EMPLOYMENT TRIBUNALS

Claimant: Miss J Burdge

Respondent: JCL UK Limited (First Respondent)
Mr B Laly (Second Respondent)
Mrs P Laly (Third Respondent)
Mrs T Hannaford (Fourth Respondent)

Heard at: Southampton (CVP) On: 25,26,27,28 September & 25,26 and 27 October 2023

Before: Employment Judge Barton
Dr Von Maydell - Koch
Mr N Knight

REPRESENTATION:

Claimant: Miss K Burdge (Mother of Claimant & lay representative)
Respondent: Mr G Graham (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

The Claimant's complaints of failure to make reasonable adjustments for disability, harassment based on disability, direct discrimination, discrimination arising from disability and constructive unfair dismissal are all dismissed.

REASONS

When relevant any numbers in bold in brackets **[ ]** refer to the pages in the agreed bundle.

Introduction

1. The Claimant was a Pharmacy Dispensary Technician and worked for Lloyds and then the First Respondent from 14 March 2016 to 6 July 2022. A Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) transfer to JCL UK Limited (First Respondent) from Lloyds took place on 1 February 2022. ACAS Early Conciliation ran from 14 March 2022 until 23 May 2022. The claim was issued on 20 June 2022 which was the date the Claimant started her notice period having resigned on that day. The Effective Date of Termination of employment was 6 July 2022.

The Telephone Case Management Preliminary Hearing (TCMPH)

2. On 3 January 2023 there was a Telephone Case Management Preliminary Hearing (TCMPH) before Employment Judge Self. The Claimant represented herself. The Respondents were represented by Miss Laxton (Counsel). At the TCMPH the Claimant confirmed that she was proceeding with the following Claims:

    a) Unfair Dismissal (Constructive)

    b) Disability Discrimination.

3. The details of the claims and issues were agreed by the parties at the TCMPH on 3 January 2023. After the TCMPH the details of the claims were set out in the Record of Preliminary Hearing dated 9 January 2023. The Record of Preliminary Hearing was included in the bundle for the final hearing, starting at page **[55]**. The details of the claims beginning at page [**60]**.

4. At the TCMPH it was clarified that the constructive unfair dismissal claim was based on a breach of the implied term of trust and confidence or an express breach of the contract in respect of the Claimant's transfer to a different branch. The transfer was relied upon as the last straw in the implied term claim.

5. The Claimant had brought a claim for Holiday Pay, but that issue had resolved itself and was dismissed following the Claimant withdrawing that claim.

6. At the time of the TCMPH the issue of disability was contested. On 28 February 2023 the Respondent contacted the Claimant and the Tribunal to confirm that they accepted that the Claimant was a disabled person at the material time on account of the following medical conditions:

    a) Fibromyalgia

    b) Endometriosis

    c) Cervical Dystonia

    d) Anxiety and depression

7. Following the TCMPH the Respondents provided an amended response **[76 – 89].** In the amended response the Respondents agreed that the Claimant was a disabled person based on the medical conditions referred to above. The Respondents agreed that the Claimant was referred to Occupational Health by the transferor, Lloyds Pharmacy, on several occasions prior to the TUPE transfer of 1 February 2022, the most recent referral being 10 November 2021. The Respondent agreed that an Adjustment Passport had been put in place by Lloyds Pharmacy for the Claimant prior to the transfer on 1 February 2022. The Adjustment Passport was included in the bundle **[159-162]**.

8. The Adjustment Passport in the bundle is dated 31 January 2022, that being the Monday and the day before the transfer to JCL UK Limited (First Respondent) on Tuesday 1 February 2022. The adjustments set out in the Adjustment Passport **[160]** are:
    (i) Set work pattern is in place and only works at base branch (Mon - Thurs 28hrs/week)
    (ii) Support with lifting and carrying from members of the team
    (iii) If operationally practicable, the ability to sit for short periods after prolonged standing to help reduce physical fatigue
    (iv) Jenna to report to manager when Brain fog is experienced for awareness that she may need additional time to complete tasks
    (v) Jenna to report to manager when having a bad day for awareness for increased breaks

Evidence and procedure

9. We sat as a panel of three throughout the hearing. The decision we reached on all the claims was unanimous. When reference is made in this judgment to 'we', 'our' or 'the Tribunal', it refers to our collective view.

