provided photographs and commentary about a visit to 'Bounce Below', which is an underground trampolining and activity centre in Wales. Ms Austin referred this matter to the respondent's Human Resource team.

91. A welfare meeting was held with the claimant on 08 September 2020. At this meeting concerns were raised about the claimant's social media posts. It was explained that his posts, which included some 200 photos and 14 videos, raised concerns as it may not be perceived as consistent with the reasons he had been giving for his absence. The claimant explained that he attended as part of his recovery. And that he did not participate, but that he followed his family round the activity as a photographer.

92. On 05 October 2020, the claimant attended an Occupational Health telephone review. Although it is recorded that the clamant remained unfit to return to work (see p.558), it was also recorded that he was fit to attend management meetings and that it would be best to address the investigations as soon as possible (see p.560).

93. The disciplinary investigation was re-commenced in line with the Occupational Health guidance. David Cooper commissioned Ms Mina Washington to undertake the disciplinary investigation into the claimant. Ms Mina Washington undertook the investigation into the matters that formed the basis of the disciplinary (this is clear from the letter from Ms Washington introducing her as the investigating officer at p.652, the investigating officer's report starting at p.627 and the disciplinary hearing notes that start at p.764). Mr Cooper, on balance, was likely the person who decided what matters were to be investigated in his role as commissioning officer.

94. Ms Mina Washington decided that there was no case for the claimant to answer in respect of allegation (a), which concerned breaching the CCG Equality and Diversity Policy by intentionally using language on Facebook that was offensive/discriminatory, and allegation (d), which concerned attending and participating in Bounce Below in manner inconsistent with his continued absence and inability to return to work in any activity.

95. The disciplinary hearing took place on 22 January 2021. The outcome of the disciplinary was sent to the claimant by email (pp.796-798). The outstanding allegations were not well-founded. The claimant was happy with this outcome.

Whistleblowing

96. On 01 February 2021 at 12.38pm, the claimant sent an email to those involved in his grievance appeal, which contained an attachment which was entitled further information (pp.801-816). This was on the same day as his grievance appeal hearing, which was due to start at 1pm.

97. The claimant had not shared any of this document with Ms Quinlan as part of the investigation process into his grievance. The claimant presented this information as a means of supporting his appeal.

98. The claimant has produced no evidence as to where he says that he is providing information that he says tends to show that a criminal offence is being committed. Nor has he explained which criminal offence he says that he considered was being committed.

99. The claimant did not consider that the matters contained in his document at pp801-816 were crimes, or that he reasonably believed that he was disclosing information that tended to show that crimes had been, were or would be committed, but considered that he had highlighted matters that he considered to be morally and socially wrong. That is what he explained under cross-examination.

100. In the claimant's attachment, he presented all the information he had and knew about in relation to the social media posts contained within it. The claimant did not have any further information about the posts or the context in which the posts were made, something which he explained under cross examination.

101. The claimant's attachment was not considered as part of his appeal, as it fell outside of the remit of the appeal. However, Mr Merrill decided that this further information would be subject to a separate and independent investigation. This was explained to the claimant at the conclusion of the grievance appeal hearing

and confirmed to him in the grievance appeal outcome letter (pp.824-825).

102. Mr Merrill commissioned an investigation into the further information provided by the claimant. Ms Helen Williams, a person external to the respondent, was appointed to investigate the matters raised by the claimant.

103. Ms Williams as part of her investigation did not meet with the claimant.

104. Ms Williams, as part of her report, included the terms of reference for her investigation (see p.855-856). The claimant had not seen the terms of reference in advance of seeing the report was not aware of what was included in the terms of reference for this investigation. However, he considers that the terms of reference contained in the report were suitable for the investigation.

105. Ms Williams reported her findings back to Mr Merrill. Mr Merrill made a decision based on the Ms Williams's report.

106. Mr Merrill met with the claimant on 14 May 2021 and provided feedback to the claimant in respect of the investigation that had been undertaken by Ms Williams, and what his decision was. The content of that discussion was contained in a letter sent to the claimant on 14 May 2021 (see p1034-1038).

