



# EMPLOYMENT TRIBUNALS

**Heard at:** Croydon (by video) **On:** 14 to 22 August 2023

**Claimant:** Mrs Joanna Crook

**Respondent:** University Hospitals Sussex NHS Foundation Trust

**Before:** Employment Judge E Fowell  
Ms D Mitchell  
Mr R Singh

**Representation:**

**Claimant** In person

**Respondent** Christopher Edwards of counsel, instructed by Cater Leydon Millard, Solicitors

## JUDGMENT

1. The unanimous decision of the tribunal is that the claims are dismissed.
2. The claims concern:
  - (a) a failure by the respondent to ensure that the claimant was aware, while off sick, of a suitable vacancy at a higher level;
  - (b) the handling by the respondent of her subsequent grievance; and
  - (c) other alleged mistreatment during the course of the grievance process.
3. The failure to ensure that she was aware of the vacancy was an oversight and there was no intention to exclude her from applying; it did not amount to a fundamental breach of contract and so the claimant's subsequent resignation did not amount to a constructive dismissal.
4. None of the alleged acts or failures amounted to unlawful harassment.

5. Although the claimant's anxiety amounted to a disability, none of the alleged acts or failures was done because of her disability, or because of her age, and so the claims of direct discrimination are dismissed.
6. The claimant's anxiety affected her attendance record, but none of the alleged acts or failures was done because of her absence and so the claim of discrimination arising from her disability is dismissed.
7. None of the alleged disclosures made by the claimant, which concerned
  - (a) the attitude of her manager to Covid, and
  - (b) a lack of experience of the part of the person appointed to the vacancyamounted to a qualifying disclosure and so the complaints of having suffered a detriment or dismissal for raising protected disclosures are also dismissed.
8. The respondent did notify the claimant of the vacancy by email but she did not access her email account while off sick although she was able to do so. The claimant was not at a substantial disadvantage in accessing her emails by reason of her disability and so there was no failure to make reasonable adjustments.
9. The claimant made allegations of discrimination on 25 November and 9 December 2020 which amounted to protected acts for the purposes of her victimisation claim, but she did not suffer any detriment as a result.

## REASONS

### Introduction

1. These written reasons are provided at the request of Mrs Crook, who left the hearing while they were being given. After about twenty minutes she interrupted to ask if she needed to continue to listen as she could not bear it, and described our conclusions as both abhorrent and contradictory. We confirmed that she was not obliged to listen any further and that written reasons would be provided.
2. The background is that Mrs Crook worked for the Trust as an Occupational Therapy Assistant. It was a Band 3 role and she was hoping to be promoted to Band 4. In October 2020 a Band 4 post came up. She was off sick at the time. An email was sent to the team to let them know about it but she did not read it and so she did not apply. When she returned to work she was shocked to find that the vacancy had been filled, and filled by a new and comparatively inexperienced colleague. Mrs Crook feels that her manager, Mrs Jane von der Becke, did not want her to apply and kept her in the dark over the vacancy. That led to an internal grievance process which took several months. Mrs Crook resigned on 26 February 2021, shortly before the process was concluded,

although she did attend the final grievance appeal meeting, which took place on 11 March 2021.

3. As to why Mrs von der Becke would have kept her in the dark, Mrs Crook points to her age, which was 55 at the time of her resignation; her anxiety, which the Trust accepts is a disability; and a disagreement she had with Mrs von der Becke earlier in 2020 about Covid, which she says involved a number of protected disclosures on her part.
4. The complaints presented are therefore as follows:
  - (a) constructive dismissal, alternatively an automatically unfair (constructive) dismissal for making a protected disclosure
  - (b) detriment at work for making a protected disclosure
  - (c) direct discrimination on grounds of age and disability
  - (d) discrimination arising from a disability
  - (e) failure to make reasonable adjustments
  - (f) harassment on grounds of age and disability, and
  - (g) victimisation.
5. The issues to be decided were set out in the case management orders made following the hearing on 6 May 2022 and so need not be repeated at the outset. We will return to them shortly. Suffice to say that there are a total of 14 alleged acts of harassment or discrimination or breach of contract. One of these relates to the grievance process and is broken down into six further allegations. The final allegation is of “continued harassment and discrediting” of Mrs Crook by Mrs von der Becke by email, which will involve us considering quite a number of emails.

### **Procedure and evidence**

6. We heard evidence from Mrs Crook, and on behalf of the Trust from:
  - (a) Mrs Jane Von Der Becke (Occupational Therapy Professional Lead), who was Mrs Crook's line manager;
  - (b) Mrs Marlize Phillips (Therapies and Dietetic Site Lead), who had overall responsibility for Occupational Therapy at the hospital and who heard the formal grievance;
  - (c) Mrs Jenny Whales (Band 7 Rheumatology Occupational Therapy Lead);
  - (d) Ms Andrea Wilson (Band 6 Senior Occupational Therapist), who was Mrs Crook's supervisor;

- (e) Mrs Judy Flahey (Employee Relations Manager, now People Manager), who provided HR support during the grievance process; and
  - (f) Ms Rachael Benson (Divisional Director), who held the grievance appeal hearing.
7. Mrs von der Becke was the main witness for the Trust so her cross examination naturally lasted the longest. Although Mrs Crook hoped that she could put all her questions to Mrs von der Becke on the third morning of the hearing, in the event it took all day. To allow time for other witnesses I had to insist that further questions for Mrs von der Becke were concluded within a further hour the next morning but even that was not quite enough. At the end of the appointed hour there was one remaining issue, the emails from Mrs von der Becke which are said to have been acts to harassment. However, I took the view that that was a question which could only be decided from reading them, and so the cross-examination was curtailed at that point.
8. We felt that all of the witnesses were honest and helpful. The differences between them were almost wholly about the interpretation to be put on the events in question. Mrs Crook's account has been detailed and consistent throughout, and there was little dispute over the events in question. Mrs von der Becke did not have the same vivid recall of each conversation and meeting, but she was very willing to concede points which were put to her and was concerned and apologetic about the fact that Mrs Crook had missed out on this promotion opportunity, as were her other colleagues.
9. There was also a bundle of 1523 pages, which is of course a considerable amount. It contains some duplication and much that is unnecessary. By way of example, there was an meeting on 9 December 2020, the minutes of which were disputed. No less than 11 different versions of those minutes have been included, occupying nearly 100 pages in all. We therefore emphasised to the parties that unless a particular page was referred to us in evidence or submissions it should not be assumed that we have been able to consider it in the time available.
10. Mrs Crook's witness statement came in two documents, one of 18 pages, which is a re-working of a document she prepared as a point-by-point response to the ET3, and another of 7 pages with a more general narrative. Having considered the evidence and submissions which were put before us we make the following findings of fact. As usual, not every point can be dealt with, only those necessary to support our conclusions.