10. At the start of the hearing, we made an enquiry with the Claimant and her mother who was also the Claimants representative about how they would prefer to be addressed in the hearing. There was the potential for confusion as a formal way of addressing them may have resulted in them both being referred to as Miss Burdge. It was the preference of both that they should be referred to as Jenna (the Claimant) and Karen (the Claimants representative). We continued to check during the hearing that they remained content to be addressed in this way.

Adjustments for the hearing

11. At the beginning of the hearing, we enquired what adjustments would be suitable for the Claimant. This was because we were aware of her disabilities. The Claimants representative also indicated that she would require some adjustments too. We offered both the Claimant and her representative additional breaks; we invited the Claimant and her representative to alert us if at any point they needed a further break; we attempted to use plain language whenever possible; and helped the Claimants representative to formulate some of the questions she wished to put to the Respondent's witnesses in cross-examination. In addition, on day two we stopped every fifty minutes to allow the Claimant to have a break during her second day of cross examination. Both the Claimant and her representative requested and were given breaks throughout the hearing including while making submissions.

12. The Tribunal hearing and deliberations took place over seven days in September and October 2023. The hearing took longer than anticipated because we wanted to ensure that the Claimant was not placed at a disadvantage by the way in which the proceedings were conducted. We therefore amended the indicative timetable set by EJ Self and the hearing went part heard for submissions, deliberations and judgment.

13. The Claimant was represented by Karen Burdge, her mother, a lay representative. The Claimant provided a witness statement and gave oral evidence. There was also a witness statement from the Claimant's friend and work colleague Leanne Maganzini. She also gave oral evidence. The

Respondent was represented by Mr Graham (counsel). The Respondent's witnesses were Mr Baldev Laly (Second Respondent), Mrs Pushpinder Laly (Third Respondent) and Mrs Teri-Lee Hannaford (Fourth Respondent). All three provided witness statements and gave oral evidence.

14. There was a joint bundle of documents of 417 pages ('the bundle') prepared by the Respondent. There was also a chronology that began on 14 March 2016 and ran through headline events until 20 June 2022. A Cast List was provided as a separate document.

Late evidence

15. The Claimant made an unopposed application to admit two pieces of late evidence. These items were a photograph of an automated machine referred to during the hearing as a "Robot" that dealt with part of the process of getting medication ready. The second piece of late evidence was in the form of printouts from Companies House showing the persons who held directorships or were in positions of significant control within the Respondent company (First Respondent). We agreed to admit this evidence

16. Both representatives made oral closing submissions. We have taken the parties' submissions fully into account even if we do not specifically refer to all their points in our judgment.

17. Neither party referred in detail to any of the relevant statutory provisions and we were not addressed on relevant case law nor were we given any case law to consider. During our deliberations we directed ourselves as to the relevant statutory and case law. When delivering the oral judgment on 27 October we did not go into detail regarding the legal framework. In our judgment we did not conclude that this would have been particularly helpful to the Claimant at that time. The Claimant became upset during the course of the judgment and came off camera leaving her lay representative to hear the judgment.

TUPE

18. The list of five issues was agreed at the TCMPH and then set out in the case management order. The issues were also confirmed at the beginning of the hearing.

a. Failure to make reasonable adjustments for disability
b. Harassment
c. Direct discrimination
d. Discrimination arising from disability
e. Constructive Unfair Dismissal

19. During cross examination the Claimant's representative began to question [Second Respondent] about a comparison between the old Lloyds contract and the new Lalys contract. The line of questioning related to the legality of the new Laly's contract and the legality of the transfer under TUPE. It was apparent that Mr Laly was not prepared to deal with this line of questioning. There were no claims before us related to TUPE and apart from a mention in the ET1 there had been no previous mention of TUPE or related issues. The Respondent's representative made representations that this was in effect adding a new claim to the list of issues at a late stage in the hearing.

20. If a list of issues is agreed, that usually limits the issues at the substantive hearing to those in the list. We considered that, the Tribunal is 'not required slavishly to follow the list presented to it' where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and evidence – Price v Surrey County Council and anor EAT 0450/10. We also considered that varying an agreed list of issues may be justified, in particular, where a party's lack of legal representation gives rise to legitimate misunderstanding as to what the list of issues covers. We also had regard to rule 29 of the Tribunal Rules 2013, which gives employment tribunals the power to vary, suspend or set aside an earlier case management order where this is necessary in the interests of justice.