Constructive dismissal

107. The claimant was sent a letter on 26 March 2021, this was to make a conditional job offer to the claimant for the to eat the Liverpool Women's Hospital (see p.840).

108. On 26 March 2021, the claimant emailed Ms Austin to inform her that he had secured a new job. He explained that the Deputy Director of HR from Liverpool Women's Hospital would be contacting her for a reference. The claimant asked Ms Austin what period of notice he would have to give (see p.845).

109. On 30 March 2021, Ms Austin responded to the claimant to inform him that she had completed a reference for him and submitted it (see p.844).

110. On 23 April 2021, having completed the formalities, the offer of appointment was confirmed to the claimant. The letter records that the manager at the Liverpool Women's Hospital confirmed the start date to be 01 June 2021, after which the claimant would attend at the next available induction (see pp.1014-1015).

111. On 23 April 2021, the claimant emailed Ms Austin. He explained that he was now in receipt of an unconditional offer of employment from Liverpool women's Hospital. The asked Ms Austin whether it would be possible for him to leave the employ of the respondent from Monday, 31 May 2021 (see p.1032).

112. Ms Austin replied to the claimant by email on 26 April 2021. She required the claimant to put his official resignation into a letter. She informed him that she would get back to him with respect to the other questions.

113. One 27 April 2021, the claimant sent an email to Ms Austin with his resignation letter attached (albeit dated 26 March 2021). This letter stated: "I am resigning from my post of Engagement and Involvement Manager from Friday 23 April 2021" (see p.1026). The clamant provided no further detail.

114. Ms Austin replied to the claimant on 27 April 2021, accepting the claimant's resignation (see p.1030). This reply also included information relating to the claimant's outstanding holiday allowance and arrangements for the claimant to

return any work equipment before he left.

115. The investigation into the claimant's whistleblowing allegations had no impact on the claimant's decision to resign. This was the claimant's evidence under cross-examination.

CONCLUSIONS

116. The tribunal does not find that the respondent applied a provision, criterion or practice ('PCP') of requiring persons, including the claimant, to write reports like other members of the team. The claimant had access to templates and was aware of reports written by others. However, he did not adduce sufficient evidence to satisfy the tribunal that such a PCP was applied by the respondent. The claimant brings no evidence in his witness statement on the application of such a PCP, nor has he directed the tribunal to any evidence in the file of documents. In those circumstances, the tribunal preferred the evidence of Ms Austin who gave evidence that no such requirement was applied byy the respondent.

117. The claimant wrote reports depending on what was required but was afforded flexibility in how he approached the writing of them. Indeed, he was afforded substantial support to assist him in writing the reports and completing the work that he was set.

118. The claimant has failed to establish the existence of the PCP on which he brings both his claim for a failure by the respondent in its duty to make reasonable adjustments and this claim of indirect disability discrimination. As such both claims are ill-founded and fail.

119. Turning to the harassment complaints.

120. It is not entirely clear how the claim for harassment, at least insofar as it relates to comments by Dr Davies, is brought.

121. If the claim is brought purely on the basis that Dr Davies referred to another discussion where it was mentioned that one could catch coronavirus from Chinese food, then the claimant has failed to establish that even from his own perception he considered this to have the effect or purpose of creating a harassing environment. If that is the case, then the claimant fails is not reaching the level of being harassing conduct. And further even had the claimant established that from his perception it was harassing conduct, in circumstances where the claimant was discussing with Dr Davies common right-wing theories surrounding the origin of the pandemic, then the tribunal would have concluded that it would not have been a reasonable perception to view this as harassing conduct. In those circumstances such claimant fails.

122. If the claim of harassment concerning Dr Davies was focused on Dr Davies relaying back a conversation around that Sue and stating that it was racist but done in humour, then the claim would still fail as the tribunal found that such comment was not made by Dr Davies. Either way does not succeed.