## Findings of Fact

### *Background*

11. Occupational Therapy is a second career for Mrs Crook. She spent about 20 years in business administration, most recently as an executive assistant and office manager to a CEO in the energy sector. In her early 40s she decided to retrain for what she hoped would be a more rewarding area of work. For five years she worked at a specialist school for children and young adults with complex needs, and then at a care home, working alongside NHS physiotherapists and occupational therapists. She then did a two-year postgraduate diploma in occupational therapy before joining the physiotherapy department at the Princess Royal Hospital in Haywards Heath in 2018. This is one of several hospitals run by the Trust. In November that year she moved across to the occupational therapy team. This was still an entry-level, Band 3 position. Nevertheless, she hoped to progress and enjoyed the work.
12. Unfortunately at around this time her father passed away. She also lost two family pets, a cat and dog, in quick succession, and then there was a car accident. All this led to her having a few weeks off work in January 2019. Although she had a good absence record for the rest of that year she continued to have underlying anxiety and at some point she was referred to the Trust's HELP service, which we understand provides counselling.
13. Occupational therapists work in many areas of the hospital. There are various "medical" wards, a term which covers the wards for the elderly, for acute admissions, those with respiratory problems, for urology and gynaecology. The Sussex Orthopaedic Treatment Centre handles elective surgery such as hip replacements. Fractures and other traumas are treated on Twineham ward. The Sussex Rehabilitation Centre which helps people with brain injuries and other neurological disorders. And there are two outpatient clinics for rheumatology patients.
14. Mrs Crook worked on the medical and elderly care team, and her immediate supervisor was Ms Andrea Wilson. They had a very good working relationship. Ms Wilson carried out her regular supervision meetings every six weeks or so, which were an opportunity to discuss any concerns. As a result, Ms Wilson was well aware that Mrs Crook wanted to progress to Band 4. They would discuss how best to support her application by gaining experience in different areas of practice.
15. The main difference between Band 3 and Band 4 is that at Band 4 level the therapist is expected to work independently and manage others at Band 3. But vacancies are comparatively rare. Above that level, at Band 5, staff have to be clinically qualified and so there is a division, to which Mrs Crook was sensitive, between qualified and non-qualified or support staff.

16. This team was part of the larger group working on the medical wards, a group managed by Ms Jo Philpott. Ms Debbie Mansell oversaw the occupational therapists in the Sussex Occupational Therapy Centre (hip replacements) and Ms Jane Burrell oversaw those in the Sussex Rehabilitation Centre (neurological disorders). We did not hear evidence from any of them but we did hear from Mrs Jenny Whales, who managed those in the rheumatology clinics. She also had a very good relationship with Mrs Crook.
17. So, in all there were about 20 occupational therapists at the hospital, all managed by Mrs von der Becke, who is at Band 8a. She too had a good working relationship with Mrs Crook and they would often discuss things directly. She was a supportive and approachable manager.
18. Mrs von der Becke reported to Mrs Marlize Phillips, who managed teams at several hospitals and spent about one day a week – usually Wednesday - at Princess Royal.
19. During each shift an occupational therapist will naturally spend most of their time seeing patients, but they have a shared office space for carrying out any admin they needed to do. It has about seven desks with computers, which they use on a shared or hot-desk basis, all apart from the departmental administrator who had a dedicated spot. About a quarter of the space is taken up by Mrs von der Becke's office, which Mrs Phillips also shared when she was there. That was how things stood at the start of the Covid pandemic in March 2020.

#### *Covid*

20. This was clearly a very difficult time for all those who worked at the hospital. On top of her existing anxiety, Mrs Crook was worried out the risk of infection. Her daughter also had problems at school. Her daughter was worried about her parents catching Covid at work, since Mrs Crook's husband also worked at the hospital, in IT. Others were in a similar position. Of the nine team members on the medical wards, no less than seven were having treatment for anxiety. Shortly before lockdown Mrs von der Becke's brother had died. His wife was then diagnosed with cancer. Her own children were in their teens and struggling. And in addition to all this she had the pressures of managing a large team at a time of unprecedented danger.
21. After the first few weeks of lockdown things began to ease up. Wards were emptied to make way for Covid patients and elective surgery like hip replacements came to an end. The medical wards were the most busy however, and carried the most risk. Some of them were changed to Covid wards and everyone on those wards was having to grapple with the difficulties of social distancing and the need for PPE.

*Discussion about Band 4*

22. In April Mrs Crook had a discussion with Mrs von der Becke about moving to Band 4. It was not of course in Mrs von der Becke's gift to offer her a post, but there was a vacancy on the horizon. Debbie Mansell had achieved the rare feat of progressing from Band 4 to Band 5. In her twenty years at Band 4 she had spent six years training on the job and was about to achieve qualification. Her Band 4 role, for 30 hours a week, would then become vacant. Mrs von der Becke agreed to speak to Marlize Phillips about when this could happen.
23. With so much going on Mrs von der Becke forgot to go back to Mrs Crook about this and Mrs Crook did not follow it up. It was another six months before the post was advertised so there was probably nothing for her to report in the meantime, but this was not a snub; again, she was supportive of Mrs Crook's application.
24. There were only two other potential candidates at Band 3 - Eleanora Sirchia, who also worked in medical, and Vaughan Frederick, who worked in the Sussex Orthopaedic Treatment Centre. But two others were due to start, one of whom was Jessamyn Guiver.

*WhatsApp exchanges*

25. One way in which the team communicated was via a WhatsApp group. It was used for all sorts of day to day chat rather than any official business. Covid was one of the topics discussed, and it is fair to say that Mrs von der Becke initially thought that some of the alarm about it was exaggerated. One article which she posted [1237] late in the evening of 22 April was to the effect that hospital staff were at no greater risk of dying from Covid than the population at large. This was meant to be reassuring. Several comments were posted in response, including one from Mrs Crook, which she says challenged this view. Since this is the first alleged protected disclosure we will quote it:

The conclusion though .... ??

Although there are caveats to this estimate - explained below - and every death is one to be mourned, the data does not clearly show that healthcare workers are dying at rates proportionately higher than other employed individuals or even the population as a whole.

Again, this is cautiously reassuring.

It also says this.

Maybe the fact that we are better protected than the general population balances things out, if that makes sense.

Sorry, that was not clear. It also says this relates to first paragraph. Last paragraph are my thoughts.

26. We take from this that her view was more sceptical; she felt that the reason more healthcare workers were not dying was because of their better protection. Andrea Wilson then commented to the same effect. She also questioned whether it was because healthcare workers were younger than the population at large. There was no strong disagreement by either of them with the contents of the article however, just a note of caution. Privately, Mrs Crook may have thought that Mrs von der Becke was not taking Covid seriously enough but that does not really come through in this post, or any others.
27. A couple of days later she sent a private message [1395] to Ms Wilson to say she was pleased that she had commented on the article, and they agreed that they were not convinced by its conclusions. That exchange is also relied on as a protected disclosure. (Mrs Crook decided to leave the hearing at this point).