21. We concluded that we were bound by the agreed list of issues and that it was not just for us to modify the list of issues after the Claimant had given evidence and because the case had not been prepared with TUPE claims or issues in mind. In reaching that decision, we took into account that the Claimant's representative was not legally qualified. We considered that the Respondent would be unduly prejudiced by a decision to expand the list of issues in this way. It was likely that additional evidence would be required; the new potential issues were not addressed in the Respondent's witness statements.

22. For these reasons, we explained to the Claimant's legal representative that questioning the Respondents witnesses about the comparison of the contracts, unfavorable contract terms and the legality of the TUPE transfer was not relevant to the issues that had to be decided.

Issues to be decided

23. The issues to be decided are reproduced below as they were set out in the Case Management Order following the TCMPH. The Claimant's representative was referred to this list of issues on three separate occasions during the hearing. It was explained to her that to establish the Claimant's case all the issues needed to be positively put to the relevant Respondents. Although the Claimant's representative acknowledged our explanations, she did not put every aspect of the Claimant's case to the relevant Respondents.

Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

a. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? If so, from what date?

b. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

i. That the Claimant needed to be able to lift and carry in her role

ii. That the Claimant should stand whilst undertaking her role

iii. That the Claimant should complete tasks in a specified time

iv. That the Claimant could be moved to any branch

v. Not permitting a representative / workplace colleague at internal meetings

c. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that any of them / any combination / any individually meant that the Claimant was not able to undertake all lifting, stand at all times and complete tasks in a specified time / as quickly as others. Further the Claimant was not able to adequately represent her position at meetings

d. Did the Respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage? The Claimant asserts they were covered by previous adjustments pretransfer and within OH Reports

e. What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

i. To offer assistance to the Claimant in carrying and lifting

ii. To allow the Claimant to sit for short periods

iii. To allow the Claimant additional time to complete tasks

iv. To keep the Claimant at her base branch

v. Allow a companion to assist the Claimant at internal meetings

f. Was it reasonable for the Respondent to have to take those steps and when? The Claimant asserts that (e) (i) to (iii) were removed by the Respondent just after the transfer and there was a failure to make reasonable adjustments thereafter and that (e) (iv) was removed on 7 April 2022.

g. Did the Respondent fail to take those steps?

Harassment related to Disability (Equality Act 2010 s. 26)

a. Did the Respondent do the following things:

i. On 14 March 2022 “Prin” told the Claimant she would no longer be working in nomad trays

ii. On 14 March 2022 “Prin” told the Claimant that Ms Maganzini would be undertaking the Claimant’s job going forward as she was “quicker that the Claimant and made less mistakes”

iii. On 14 March 2022 the Claimant took over Ms Maganzini’s tasks which were more onerous and caused greater mental stress and physical pain on account of the claimant’s disability.

iv. On 16 March Second Respondent and Third Respondent held a meeting with the Claimant in which he / she said:

A) That having read the health reports he was worried that “someone like you” is working in the health sector with the fibro fog the claimant was experiencing (Second Respondent);

B) “Oh my gosh should you even be near tablets due to the fibro fog you are experiencing (Third Respondent)”

C) That she had spoken to a doctor about the Claimant and her conditions (Third Respondent);

D) That the Claimant had “health conditions not disabilities. You are not disabled” (Third Respondent);

E) That in 30 years she had never known a dispenser sit down (Third Respondent)

F) That he was really worried about the Claimant “placing the patient at risk by giving them the wrong tablets” (Second Respondent)

G) That a patient would be very angry if given the wrong tablets (Second Respondent)

H) “Should (the Claimant) even be working around medicine” (Second Respondent)

I) “Maybe (the Claimant) should be moved to Lalys Kingston Road where she could answer

v. On 31 March 2022 the Claimant was refused permission by Second Respondent to be accompanied to an internal meeting.

vi. On 5 April 2022 Fourth Respondent told the Claimant that she was not able to be accompanied by Ms Maganzini.

vii. On 7 April 2022 Second Respondent told the Claimant in a patient consultation room that:

A) He was worried about the figures the Claimant’s branch was producing;

B) He was worried about the Portsmouth Centre branch and felt he needed to do something drastic;

C) That on 31 March the Claimant had made a dispensing error telling the Claimant that if it had not been noticed it would have led to an angry patient.