123. Similarly, the harassment claim brought on Ms Thompson informing a meeting that it was not possible to catch coronavirus from eating Chinese food, also fails on the basis that the claimant has not satisfied the tribunal that even from his own perception he considered or viewed this to be harassing conduct. And further it would be unreasonable to view such comment, that was made at a meeting that was arranged primarily for myth-busting, when media was reporting concerns of catching coronavirus from eating Chinese food, as having the purpose or effect of creating a harassing environment. This claim of harassment does not

succeed either.

124. If it was not disputed that the grievance raised by the claimant in relation to Ms Austin in November 2019 was a protected act for the purposes of a victimisation complaint. However, the claimant has not established that any of the four detriments contained at 5.2 of the list of issues with detriments that he was subject to as a result of having raised the grievance. Turning to each in turn.

125. As of 02 December 2019, the only outstanding adjustment to be made for the claimant was the final training session for Dragon software. This was what was explained to the tribunal by the claimant. However, the claimant was due to complete this session on 26 November 2019. It only did not take place because the trainer, Maurice Bowness was ill on that day, as confirmed by Adrienne Bowness by email of the 25 November 2019. The claimant was contacted again by Adrienne Bowness on 02 December 2019, with the training being completed on 12 December 2019. First, the Tribunal concludes that not having completed the training on 02 December 2019 in circumstances where the reason behind the cancellation of the training was due to the illness of the trainer was putting the claimant to some detriment. Secondly, even if we had found that the claimant had been put to a detriment, the reason why his training was not completed on 02 December 2019 was because the trainer was ill. He was not subjected to a cancelled training by reason of having raised a grievance. Therefore, if the claim of victimisation on the basis of Ms Austin not implementing reasonable adjustments on 02 December 2019, must fail.

126. As a matter-of-fact Ms Austin did not ask for a disciplinary investigation to take place. At its height, Austin informed the claimant that he was to be investigated following a complaint from a member of the public. The claimant has failed to establish that it was Ms Austin asked for a disciplinary investigation. And therefore this part of his victimisation complaint must fail.

127. Under cross-examination the claimant accepted that it was not Ms Austin undertook investigation into allegations following a complaint from a member of the public. Therefore, this part of his victimisation complaint must also fail.

128. In terms of investigation into holiday photographs posted on Facebook. This again was not investigated by Ms Austin and therefore must also fail.

129. However, the tribunal feels it necessary to go one step further in relation to the investigation into the complaint and the Facebook postings. There is no evidence to support that either of these matters were investigated or considered because the claimant raised a grievance over 12 months earlier. The disciplinary investigation naturally followed the complaint from a member of the public, a course of action that the claimant himself accepted as being appropriate when cross-examined. In terms of further enquiries being made following holiday photographs been posted by the claimant on Facebook whilst he was on sick leave, those enquiries were a natural flow from the way the claimant was presenting himself at occupational health assessments which appear to contradict his ability to partake in the activities that his family were partaking in whilst on holiday. There were clearly questions that need answers and that was the reason behind those further enquiries. The claimant has not produced any evidence that links enquiries into his holiday photographs with him having raised a grievance.

130. Turning to the final of the detriments in which the claimant brings his victimisation complaint, that in 2021 the director of commissioning showing a disciplinary meeting dropped the misconduct allegations. The claimant accepted under cross examination that he perceived this to be a positive result. The claimant did not perceive it to be a detriment. Nor would it be reasonable to perceive such action as it detriment. This part of the victimisation complaint also fails.

131. For the avoidance of doubt the victimisation complaint in its entirety fails.

132. The claimant's complaint of having been subject to a detriment on the grounds of making a qualifying disclosure rests on an alleged disclosure that he says he made on 01 February 2021 and that he says he reasonably believes that it was a disclosure of information that tended to show that a criminal offence had been committed. However, the claimant's own evidence does not support this first, his witness statement provides no evidence in respect of whether the document that he had sent was a qualifying disclosure. Furthermore, when cross-examined the claimant appeared to accept that he did not have a reasonable belief that a criminal offence had been committed but rather an act that was morally or socially wrong. The Tribunal concludes that the claimant did not have a reasonable belief himself that he was disclosing information that tended to show that a criminal offence had been committed. And that is on his own evidence. As such the Tribunal concludes that the claimant did not make a qualifying disclosure on 01 February 2021 as pleaded.