*26 May 2020*

28. 26 May was a difficult day for Mrs Crook, or at least a difficult morning. It seems from one of the texts that she sent to Mrs von der Becke that afternoon [992] that she was only in from 08.30 to 10.45. But while she was on the ward she became upset, having counted 17 people there – too many to observe social distancing – and having seen some junior doctors with their masks dangling down. She spoke to Ms Wilson about how she was feeling. Ms Wilson reassured her and told her about a mindfulness app for NHS staff that she might find helpful. It needed a password, which she could get by logging in to her work account. They texted afterwards [1394] as follows:

[26/05/2020, 13:04:09] Andrea Wilson: I didn't do much Jo. Just listened. I really felt for you, it's not nice to not have any sleep and feel like you need to try and push through! Good idea re holiday. I hope you get to relax and wind down a bit. You can sign on to work emails remotely, if you can't wait for that password! Take care you! Xxx

[26/05/2020, 13:07:21] Jo Crook (OTTI): Oh, thank you, didn't think about signing on remotely [scream emoji] xx. You really helped & am lucky to have you as my supervisor ...

29. After they had spoken at work, Mrs Crook also went to see Mrs von der Becke. That is clear from the text or WhatsApp messages between them. One of them was sent two days later, on Thursday 28 May, saying “thank you for your understanding on Tuesday”. It was part of a series of friendly exchanges about leave dates and working hours and ended with the words “Thank you for your support to date, much appreciated”.
30. It is difficult to know what was said in any detail as only Mrs Crook had any real recollection of the conversation, and that recollection does not really match these messages. She says that Mrs von der Becke asked her what the problem was, to which she responded that it was asthma and her age – her main personal risk



factors. Mrs von der Becke then made some remarks to the effect that Covid was rather like flu, and that there would be fewer deaths in the winter as a result. It is said that Jenny Whales, who was in the office, then interrupted, rather shocked, and said that Mrs von der Becke could not say that, after 45,000 deaths.

31. Mrs Whales could not remember this conversation in any detail – she thought it had taken place in a corridor, and did not remember this remark or anything contentious, and Mrs von der Becke had no recollection of it at all. But it is relied on, together with the earlier conversation with Andrea Wilson, as a further protected disclosure. We accept that in each case Mrs Crook may well have told them about the 17 people and the masks not being worn properly. That is the alleged protected disclosure. There is nothing to suggest that Mrs von der Becke took anything amiss from that conversation and the text messages show that there was no change in the friendly, supportive tone after that point. And since the tone continued to be friendly on both sides, we also conclude that Mrs von der Becke did not say anything of particular concern, so Mrs Crook may have misinterpreted or misremembered the discussion.
32. Before leaving that episode however, we note that Mrs Crook certainly knew that she could log in remotely to access her work account.
33. Naturally she had an NHS email account and there are many examples in the bundle of emails from her on that account. One rather surprising piece of evidence to emerge at this hearing, particularly surprising to Mrs von der Becke, was that she did not access it very often. Staff were expected to access their emails, particularly during Covid when paper was a possible source of infection. However, much of the information at work was paper-based. Even minutes of team meetings were printed and put in a plastic wallet on the notice board. Hence, Mrs Crook felt that she had little need for her to keep checking her emails and she did not do so.

#### *Arrival of Jessamyn Guiver*

34. At some point in around July 2020 Jessamyn Guiver arrived to take up her new Band 3 post. She was in her late thirties and she too was having a second career, having qualified as a teacher in 2010. Her contracted hours were 30 per week. Mrs von der Becke thought about where best to send her in the hospital. There was a vacancy on Twineham Ward, but they did not need someone for 30 hours a week. Mrs Crook worked for 15 hours a week, spread over three days, so it made more sense for her to go to Twineham instead. Ms Guiver would also benefit from being in a larger team on the medical wards.
35. However, Mrs Crook preferred to stay where she was. She felt that there was a good deal of heavy lifting on Twineham ward which she would not be able to manage. She raised her objections with Mrs von der Becke and the idea was shelved for the time being. When Ms Guiver arrived Mrs Crook took her around

the wards and helped her with her first steps. After that, she worked under the supervision of Ms Mansell, who would of course soon be moving to her Band 5 post.

*The recruitment exercise*

36. There was a staff meeting on 1 September 2020 [208] which unfortunately Mrs Crook missed as she was on annual leave. Under the heading "Recruitment" the notes read:

We are aiming to recruit to posts asap, ideally before the person in post has left.

37. This was a reference to Debbie Mansell taking up her Band 5 role and the need to recruit someone at Band 4 level to replace her. Hence, recruitment to that post was imminent. It went on:

We have received feedback that it would be good for staff to be made aware of any posts that are out to advert and have agreed to send out an email informing everyone. Marlize [Mrs Phillips] stressed this had not been done routinely up till now but for no specific reason.

38. Hence, not only was the recruitment imminent but staff would be informed about it by email to ensure that it came to their attention. This followed a recent recruitment exercise at Band 6 level where one candidate had been unaware of the vacancy. The normal process was for it to be advertised on NHS Jobs, a national portal or website which most people used to alert them to suitable vacancies. They can also set up an alert to get a message about any vacancies at a particular Trust or at their level elsewhere, applying suitable filters.
39. These minutes would have been printed off as usual and put on a notice board so that they could be consulted by those like Mrs Crook who were not there. There was some trouble locating those minutes for this hearing, but we can see nothing sinister in that from the Trust's point of view. This was a time when the team administrator had left and her replacement had not yet started and so a number of records could not be found at the time. The notes of that meeting do not undermine the Trust's case in any way and we do not accept that there was any attempt to conceal relevant evidence.
40. There is a process to be followed before any such new post can be advertised. It has to be approved by the relevant budget holder, the finance department and a vacancy control panel. Mrs von der Becke started the internal process on 8 September. She then had to prepare the surrounding documentation including the advert, job description and person specification and submit them to the panel. All this was completed on 1 October and the post was advertised on NHS jobs the next day.

41. So, throughout the month of September these preparations for the new post were being made but were not announced. Mrs Crook, for example, had one of her regular supervision meetings with Ms Wilson on 29 September and there was no mention of it. That is because she was not aware of it. We have no doubt that Ms Wilson would have mentioned it if she had known, but nothing definite had been said to the team by then, which appears to be the standard practice.
42. By chance, Mrs Crook went off sick the following day, 30 September. She was signed off for two weeks with anxiety. It is not clear whether this was related to anything discussed at supervision meeting or not. There was some further discussion about a move to Twineham ward, which was obviously still on the cards, and Mrs Crook had had a difficult summer with her daughter's schooling. About a month earlier she had had another bereavement involving her cousin. Whatever prompted this latest absence, it would continue in total for seven weeks.