D) That as of 11 April 2022 the Claimant would be working at the London Road branch entering data at the back of the branch.

E) That he was unwilling to discuss reasonable adjustments that might be put in place at London Road at that time.

viii. On 8 April Fourth Respondent sent the Claimant confirmation of the change of workplace.

ix. On 4 May Fourth Respondent refusing to change Second Respondent and Third Respondent as arbiters of the claimant's grievance despite the Claimant asserting that the grievance was about their conduct.

x. On 5 May Fourth Respondent telling the Claimant that she had disrupted operations by cancelling her grievance hearing at a late stage.

xi. On 5 May Fourth Respondent telling the claimant that "performance elements were on hold". The Claimant was unaware that she was under a performance review formal or otherwise.

xii. On 5 May the Claimant being asked if it was her intention to continue working for First Respondent as her current actions did not give that impression (Fourth Respondent).

xiii. On 11 May confirming that the Second and Third Respondent were still going to hear the claimant's grievance on the rearranged date 17 May (Fourth Respondent)

xiv. The grievance outcome on 23 May 2022.

xv. Confirmation on 24 May 2022 that the claimant had been taken off the original branch's payroll and moved to London Road.

b. If so, was that unwanted conduct?

c. Did it relate to the Claimant's protected characteristic, namely her

disability?

d. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

e. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Direct Disability discrimination (Equality Act 2010 section 13) (In the Alternative to the Harassment Claims)

a. Did the Respondent do the things set out in the harassment section above plus the Claimant's constructive dismissal

b. Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who she says was treated better than s/he was and therefore relies upon a hypothetical comparator.

c. If so, was it because of Disability?

d. Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to Disability

Discrimination arising from disability (Equality Act 2010 section 15)

a. Did the Respondent treat the Claimant unfavourably by all matters under (i) –(iv) inclusive, (vii-viii) inclusive, (xii) and (xv).

i. ….;

b. Did the following things arise in consequence of the Claimant's disability?

The Claimant's case is that she was spoken to in the manner she was, and she was moved because of the Respondents' preconceived ideas /ignorance about the effects of her ill health and/or their unwillingness to maintain the adjustments that were in place pretransfer

c. Was the unfavourable treatment because of any of those things?

d. Was the treatment a proportionate means of achieving a legitimate aim? *The Respondent will set out its defence in its Amended Response.*

e. The Tribunal will decide in particular:

i. Was the treatment an appropriate and reasonably necessary way to achieve those aims; or a non-discriminatory reason not connected to Disability
ii. Could something less discriminatory have been done instead;
iii. How should the needs of the Claimant and the Respondent be balanced?

f. Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

Constructive Unfair Dismissal

a) The Claimant claims that the Respondent acted in fundamental breach of contract in respect of an express term / implied term of the contract (mutual trust and confidence). The conduct / treatment breaches that amount to the breach of mutual trust and confidence is the treatment set out in the discrimination section (whether found to be discriminatory or not) plus a meeting with other TUPE transferees on 16 March which the Claimant describes at the bottom of page one of the attachment to her Claim form.

b) The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law, was confirmation that she had been transferred to another branch for the reasons given (which the Claimant also asserts is a breach of an express term).

c) The Tribunal will need to decide:

i. Whether the Respondent behaved in a way that was *calculated* or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

ii. Whether it had reasonable and proper cause for doing so.

iii. Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

iv. Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

v) In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

Findings of fact

24. We make the following findings of fact on the balance of probabilities. To find facts on the balance of probabilities, we are making an assessment about whether something is more likely than not to have happened. Our findings are based on the quality and sufficiency of the evidence presented by both sides. It is entirely a matter for the parties what evidence the present to us and how they go about presenting that evidence.

25. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the relevant point. When finding these facts, we have considered the documents we were referred to in the bundle, the written evidence in the witness statements and the oral evidence heard in cross examination. We attempted to assist the Claimant by on three occasions referring to the list of issues in the Case Management Order and suggesting that this list was a useful guide to the points to be put to the Respondents witnesses. We noted that the Claimant's representative did not work through the list of issues in the detailed way that the Respondent's representative did.

26. Sizeable sections of the evidence proved to be common ground between the parties. An example of this is that there was no dispute about the dates when events took place. In many instances the evidence from a witness was corroborated by documentary evidence such as emails that confirmed when events took place.