133. Even if the tribunal is wrong on that, and had the tribunal found that the claimant had made a qualifying disclosure, his claim for detriment on the grounds of having made a qualifying disclosure would still have failed. This is because the claimant has failed to establish that any of the three matters on which he brings this complaint with detriments to which he was subjected to. Turning to each in turn.

134. The claimant when cross-examined on the first of these detriments explained that he had included all of the information he knew in the document of 01 February 2021. That he had no further information or context behind the social media posts in question. The tribunal accepts that he was not invited to meet the investigation officer. However, in circumstances where he could offer no further information or contextual background, not inviting him to such a meeting, in the view of this tribunal, is not subjecting the claimant to a detriment.

135. The claimant under cross examination, having been taken to the investigating officer's report, accepted that the report did have terms of reference. He even commented that the terms of reference were suitable. The claimant in the circumstances has not been subject to the detriment as pleaded.

136. The claimant was not given feedback from Ms Williams, the investigating officer. That is simply because that was not her role. The commissioning officer, and decision-maker, was Mr Merrill. He met with the claimant and provided him with feedback on 14 May 2021. In those circumstances claimant has not been subjected to the detriment as pleaded.

137. For the avoidance of any doubt, the whistleblowing complaint does not succeed. The claimant has not established that he made a qualifying disclosure as pleaded. Nor has he established that he was subjected to any such detriments.

138. The constructive dismissal complaint was brought on all of the above complaints. Given that the tribunal has found that all of those complaints have failed, the claimant has failed to establish that the respondent has subjected him to conduct that when considered objectively is a fundamental breach of his contract or a repudiated breach of it.

139. Given the circumstances around which the claimant left the employ of the respondent. Given the lack of any detail in his resignation letter. And given the amicable engagement between the claimant and Ms Austin at the time the claimant secured his new employment. The tribunal, on balance, find that the reason why the claimant resigned from his employment with the respondent, was not because

of the conduct of the respondent but rather because he had secured new employment which he intended to take up. There has been no fundamental breach of the claimant's contract by the respondent, and the reason for his resignation were for other reasons other than alleged breaches of contract. In those circumstances the claimant has resigned, he was not constructively dismissed, and his claim of unfair constructive dismissal fails.

140. All claims in this case have failed and are dismissed.

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Employment Judge **Mark Butler**

Date 04 April 2023

JUDGMENT SENT TO THE PARTIES ON

11 April 2023

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

1 Disability

1.1 The Respondent has conceded that at the relevant time the Claimant has a mental impairment, namely Dyslexia (see Respondent representative email of 27 April 2022).

1.2 Did that impairment have a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities?

1.3 Did the Respondent know or ought it to have known that the Claimant had a disability?

1.4 The relevant time is:

1.4.1 The date of the grievance (28 October 2020)

1.4.2 The date of the grievance appeal (1 February 2021)

2 Failure to Make Reasonable Adjustments

2.1 Did the Respondent apply the following PCP:

2.1.1 The Respondent, namely Maria Austin, Director of Communications, insisted that the Claimant write reports like other members of the team.

2.2 If so, did the application of the PCP put the Claimant at a substantial disadvantage compared to people who were not disabled by:

2.2.1 By his inability to write reports at the same pace and quality as others due to dyslexia

2.3 Would the following adjustments avoided those disadvantages?

2.3.1 To provide training and IT software/hardware to assist the Claimant with writing reports. The Respondent says it had already provided training and support such as the provision of laptops, Dragon Software, a livescribe pen, extended timescales and reduced workloads. The Claimant says the following additional steps should have been taken

2.3.2 [Claimant to specify]. – Specification by Claimant

The training which was started should have been completed, not left unfinished.

The more powerful laptop the access to work trainer requested that Maria Austen provide the claimant should have been provided and not delayed.