#### *The recruitment process*

43. On 5 October Mrs von der Becke sent an email to the whole team about this vacancy, not just those at Band 3 level [225]. This went to their NHS email accounts, which of course they were able to access remotely but which Mrs Crook did not see. Applications closed on 21 October.
44. On 14 October Mrs Crook emailed Mrs von der Becke from her Hotmail account. She attached another two-weekly medical certificate and informed her she was still having severe panic attacks and insomnia [226]. Mrs von der Becke thanked her and said she was sorry to hear that she was still struggling. She asked if she would like another referral to HELP or any other support. All this was very supportive, but unfortunately it did not occur to Mrs von der Becke to ask whether she had seen the notice about the vacancy. The same happened two weeks later, by which time the vacancy was filled.
45. Mrs von der Becke had prepared the person specification using an example for a similar post elsewhere. She accepted that it was less than ideal and wrongly included, as a desirable characteristic, experience in physiotherapy. It also provided for a minimum of one year's experience as an occupational therapist or physiotherapy assistant [1480].
46. That contrasted with the job advert itself [1496] which she also prepared, which stated:

“We are also offering the possibility of this being a development post from B3 to B4 where you would spend a year working on your B4 competencies before moving up to Band 4 post.”
47. Given that the post was awarded to Ms Guiver, who had considerably less than a year's experience, this is certainly an indication that she was the preferred candidate. There are a number of other such features: Ms Guiver was working

for 30 hours a week, the same working pattern as Ms Mansell whom she replaced, so she was a convenient replacement; she was working with and being trained by Ms Mansell; Ms Mansell was one of the two-person interview panel for the vacancy, and as usual in such cases Ms Mansell had input into the questions for the interview.

48. The other member of the interview panel was Ms Wilson, Mrs Crook's friend and supervisor. Although it is surprising that she did not think to check with Mrs Crook, she simply assumed that she was aware of the vacancy and indeed she told us that she expected to see Mrs Crook at the interviews.
49. There were a total of 13 candidates, 9 of them external. These were whittled down to a shortlist of four. One of them withdrew leaving just three to be interviewed. We do not know who the other two were but Ms Guiver was selected. The two interviewers were concerned that this might give the appearance of favouritism and went to see Mrs von der Becke about it. Her view was that she should trust their judgement and so she did not interfere. We note however that Ms Guiver was professionally qualified as a teacher with excellent A-levels and a degree, and had previous experience as a bereavement counsellor, so she clearly had much to offer.
50. The team, including Mrs Crook, were notified of her appointment by email on 5 November [243], but Mrs Crook was still off sick and not accessing her work emails.
51. She came back to work on 18 November and had a meeting with Mrs von der Becke. It was agreed that she would return on reduced hours, dealing with non-clinical work such as phone calls. This would be done in the SOTC, which dealt with hip replacements and the like, and where there was no prospect of her being confronted with patient deaths which might be a trigger for her anxiety.
52. After a week of this they met again and during the meeting Mrs Crook noticed some information on the noticeboard behind Mrs von der Becke which listed Ms Guiver as a Band 4. She said nothing and the meeting ended. Later, she came back to ask Mrs von der Becke about this. Mrs von der Becke could see that she was different, and rather tense. Mrs Crook asked her about it and Mrs von der Becke told her. Seeing the change in her demeanour, Mrs von der Becke asked how she had found out. That remark seems to us understandable, given that this was all public knowledge and had been for some time. It reflected the sudden change she had observed in Mrs Crook.
53. Mrs Crook was of course shocked and upset. She had been waiting for the chance to progress for some time. She had plenty of experience and had made her supervisor and other managers well aware of her hopes. Yet when the time came, not one of them had contacted her by phone or text to make sure that she

was aware of the vacancy. And it had gone to someone else who had just arrived and whom Mrs Crook had only recently been showing the ropes.

*The kitchen meeting*

54. Mrs von der Becke did not perhaps appreciate how shocked Mrs Crook was, and suggested they step into the kitchen area while they talked, but Mrs Crook was upset and wanted to have her say. During that conversation, Mrs von der Becke asked whether Mrs Crook would have wanted to apply for a 30 hour per week post, given her anxiety and childcare commitments, which seems to us an understandable question in the circumstances. Mrs Crook complained about Ms Guiver's lack of experience. (This is one of the alleged protected disclosures) She felt badly let down and said that this was discrimination. No doubt things became very strained. Describing it in her evidence, Mrs von der Becke said that things all came crashing down in that kitchen conversation.
55. Later, Ms Mansell asked Mrs von der Becke if something was wrong with Mrs Crook as she seemed upset. When it was explained to her, Ms Mansell said she assumed that Mrs Crook had picked up the vacancy on NHS jobs. That seems to have been a widespread view.

*The informal resolution meeting*

56. Mrs von der Becke was rather taken aback to find that Mrs Crook had been unaware of the vacancy and was sorry about it. Rather than take offence at what Mrs Crook had said, she continued to try her best to maintain good working relations and to assure Mrs Crook that she was a valued member of the team. But that did not prove possible. For whatever reason Mrs Crook felt that Mrs von der Becke was against her, that she was the head of a team of people who were all considerably more experienced than her, who had been together for a very long time and who had excluded her. She could not accept that this had been simply an oversight on anyone's part. The grievance process was therefore carried out in an atmosphere of distrust and it made no progress.
57. Many of the allegations of harassment or discrimination concern the handling of this process rather than the underlying events themselves. Our overall view is that the grievance process was handled appropriately and considerately and that there was no attempt to penalise Mrs Crook or make matters any worse for her.
58. Mrs Crook wanted to go straight to a formal grievance meeting but the Trust's policy involved an attempt to resolve things informally first of all through a meeting with Mrs von der Becke. This took place on 9 December 2020. A member of the HR Department was present but for some reason Mrs von der Becke took the minutes, and so the record of her contributions is incomplete. This is the meeting which led to 11 different versions of the minutes, and the discussion gave rise to five separate allegations of discrimination or breach of contract, one of which is

simply the inaccuracy of the minutes. Another of them is rather confusing – “requiring her to raise a grievance” - although this was her choice and she was entitled to do so.

59. Mrs Crook was accompanied by Ms Sirchia, her Band 3 colleague. Mrs von der Becke had suggested her for this and Mrs Crook had agreed, with some reservations. Her first choice had been Mr Frederick but he had pulled out after Mrs von der Becke spoke to him about it in the office in front of two colleagues. She had felt this was appropriate as they knew about the meeting anyway - one was the team administrator, Leah, and the other was Ms Philpott. Speaking to Mr Fredrick was not therefore an attempt to interfere with her choice of companion.
60. It is not really clear why the minutes were so disputed. Ms Sirchia was provided with a copy of them, as of course was Mrs Crook. She made the numerous amendments to them over the subsequent weeks, all of which were accepted, and Mrs von der Becke added some too.
61. The outcome Mrs Crook was looking for was to be given a Band 4 role but that was not something which Mrs von der Becke could offer. Most of the discussion was about what had been said in the kitchen, in particular about whether Mrs von der Becke had asked whether she would have applied for the job given her anxiety and childcare commitments. There was also a discussion about whether Mrs Crook was expected to read her emails whilst off sick, and whether Mrs von der Becke said that she agreed that no one did so. Mrs von der Becke described Mrs Crook as visibly cross and shaking during the meeting, and we accept that it became tense. Mrs Crook referred to contacting ACAS and taking matters to an employment tribunal, which Ms Falaye (from HR) described as threatening. After about half an hour Mrs Crook became upset and left the meeting, so there was no real discussion about how this situation had come about in the first place. All we can conclude is that Mrs Crook was made aware in May that she could access her emails remotely, she was not expected to do so whilst off sick, so the choice was hers.
62. When Mrs Crook left the meeting she found Mrs Marlize Phillips waiting outside,. It was a Wednesday and she would normally have been working from the office where the meeting was taking place. So she had positioned herself on a chair outside and waited for them to finish. The office has poor soundproofing and the staff in the outside area usually put a radio on to mask the noise of any such discussion, so Mrs Crook thought she had come there to eavesdrop on the meeting. It is not clear whether the radio was on at the time or how much Mrs Phillips heard, but there was nothing sinister in her being in the vicinity that day.