Background

27. JCL UK (LTD) T/A LALYS PHARMACY (First Respondent) employs about 150 staff in Great Britain. First Respondent operates several high-street chemists in Portsmouth, Hampshire. The Pompey Centre (Fratton Way) and the London Road branch are the two locations that feature in this claim. Second Respondent

is Mr Baldev Laly, First Respondent 's statutory director, who has served in this position since 1997. The third Respondent is Mrs Pushpinder Laly, First Respondent 's statutory director, who has served in this position since 1998. The fourth Respondent is Teri-Lee Hannaford, First Respondent 's HR/Accounts Lead, who has served in this position since 2021. First Respondent had a business model which included buying pharmacies from other companies such as Lloyds.

28. The Claimant started working at Lloyds Pharmacy as a Healthcare Partner from 14 March 2016, she was then and still is a single parent with disabilities. She worked at 5 different Lloyd Pharmacy branches & two of these stores were permanent transfers. The Claimant's last branch with Lloyds was the Pompey Centre at Fratton Way. While at the Pompey Centre she was promoted to supervisor until this became detrimental to her health; this led the Claimant to step down from her supervisor role. The Claimant was able to carry on working in a non-supervisory role.

29. The Claimant's evidence was that she was optimistic about the takeover by Lalys and that she was looking forward to learning new skills and meeting new people. In her evidence she stated that she was very excited about her new career within Lalys Pharmacy.
30. Based on the evidence, we were presented with we find that the Claimant attended work for her new employer for approximately 34 days between the takeover in February and 7 April 2022 when she left work and was signed off as unfit the next day.

The takeover from Lloyds

31. First Respondent took over as the Claimants employer on Tuesday 1 February 2022. There was evidence that the Respondent had purchased the former Lloyds branch at the Pompey Centre in part because it was a failing branch and we found that was the case. Based on statements made on behalf of the Claimant and lines of questioning that were pursued it was apparent to us that the takeover by Lalys had not gone down well with all the former Lloyds staff. An example of this were references made by the Claimant to a dispute about claiming for NHS prescriptions properly the implication apparently being that Lalys were doing something wrong. The specifics of this were not made clear.

Claimant's Adjustment Passport

32. In the Claimants statement (para 6) she stated that she gave Penny Masters her Adjustment Passport **[159-162]** and that she also spoke with Mr Baldev Laly (Second Respondent) informing him of her current situation. It was accepted in closing submissions by the Respondents that the Adjustment Passport had been handed over on 1 February 2022.

33. The Claimants position throughout the hearing was that it was not her obligation to tell her line manager or her colleagues about her Adjustment Passport. The Claimants position was that this was entirely a matter for the Respondents to deal with and that the Respondents should have told other people such as the Pharmacist in charge at the Pompey Centre, on a given week, about the Claimant's Adjustment Passport.

34. Based on the evidence and in particular the Claimants stated position on this matter we find that the Claimant deliberately did not take steps to tell other people she was working with, or her line managers, about her Adjustment Passport. When asked in cross examination about the wording of the Adjustment Passport the Claimant maintained her position that it was the Respondent's obligation to deal with this. We noted that the Claimant was evasive in not answering straightforward questions about what was stated in the Adjustment Passport regarding ownership of the document and the responsibility of the Claimant to tell people about the Adjustment Passport. We will return to the wording of the Adjustment Passport in due course. There was no evidence presented to us as to any alternative explanation for the Claimant not sharing the Adjustment Passport with line managers or colleagues. We noted that the Claimant had shared similar information with colleagues at Lloyds.
35. The Adjustment Passport was signed off the day before the transfer to the first Respondent took place. It is reasonable to infer from the Claimants evidence and the evidence of her witness Leanne Maganzini, that the way she was used to working a Lloyds before the takeover included practices that were not written into the Adjustment Passport. We found as a fact that this was the situation. We were provided with no evidence to explain why the Adjustment Passport did not include all these practices.

36. The Claimant referred to her workspace and doing NOMADS as examples of adjustments that were taken away from her. However, neither of these items were written into the Adjustment Passport as shown by reference to the documentary evidence included in the bundle. NOMADS being a way that medications were organised and assembled for dispensing to customers.