The Health and Safety Executive risk assessment should have been carried out. This was actually a legal duty to protect employees from stress at work.

The second access to work assessment commenced by the Respondent for the claimant should have been completed. The first access to work assessment done was inadequate, and the wrong form of learning for the claimant.

2.4 Was it reasonable for the Respondent to make any further adjustment.

2.5 Did the Respondent know (or ought it to have known) that the PCP placed the Claimant at that disadvantage.

3 Indirect Disability Discrimination

3.1 Has the Respondent applied the following provision, criterion or practice:

3.1.1 That the Claimant write reports like other members of the team

3.2 Did the Respondent apply those PCPs and were they likely to put people who shared the Claimant's disability at a particular disadvantage when compared with people who did not have a disability?

3.3 The relevant pool is: the Corporate Department

3.4 Did the PCP put the Claimant at the particular disadvantage?

3.5 If so, has the Respondent shown that the application of the PCP was a proportionate means of achieving a legitimate aim?

4 Harassment

4.1 Did the Respondent subject the Claimant to unwanted conduct by:?

4.1.1 On 6 February 2020, Dr Davies referring to another discussion where catching coronavirus from Chinese food was mentioned

4.1.2 On 10 February 2020, Leigh Thompson informing a meeting that it was not possible to catch coronavirus from eating Chinese food

4.2 If so, was the unwanted conduct related to the Claimant's race?

4.3 If so, did the unwanted conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading or offensive environment for the Claimant?

4.4 In deciding whether the unwanted conduct had the prohibited effect, the Tribunal will take into account the perception of the Claimant, the circumstances of the case and whether it was reasonable for the conduct to have the effect.

5 Victimisation

5.1 Did the Claimant make a protected act in September 2018?

5.2 Did the Respondent subject the Claimant to a detriment because he had raised a protected act by:

5.2.1 On 2 December 2019, Ms Austin not implementing reasonable adjustments

5.2.2 In December 2020, Ms Austin asking for a disciplinary investigation to take place

5.2.3 In late December 2020, Mrs Austin conducting a one sided investigation into disciplinary allegations relating to a social media complaint and holiday photographs posted on Facebook whilst on sick leave.

5.2.4 In 2021, the Director of Commissioning chairing a disciplinary meeting and dropping the misconduct allegations

6 Whistleblowing

6.1 Did the Claimant make a qualifying disclosure as defined in s.43B(1)(a) Employment Rights Act 1996?

6.2 In particular:

6.2.1 Did the Claimant made a qualifying disclosure on 1 February 2021.

6.2.2 Did the Claimant disclose information which tended to show that a criminal offence had been committed?

6.2.3 Did the Claimant believe the disclosure of information was made in the public interest?

6.2.4 Did the Claimant believe it tended to show that a criminal offence has been committed or is likely to be committed?

6.2.5 Was that belief reasonable?

6.3 If the Claimant made a qualifying disclosure, the Respondent accepts that it was a protected disclosure because it was made to the Claimant's employer.

6.4 Did the Respondent subject the Claimant to the following detriments because he had made a protected disclosure:

6.4.1 Not being invited to meet the investigation officer, no terms of reference, no feedback from the investigation officer [see claimant's application of 17 January 2022].

7 Constructive Unfair Dismissal

7.1 Did the Claimant resign because of an act or omission (or a series of acts or omissions) by the Respondent?

7.2 If so, did the Respondent's conduct amount to a fundamental breach of contract? Does the Claimant rely upon a breach of an express or implied term of his contract of employment?

7.3 Did the Claimant resign promptly in response to that breach?

7.4 Did the Claimant affirm any breach of contract?

7.5 If, which is denied, the Claimant has been dismissed, was that dismissal for "some other substantial reason" and did the Respondent act reasonably in treating that reason as a sufficient reason to dismiss the Claimant.

8 Time limits

8.1 Has the Claimant presented his claim out of time in respect of any matter which occurred prior to 31 January 2021?

8.2 If so, would it be just and equitable to extend the time for presentation of the claim.