*The formal grievance*

63. Since there was no resolution to the grievance Mrs Crook was able to proceed to the formal stage. She was signed off sick again as a result of all this disagreement and returned to work on 6 January 2021. By agreement with Mrs von der Becke, this was not in her usual area but at the Sussex Rehabilitation Centre. Mrs Crook did not want to see her former colleagues at that point, or at least some of them. That remained the case for the rest of her employment and in her resignation letter she made the point that her anxiety was such that she had made clear that if Mrs Mansell came onto her ward at any point, she would walk out. In all this she was accommodated and no further steps were taken in regard to her level of sickness absence.
64. She began to become increasingly preoccupied with the grievance process itself, taking a good deal of time in email communication about it and in correcting the minutes of the previous meeting. She also set about assembling documentary evidence in support of her case. That included her previous supervision notes which she wanted to use to show that she had been consistently discussing promotion, carrying out many tasks at Band 4 level and acquiring the relevant range of experience to make her a strong candidate for promotion. In the event none of that was disputed by the Trust, but Mrs Crook could not locate those supervision notes. Again, this seems to have been the consequence of a change of administrator with a gap between one person leaving and another arriving. There would have been no advantage to the Trust in concealing them. Mrs Crook has been given a copy after each meeting. She said that she searched high and low in every part of the office except the corner where Mrs Mansell and Ms Guiver used to sit and since they were subsequently found, one of those two must have hidden them. That seems to us most unlikely - there would be nothing for either of them to gain by hiding papers from her.
65. At one point in January 2021 Mrs Crook came into the office area to look for these notes and make copies. She saw some of her former colleagues there including Ms Wilson. They were surprised to see her, thinking she was still off sick. One of them was a Ms Ransome-Lewis. She later provided a statement in support of Mrs Crook for the appeal hearing [1505]. That statement records that Mrs Crook was not herself and that her hands were shaking while she was using the photocopier, so she asked what was wrong, at which point Mrs Crook quietly confided in her. Mrs von der Becke says that she could hear them talking about ACAS, and saying that she was going to bring a grievance against the Trust, so she stepped in to ask them not to. We accept that they were overheard discussing this, and there was nothing inappropriate about Mrs von der Becke stepping in to ask them not to.
66. As the formal grievance hearing approached there were further difficulties in arranging a suitable companion for Mrs Crook. It was to be held by Mrs Phillips,

who took it on herself to contact Mrs Jenny Whales about this in mid-January. This was the first Mrs Whales knew about any of this disagreement. It was a difficult time for her personally but she agreed to help Mrs Crook if need be. Mrs Crook was not happy however that Mrs Whales had been approached without consulting her and she told Mrs Whales the next day that she would not take her up on the offer of support. Mrs Whales then wished her well with the meeting.

67. Mrs Crook then asked for her husband to accompany her, but that was refused. We understand that he was not an NHS employee. So the meeting went ahead on 5 February 2021 with Mrs Crook on her own. Mrs Phillips was supported by a Ms Morgan from HR and there was a separate note-taker present.
68. The same points were of course considered again, and as before Mrs Crook was hoping simply to be appointed to a Band 4 post. Mrs Phillips' conclusions were set out by letter on 11 February 2021 [589]. She accepted that staff are not expected to check their work emails whilst off sick, and pointed out that there was no Trust policy that staff were required to be informed of vacancies, but she accepted that in the circumstances - particularly given Mrs Crook's interest in the post and the fact that it was hoped that her sickness absence would be short-term - she should have been informed about it. The failure to do so was, she concluded, an unintentional oversight. She was not able to create such a post but she addressed a number of smaller points raised in the grievance regarding some time off which should have been treated as sickness absence. She also confirmed that Mrs Crook would be allowed to stay in the SRC for the time being. They were advertising for a Band 2 post and while that position was vacant Mrs Phillips was happy for her to stay there. This was a genuine concession as the Trust was now short of an occupational therapist on the medical wards, but this still left Mrs Crook concerned about eventually having to come back to her old team.
69. This decision was received during a further week of sickness absence which began on 10 February. She appealed against it on 13 February 2021 [593]. On 17 February she returned to work on a working from home basis and provided a fit note that day which said that she was fit to work remotely until 30 March 2021
70. On any view this was a difficult time for Mrs Crook and her anxiety was becoming more and more acute. At about this time she called Mrs Judy Flahey in HR because she felt she needed more support with the grievance process. There was no immediate response and a week later, on 10 February, Mrs Crook emailed her asking for a call back and she received one that day. It soon became clear to Mrs Flahey that Mrs Crook was seriously stressed since Mrs Crook spoke to her about the whole situation for about an hour without giving her any real opportunity to say anything. Afterwards she arranged to refer Mrs Crook to occupational health. Even that step has proved controversial. One of the allegations of discrimination is that the referral to occupational health was made



too late and a second (though not in the list of issues) is that it was a referral for the purpose of getting her back to work rather than to support her with the grievance. That is a misunderstanding of the role of occupational health which is to help staff to get better.

### *Resignation*

71. The following week, on 26 February 2021, Mrs Crook resigned. She did so first in an email to Mrs Flahey [651]. The opening line was that:

“I wish to highlight this with you as it is evidence of Jane’s [Mrs von der Becke’s] stance towards me.”

72. She was forwarding a chain of emails she had received from Mrs von der Becke on the subject of whether it was appropriate for her to be spending her work time on her grievance. Mrs von der Becke had looked at the grievance policy which was not specific about this, asked HR, been told that the amount of time spent on this should be proportionate, and passed that advice back to Mrs Crook. She also suggested the questions like this would be better sent directly to Mrs Flahey.

73. There seems nothing wrong in the advice that the time spent should be proportionate. Strictly speaking, a grievance is a work-related matter and ought to be accommodated in work time, but at the same time it is not up to the employee how much time should be devoted to it, nor should it trump all other work commitments. It may well be that by this stage Mrs Crook was spending a disproportionate amount of time on, for example, correcting minutes of meetings. Her resignation email went on:

She [Mrs von der Becke] has denied conversations with me, at the informal meeting with Evelyn Falaye. I cannot even bring myself, to date, to go through her response to my comments on the Minutes, in detail as just a glance at them was shocking in its content.

The trail of correspondence, herewith, shows how she has manipulated wording of a Return to Work form that she obviously didn't realise I have a copy of.