37. The evidence of Leanne Maganzini in her witness statement dated 20 May 2022 dealt with adjustments. This evidence was that at some point after the Claimants accident at Lloyds on 20 August 2019 there was a staff meeting. The Claimant briefed the staff at Lloyds on her health issues and they all discussed how they could adjust their working practices to accommodate the Claimants needs (para 1 of witness statement). Leanne Maganzini went on to list the “adjustments” that were put in place.

> “Jenna Burdge would be put onto NOMADs as it was a single task that she could focus on rather than multitasking. NOMADs are the most structured and time manageable role in the pharmacy”

- “Jenna Burdge would be allowed to sit whenever she felt the need to. This never affected Jenna Burdge's ability to work as the stools provided were of the right height to sit at our work benches and she could continue to dispense NOMADs.”

- “Jenna Burdge would be allowed to take extra breaks if she needed too. These were no longer than 10 minutes and were only as and when required.”

- “Jenna Burdge would be given extra time to complete tasks as sometimes she could feel overwhelmed, for example, learning new procedures/services, coping with multiple NOMAD changes and busy periods such as Easter and Christmas.”

- “Jenna Burdge would stay in her base store and not be moved to other branches as previous moves during her time at Lloyds had had a negative impact on her health.”

- “Jenna Burdge would be supplied with a small foldable ladder which enabled her to reach higher shelves as she can sometimes become unsteady on her feet. The ladder could be used by all of the colleagues and could be folded away when not in use. This helped Jenna Burdge immensely as many drugs are stored at high levels in the pharmacy and the PHARMA drawer steps don’t always feel stable enough under foot. We would also help Jenna Burdge to retrieve items if she asked or if we felt she looked unsteady. It has never been an issue for me or any other colleagues to do that.”

38. There was no evidence before us to explain why all the practices listed by Leanne Maganzini were not written into the Adjustment Passport that was signed on 31 January by Lloyds. We found as a fact that the practices or adjustments that the Claimant had been used to while working for Lloyds were not all included in the Adjustment Passport.

    Leanne Maganzini's evidence was that:

    "Our pharmacist/manager, Prin, was not aware of Jenna Burdge's need to sit."

39. Members of staff that the Claimant worked with or who line managed the Claimant such as Prin Suksom were not shown the Adjustment Passport by the Claimant. We find that they were also not told by the Claimant about the Adjustment Passport. In that situation they could not have known about the adjustments that had been put into writing by Lloyds the day before the transfer.

40. While we understand the point raised by the Claimant that an employer has a duty of care to employees, we find that staff such as Prin Suksom were at a considerable disadvantage if the Claimant, whom they are managing does not follow the terms of the Adjustment Passport and tell them what the situation is regarding her disabilities.

41. We have considered that the Claimants disabilities may have contributed to her reluctance to share her Adjustment Passport with new colleagues that she did not know. Balanced against that we find that the wording of the Adjustment Passport itself made it clear that the passport was the Claimants document. We find that the wording of the Adjustment Passport was clear that the responsibility to ensure that any new manager or anyone that needed to know about the Claimants condition or adjustments, was the responsibility of the Claimant. We were also mindful of the evidence of Leanne Maganzini that the Claimant had shared her circumstances with all the staff while at Lloyds. We accept that this was a different set of circumstances, but the evidence does show that the Claimant could discuss her circumstances with other colleagues. We were not provided with any other evidence about why the Claimant's decided to withhold the Adjustment Passport from her day-to-day line managers.

42. We heard evidence from both parties that the period following the takeover was a busy and chaotic time. Mr Laly gave evidence of the requirements imposed by the NHS and Data Protection Law that meant that all the existing computers and tills had to be removed by Lloyds and the Respondents then had to replace all

that equipment and integrate that into their systems. Mr Laly himself described this time as chaotic. We accept the evidence that was before us and find that this was a busy and at times chaotic period. The evidence was that in the approximately 34 days that the Claimant was in work for the Respondent company there was an ongoing period of change necessitated by the takeover. We find that this was not unusual for the Respondent when they took over pharmacies from other companies. We also find that this period was relatively short given the context of the takeover and the necessary changes. This in turn we find gave the Respondents relatively little time to get to know the Claimant and what she may require in terms of reasonable adjustments. We also find that the Claimants decision not to tell her day-to-day line managers about her disabilities or her Adjustment Passport did not make matters better.