I was liaising with Jane with the work I am doing from home, and separately had to deal with this correspondence in relation to the Grievance. I submitted my day's update of work to her after receiving this. I did not sleep well that night and it affected my non-working day, yesterday also. I am finding Management's handling of all of this morally reprehensible. I also have evidence that the Minutes from the Resolution meeting were also not accurate in one part and so I have no trust in HR either. In addition, I was accused at the informal meeting of being 'threatening' by HR.

I feel I have no choice but to resign and continue to work my notice from home. In that time, I wish to liaise with our team administrator, Leah Adams, who may in turn update Jane with regards to the work I am doing. There is a complete breakdown in trust; injury to feelings; continued disability discrimination; breach in duty of care and now, constructive dismissal.

74. Hence, she was raising several points, the most recent being whether she could work on her grievance in work time but all of which stemmed back to the recruitment issue. There was also this mention of a return to work form. We were not in fact taken to that document but whatever comment was made on it was also in the context of this issue over being allowed to work on her grievance at work.
75. This email was followed by a more formal letter of resignation on 28 February addressed directly to Mrs von der Becke [677], but this made no mention of that issue. It talked instead of her treatment being a fundamental breach of contract, together with “continuous harassment and inaccurate reporting of events, the handling of the grievance and the failure of the Trust to issue an apology or a fair resolution.”

*Grievance appeal meeting*

76. So, Mrs Crook continued to work from home for the rest of her time with the Trust. Having already lodged her appeal, an appeal meeting was arranged for 11 March 2021, and despite having resigned she attended. This time the hearing was with Ms Rachel Benson, a Divisional Director of Operations. She had no previous knowledge of Mrs Crook but was provided with the relevant documents. The meeting took place by Microsoft Teams. Mrs Phillips presented the case for the Trust. An HR Business Partner attended to support Ms Benson and there was again a separate note taker. And as before, Mrs Crook was unaccompanied.
77. There are three versions of the appeal minutes in the bundle, the final one including a good deal of additional text in red representing Mrs Crook’s statements. It is clear from these notes that she was given the floor and did most of the talking, which is entirely appropriate for an appeal meeting. Her very detailed initial account is set out over nearly 7 pages without interruption. Mrs Phillips set out her view in accordance with the grievance outcome letter and there was then a very full discussion about the many points raised. To give a flavour, Mrs Crook described it as a toxic team and that she had a total lack of trust in management. The meeting ended at 1700, after four hours.
78. The outcome was then set out by letter on 19 March 2021, and that letter was also very detailed. Ms Benson noted that management had attempted to notify all staff of the vacancy by email and they may reasonably have assumed that all staff would have been aware of it as a result. The process that had been agreed for notifying everyone had been followed. There was a difference of recollection over whether Mrs von der Becke had said that she did not notify her of the vacancy due to her anxiety and childcare commitments, but Mrs von der Becke had previously been very supportive and encouraged her to apply when the post became available so there was no evidence that she had purposely attempted to

hinder her knowledge of the vacancy. The lack of any additional attempt to notify her by other means was unintentional.

79. Ms Benson also noted that she had been informed by email that Ms Guiver had filled the post, and that she had still not read this email a week after her return to work. She found that the handling of the grievance had been appropriate although it had been an error to share information about her case with Mrs Whales prior to the grievance meeting, even though Mrs Whales was known to be supportive. We do not disagree with any of those conclusions.
80. That was therefore the end of the internal process and Mrs Crook's employment came to an end on 31 March 2021. The claim was submitted 4 days later.
81. At the risk of some duplication it may be helpful to summarise our findings on the allegations set out in the list of issues [43] using the same numbering system:
- (i) After the discussion in April 2020 about a future Band 4 vacancy, there was no particular need for Mrs von der Becke to report back to Mrs Crook.
  - (ii) This vacancy was filled while Mrs Crook was off sick.
  - (iii) She was asked to work in a different building on her return to work with her agreement, as part of a phased return.
  - (iv) She had by then been informed by email that the vacancy had been filled, but she did not access her emails.
  - (v) She was not told in the kitchen meeting that she had not been informed of the vacancy because of her anxiety or childcare issues – she had been informed but did not access her emails.
  - (vi) In the informal resolution meeting, Mrs von der Becke did say that contacting her at home might have added to her anxiety, but she did not use this as an excuse for not contacting her personally.
  - (vii) Mrs von der Becke did not tell Mrs Crook that she should have checked her emails while off sick.
  - (viii) Mrs von der Becke did not require Mrs Crook to raise a grievance.
  - (ix) With regard to the grievance process:
    - a. there was an attempt by Mrs Phillips to influence Mrs Crook's choice of companion at the formal grievance meeting but she had intended to be supportive by contacting Mrs Whales;
    - b. Mrs von der Becke did not breach confidentiality by talking to Mr Frederick about the informal grievance meeting in front of two colleagues, since they knew about it;

- c. Mrs Crook was told in the meeting on 9 December 2020 not to threaten the Trust with ACAS;
- d. The minutes of all meetings were substantially accurate and Mrs Crook had a full opportunity to amend them as she saw fit;
- e. Eleanora Sirchia he was not in fact discouraged in any way from commenting on the minutes – she was asked to do so considerable later by Mrs Crook by which point they had been finalised.
- f. Mrs Phillips presence outside the office during the meeting on 9 December 2020 was of no significance.

- (x) The supervision notes did go missing for a while but had all been provided to Mrs Crook at the time of the meetings and were not concealed;
- (xi) The resolution sought in the grievance process, a Band 4 post, was not one that was open to the Trust;
- (xii) Mrs Flahey did not return her Mrs Crook's phone call but did so promptly on receipt of a reminder email;
- (xiii) Mrs Crook was then referred to Occupational Health promptly and appropriately
- (xiv) None of the emails from Mrs von der Becke amounted to an act of harassment

82. Those emails call for some brief further description. They were not specified in the list of issues and so a direction was given that Mrs Crook provide the relevant dates. There are as follows:

- (a) [877 – 883] There were a series of exchanges between Mrs Crook and Mrs von der Becke in October and November 2020 while Mrs Crook was off sick and before any falling out. Mrs von der Becke explained that the 28 day trigger point had been reached but reassured Mrs Crook about the sickness absence procedure, advised that the stage 1 sickness meeting could be done remotely reminded her that she could return to work on 50% hours under the return to work process and described it as “really great news” that she was starting to feel better. We are unable to see any grounds of complaint here.
- (b) [241 – 246] Mrs Crook did raise on 5 November 2020 a request to stay on her usual wards for now because she was anxious about change. Mrs von der Becke responded by saying that the other job (on Twineham) was a lovely job and can be done from the office. Nevertheless she effectively left this as a choice to Mrs Crook and did not insist on a move.

- (c) [266] There was an email from Mrs von der Becke on 30 November 2020 advising Mrs Crook that the time she had taken the previous Friday when she went home early would have to be taken as sick leave or similar. That was based on the advice she had received from HR and one of the outcomes of the grievance hearing was to allow her to take it as annual leave.
- (d) [276, 283] An email the following day from Mrs von der Becke made the point that if it was taken as sick leave it would be a new absence. She suggested that Mrs Crook take the following Monday as part of the same sickness absence which would be better for her under the sickness absence policy. She also discussed working from home and was generally supportive.
- (e) [741] On 18 January 2021 Mrs von der Becke wrote to Mr Frederick, perfectly appropriately, about the conversation which had made him uncomfortable. That was not however an email directed to Mrs Crook, so cannot be an act of harassment.
- (f) [607-8] On 18 February 2021 Mrs von der Becke wrote to Mrs Crook about the fact that Mrs Flahey had recommended a referral to occupational health and suggested in the meantime that she may prefer to work from home. She went into some detail about what might be manageable. Again this seems entirely supportive.
- (g) [631-2] There are then three further emails from Mrs Crook on 22 February 2021 about her missing supervision notes, but there are no emails from Mrs von der Becke.
- (h) [634] This is the occupational health referral sent by Mrs von der Becke on 22 February and copied to Mrs Crook. There is nothing objectionable in the contents of the referral that we can see, and this must relate to the purpose behind the referral, and Mrs Crook's position is that she only agreed for the limited purpose of getting support with the grievance.
- (i) [638] This is another email that day from Mrs von der Becke starting

"Dear Joanna,

I am really sorry for the delay in replying to your emails and I hope to answer all the queries in one email, copy to everyone involved to avoid too many different emails about different things."

She then responded to various requests. These including agreeing that Mrs Crook could take annual leave over the next few days and on the question of whether she could complete all her grievance related correspondence at

work, to which Mrs Crook did take exception. The tone was not in any way critical however.

- (j) [644, 654-6] This is the same correspondence, with Mrs von der Becke forwarding her comments to HR “in the interests of transparency”. It is not clear to us how this is contentious, since Mrs von der Becke was passing on HR advice on this point.

83. Those are the relevant findings of fact.

### **Applicable Law and Conclusions**

84. Turning to the applicable law, because there are a number of claims we will set out the relevant legal position under each heading and then our conclusions before going on to the next claim, starting with the claim of constructive dismissal.

#### *Constructive dismissal*

85. Constructive dismissal is not a term used in the Employment Rights Act 1996, but section 95(1) gives the legal definition of a dismissal, and it includes where:

“(c) ... the employee terminates the contract under which [she] is employed (with or without notice) in circumstances in which [she] is entitled to terminate it without notice by reason of the employer’s conduct.”

86. So there have to be circumstances justifying the employee in downing tools and walking out. In legal terms, there has to be a fundamental breach of contract by the employer. In cases of constructive dismissal that usually means a breach of what is known as the implied duty of trust and confidence. According to the House of Lords in the case of **Malik v BCCI** [1997] UKHL 23 that happens where an employer conducts itself:

“in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence”.

87. We can certainly see how upsetting this was for Mrs Crook and we accept that it did in fact destroy the relationship of trust and confidence. From her point of view it showed a total lack of regard. Equally, it should be clear from what we have already said that we do not accept that there was any calculation involved. Was it therefore *likely* to destroy or seriously to damage that relationship?

88. The main and rather obvious point here is that notice of the vacancy was emailed to her, as part of the group of occupational therapists at the hospital. In the ordinary way of things that was likely to bring it to her attention, if not immediately then reasonably soon afterwards. This was the extra step which Mrs von der Becke had agreed to introduce at the staff meeting on 1 September, seemingly with this very situation in mind. Emailing people did not of course ensure that they saw it but this was an extra step, over and above the Trust’s normal policy,

which requires no more than posting it on NHS Jobs. There is also no question that Mrs Crook was able to access that email, but even a week after her return to work when she had been engaged in admin work she had not done so. As already noted, that came as a considerable surprise to Mrs von der Becke. In those circumstances we conclude that a reasonable manager, posting the vacancy in the usual way and emailing the internal team separately, would feel that they had done all they reasonably needed to do to bring it to everyone's attention and indeed it was objectively likely to come to their attention. Had any further thought been given to the matter she might have taken the trouble to contact Mrs Crook directly, but without the benefit of hindsight that failure cannot be said to be something which was *likely* to destroy or seriously to damage the relationship of trust and confidence.

89. It was never in fact specified exactly what Mrs von der Becke should have done. She was blamed, although all of the others in the team, including Ms Wilson and Mrs Whales, were very friendly with her, knew about the vacancy. They just assumed that she knew about it, which reinforces our view that it was likely (in the ordinary course of events) and expected to have come to her attention.
90. Of course, Mrs von der Becke could have picked up the phone to Mrs Crook, but that was not the normal method of communication and some care has to be exercised in ringing members of staff who are off sick with anxiety. It could have been mentioned in the WhatsApp group, although that was not really used for official business of any sort. Or she could have emailed Mrs Crook using her Hotmail account, the account that Mrs Crook used for sending in sick notes and making other requests. She may not even have noticed that some emails from Mrs Crook came to her from that address. There is also some sensitivity about contacting individuals about a vacancy, lest it be suggested that this is a special favour. We accept that it never occurred to Mrs von der Becke to do any of these things, so it was not a question of weighing up the pros and cons. The only explanation she could offer was that she was so very busy and because of her own significant stresses, but we have no reason to doubt that that was the case.
91. Indeed, it seems to us that if Mrs Crook had not been suffering from such anxiety at the time she would have appreciated that this was simply an unfortunate oversight and that there no intention to exclude her or any lack of respect. No doubt from Mrs Crook's point of view the situation was exacerbated by the appointment of such a junior colleague, and perhaps she would have felt differently had the position gone to an external candidate with more obvious experience. But that makes no difference to the question of whether or not any failure on the part of Mrs von der Becke was a fundamental breach of contract.
92. The rest of the allegations of discrimination or breach of this duty are all secondary. Without rehearsing them again they relate to peripheral matters like the choice of companion for the hearing, the accuracy of the minutes and the level

of support available from HR and occupational health. In our view, none of those points, individually or even collectively amounts to a breach of the duty of trust and confidence. The only one to which any exception could perhaps be taken was the comment about ACAS in the informal grievance meeting, but even that has to be seen in context; it was a tense meeting in which Mrs Crook was indeed threatening to take matters to an employment tribunal. That remark alone, by the member of staff from HR, cannot be regarded as a fundamental breach of contract, and she did not resign over it.

*Was there a Public Interest Disclosure?*

93. That conclusion also resolves the allegation that she was dismissed (constructively) for making a protected disclosure, but we are not satisfied that there was a protected disclosure. Section 43A Employment Rights Act 1996 provides that:

In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

94. Then by section 43B:

- (1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following— ...
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,

95. Health and safety is one of six potential failures that would qualify. According to the list of issues, the concerns here are that the health or safety of the team and patients had been put at risk because Mrs von de Becke did not believe in the existence of Covid and because of the recruitment of an inexperienced employee (Ms Guiver).