43. From the Claimants evidence we accept that there were new Lalys staff regularly coming into the Pompey Centre and that at least three pharmacists were working there at different times between February and April. We also accept that the pharmacist in the branch is the line manager of the staff in the branch.

44. We accept the Claimants evidence that on 1 February 2022 she was asked to undertake cleaning responsibilities by Prin Suksom (pharmacist). We also accept the Claimants evidence that she had one day off work due to being ill – this was 15 February 2022. The Claimant returned to her responsibilities on 16 February 2022.

45. The Claimants evidence which we accept is that she started to receive training on the new processes for NOMADS in about the third week following the takeover. We found this to be the week commencing Monday 14 February 2022. The Respondent had different ways of working to Lloyds that meant that the Lloyds staff needed to be trained to work in that way. The Claimants evidence was that Abbie Gardener came to the Pompey Centre to provide training. The Claimant's evidence was that watching someone else perform a task was not training. In relation to this we do not find that this is the case. Watching someone perform a task is often the first step in any training. The Claimant did not accept this point when asked about it by the Respondent's representative.

46. At paragraph 11 of the Claimants statement, she referred to an adjustment in the form of been given NOMADS. This was not something that was set out in the Claimants Adjustment Passport. The Claimant goes on to state in her evidence that this adjustment was removed. Based on the evidence before us we do not

find that NOMADS was an adjustment in relation to the disabilities of the Claimant. It was not set out as an adjustment in the Adjustment Passport.

47. In the Claimants statement at paragraph 12 her evidence was that due to the lack of training, removal of her original working area and that some of her adjustments that were still not implemented, and the lack of flexibility she found her medical conditions starting to worsen and become less manageable. The Adjustment Passport does not detail any requirements in relation to a working area for the Claimant.

48. The Claimant then had a period of annual leave that ran from Thursday 3 March until Monday 14 March 2022.

14 March

49. On the Claimant's return from annual leave on 14 March 2022, Prin Suksom (Pharmacist) told the Claimant that she would no longer be working on NOMADS. The Claimants adjustments as set out in the Adjustment Passport did not include an adjustment to only perform certain tasks such as NOMADS at work.

50. The Claimants evidence was that she was told that Leanne Maganzini has been doing this job whilst the Claimant was on leave and that the reason was:

"she is quicker than me and makes less mistakes".

The Claimants evidence was that Prin Suksom also informed her that she would swap job roles with Leanne Maganzini.

It was the Claimant's case that this was yet another failure to implement what she saw as her reasonable adjustments and to adhere to those adjustments. The Claimants evidence was that she felt instantly like a failure, and this knocked her self-esteem and confidence. We heard no evidence from Prin Suksom and there was no witness statement from her in the bundle. We accepted the Claimants evidence of the conversation that had taken place.

What we did not have was any evidence of the context for the decision that Prin Suksom had made. There was no evidence that this decision was due to the disabilities of the Claimant. The evidence was and we found that the Claimant had made a conscious decision not to tell colleagues such as Prin Suksom about her disabilities or the Adjustment Passport. The Claimants evidence was that in

her view it was for the Respondents to do that. In that case we find that it is reasonable to infer that Prin Suksom did not know about the Claimants disabilities when she made that decision.

Paragraph 14 of the Claimants statement states that she began to struggle within a few hours of taking over Leanne Maganzini's job role. This was, the Claimant stated, because her reasonable adjustments were not in place. The Claimant gave an example of a reasonable adjustment that had been removed – a step ladder aid. In the Adjustment Passport there is no mention of a step ladder as an adjustment. The evidence of Leanne Maganzini was that the step ladder was still on the premises it had just been moved to another part of the pharmacy. In cross examination the Claimant accepted that not all the tasks of LM were transferred to her and that not all the tasks caused the Claimant to struggle.

16 March

51. On Wednesday 16 March 2022 the Second Respondent and the Third Respondent accompanied by another employee Henry Nettle arrived at the Pompey Centre. The Claimant's evidence was that there was an unplanned meeting in the staff room at approximately 1.20pm and that only the former Lloyds staff were asked to attend. The Claimants evidence was that the meeting consisted of the Second Respondent and the Third Respondent criticising the former Lloyds staff. The meeting was a one-way meeting without any opportunity for the Claimant or her colleagues to speak or defend themselves. This was corroborated by the evidence of Leanne Maganzini (paragraph 10 of her witness statement).