96. It is clearly overstated to suggest that Mrs von der Becke did not believe in Covid, and Mrs Crook did not say so, either in the WhatsApp messages in April 2020 or in any other messages or conversations at around that time. Even if she had concerns about Mrs von der Becke’s approach to Covid, that was never made clear, and even then it would not follow that this attitude by itself posed a risk to patients or members of staff. No failure by Mrs von der Becke to take precautions has been suggested, and she was not responsible, for example, for too many people being present on particular wards or for doctors not wearing masks.

97. For a qualifying disclosure, Section 43B required that there must be some “information” disclosed. The mere making of an allegation is insufficient, unless some concrete factual information is also conveyed. As the Employment Appeal Tribunal held in **Cavendish Munro Professional Risk Management Limited v**



**Geduld** [2010] IRLR 38, saying: “you are not complying with health and safety requirements” is not enough. It discloses no information. But adding, “because the wards have not been cleaned for two weeks”, does.

98. More recently, in **Kilraine v London Borough of Wandsworth** [2018] ICR 846, the Court of Appeal stressed that ‘information’ and ‘allegation’ are not mutually exclusive and that Tribunals should consider instead whether the disclosure has “a sufficient factual content and specificity such as is capable of tending to show one of the six relevant failures”.
99. Again, the post by Mrs Crook in the WhatsApp group does not disclose any information. It is not even a statement to the effect that she was concerned about the article posted by Mrs von der Becke. Similarly, the alleged disclosure about Ms Guiver’s inexperience did not disclose anything that Mrs von der Becke was not already aware of, and was generally lacking in any specific factual content that might suggest a health and safety issue.
100. Hence, the claim of detriments for making protected disclosures also has to be dismissed. And regardless of whether the relevant test was met, we can see no connection between those concerns and the way in which the grievance process was handled. There was no sense in which Mrs Crook was shown less consideration because her stance on Covid was perceived to be more concerned than Mrs von der Becke, and of course the remarks about Ms Guiver came after she got the Band 4 position.

*Disability and age discrimination*

101. The test under of harassment section 26 Equality Act is as follows:

- (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.

102. In each case therefore there is a threshold test to be met and the wording used, such as violating a person’s dignity indicates that it is a significant threshold. In our view, putting to one side the recruitment issue itself, none of the alleged acts approach that test. It is difficult to elaborate the point, but even if we are wrong about the events in question it cannot be said that inaccurate minutes or difficulty obtaining the right companion amounts to creating an intimidating, hostile degrading, humiliating or offensive environment. Arguably the recruitment issue

was capable of meeting that test but the test for harassment first requires some unwanted conduct, i.e. for something to be done which is unwelcome, and it is difficult to see how an oversight of this sort can meet that test.

103. The conduct in question also has to be related to the disability in question, and again there is no basis that we can see to draw any connection between an oversight of that sort and Mrs Crook's disability. The same considerations apply to the allegations of harassment on grounds of age.

*Direct discrimination*

104. The test for direct discrimination under section 13 Equality Act is as follows:
- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
105. The emphasis here therefore is on less favourable treatment. We need to consider how things would have been if all of the circumstances were the same except for the relevant protected characteristic, if for example Mrs Crook was in the same age group as Ms Guiver. In the context of disability discrimination this does not mean that we have to consider what would have happened if she did not have any anxiety, or if she had not been off work - the appropriate comparator is someone who was also off sick for seven weeks but whose condition did not amount to a disability. In either case we can see no reason to believe that things would have been any different, and nothing was put forward to suggest otherwise.

*Discrimination arising from disability*

106. There is a more specific head of claim in disability cases, which focuses on whether an employee is discriminated against for the effects of their condition – discrimination arising from disability. The test under section 15 Equality Act is as follows:
- (1) A person (A) discriminates against a disabled person (B) if—
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
107. So, this involves unfavourable treatment as a result of something arising in consequence of Mrs Crook's disability. The "something arising" is Mrs Crook's absence from work at the time this post was advertised, and the unfavourable treatment is said to be not referring the vacancy to her. Once again however, given that this was an oversight, in the circumstances described, there is no basis for concluding that anything was kept from Mrs Crook intentionally, let alone because she was off sick.

*Failure to make reasonable adjustments*

108. The duty to make reasonable adjustments arises, according to section 20 Equality Act 2010 where:
  - (3) ... 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,
109. The duty is then:

to take such steps as it is reasonable to have to take to avoid the disadvantage. ...
110. According to the list of issues, the practice in question was that the Trust did not send staff emails when they were off sick. In those circumstances it is said that a reasonable adjustment would have been to disapply the policy and to send her an email about it. It may well be that the Employment Judge dealing with the preliminary hearing, in the very little time available, assumed that this was the claimant's case and was unaware that an email had been sent to her NHS account.
111. Having heard the evidence, a better formulation would have been to suggest that the Trust had a practice of *only* sending an email about vacancies to members of the team in question (as well as posting it to NHS Jobs) and that a reasonable adjustment would have been to go further and to contact anyone off sick with a disability directly, in case they did not access the email.
112. The first difficulty with that approach is that that is not the way in which it has been set out at the preliminary hearing and so that is not the case that the Trust came to meet. The second difficulty is that there is no evidence that Mrs Crook was at a substantial disadvantage in accessing her emails because of her anxiety. From what we can gather this seems to have been something which she simply never did, whether she was off sick or whether she was at home in the evening or weekends or on her days off. Her hours of work were only 15 per week so there were very many such days. She was not accessing her emails because she was not at work and saw no need to do so, not because she had anxiety. It is not a case in which she was off with work-related stress and was unwilling to look at work-related issues for that reason.
113. The third difficulty is that if she was at a substantial disadvantage because of her anxiety in checking her emails, there is nothing to show that the Trust was aware of it. They can only be liable for a failure to make reasonable adjustments if they knew or ought to have known that she was labouring under a difficulty of this sort and failed to take steps to address it. Consequently, this claim cannot succeed either.

### *Victimisation*

114. The final claim is of victimisation, which is essentially of suffering a detriment for complaining about discrimination. It is therefore similar to the whistleblowing complaints. The test under section 27 Equality Act is as follows:
- (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.
115. We have already accepted that Mrs Crook mentioned discrimination in the kitchen meeting and in the informal grievance meeting on 9 December 2020. The Act does not require her to specify a protected characteristic, and so the test is met. She was asked on what grounds she said she was being discriminated against and responded to the effect that it was for the Trust to show why they had discriminated against her. After that the subject seemed to lapse and it does not feature in the grievance outcome letter or the appeal letter. Far from reacting badly to his allegation it seems to have been disregarded as a throwaway remark. Again therefore, we can see no connection between any of the alleged acts and these complaints, and once again we have to note that they were raised after the Band 4 vacancy was filled.

### **Endnote**

116. We realise that these conclusions will be disappointing to Mrs Crook and we appreciate that she has been through a very difficult time at work and outside work. We are also pleased to note that she has now obtained a Band 4 vacancy elsewhere within the NHS. But all of the above reasons, these claims arising out of her previous missed opportunity cannot succeed.

Employment Judge Fowell

Date 22 August 2023