52. The Respondents position was that the meeting did take place, but this was not how the meeting happened. The meeting was minuted by Henry Nettle. The minutes were accurate said the Respondents. Cross examination revealed that Henry Nettle had taken handwritten notes in a diary or similar book. He had then typed those notes at a later point in time. The handwritten notes were not in the bundle, the typed notes in the form of an email were in the bundle.

53. The Claimants evidence was she was then kept back and spoken to by the Second Respondent and the Third Respondent with Henry Nettle present. The Claimants evidence was that the Second Respondent said he was worried that someone like the Claimant was working in a health sector like this with the fibro fog that the Claimant experiences and that the Claimant could potentially give a patient the wrong medication and put a patient at risk.

The Claimants evidence was that the Third Respondent then said

> “oh my gosh should she even be near tablets”

because of the fibro fog the Claimant experiences. The Third Respondent then said,

> “the conditions that I have aren't small”

The evidence of the Claimant was that she found herself having to defend herself and her disabilities. The Claimants evidence was that she replied

> “I have passed all my training I am a qualified dispenser”

The Claimant’s evidence was that this was dismissed by the Second Respondent and the Third Respondent.

The Claimants evidence was that the Third Respondent then carried on to say that she had spoken to a doctor about the Claimants health conditions. The Claimants evidence was that she was aware that there was a doctor within JCL UK Ltd. She believed that the Second Respondent and the Third Respondent had broken her confidentiality by discussing her health conditions with their son Dr Raj Laly who is a GP and a director of the First Respondent.

The Third Respondent then continued saying:

'' Jenna you are not disabled I think you are confused as they are health conditions and not disabilities”

The Third Respondent then said

> “she is worried about this & doesn’t know if this is the place for me”

she also said

> “in the 30 years she has worked in pharmacy she has never known a dispenser to sit down” and “wasn’t sure how this would work.”

The Claimants evidence was that the Second Respondent then said:

> “as a superintendent & a pharmacist he is really worried I will put a patient at risk by giving them the wrong tablets' '

54. The Claimant's evidence was that once the Second Respondent, the Third Respondent & Henry Nettle left she went to the nearby staff toilet & burst into tears. Her anxiety was through the roof, her heart was pounding, and she felt sick. Her evidence was that she was in complete shock at what had just

happened. The Claimant's evidence was that Leanne Maganzini knocked on the toilet door having come to look for her. After being comforted by Leanne Maganzini the Claimant's evidence was that she spoke with her Line manager Prin Suksom and explained to her what had happened and then the Claimant spent the rest of her working hours on the phone to ACAS & the Equality act helpline.

55. It is not in dispute that there were two meetings on 16 March 2022. The second meeting with the Claimant and the Second Respondent and the Third Respondent is the more relevant meeting for the issues in the case. In relation to the second meeting on 16 March 2022 we found that there was a significant difference between the parties in their recollections of what had taken place. The Second Respondent and the Third Respondent both denied in their evidence that they had spoken to the Claimant in the way that she set out in her evidence. The minutes that were sent out by Henry Nettle did not reflect the Claimants evidence.

56. A significant amount of the agreed bundle contained social media messages exchanged between the Claimant and other persons. Many of the messages were between the Claimant and Leanne Maganzini. We found that the messages exchanged represented an open and frank exchange of views between friends in which the use of language was robust. We found that the text messages sent after the second meeting between the Claimant and Leanne Maganzini did not reflect the gravity of the allegations that the Claimant was making against the Second Respondent and the Third Respondent. Given the free use of language in the other text messages in the bundle we would not have been taken by surprise to see a frank exchange between the Claimant and Leanne Maganzini about the events of the afternoon of 16 March 2022. There was no such exchange.

57. We did take the point that not all the text messages were included in the bundle, and it was apparent that the messages from 16 March had not all been included. We understood from the Claimant that some material had to be left out of the bundle to meet the overall limit set for the page count. It is a matter for the Claimant and Respondent to determine how their cases are presented and we can only make findings on the evidence presented to us. There was no application made by the Claimant to add any further pages to the bundle or admit further evidence of text messages. Given that the Claimant had successfully made an application on the first day to admit late evidence we concluded that all

the relevant text messages had been included regarding this significant element of the Claimants case. We heard no specific evidence to the contrary.

58. We also considered that when the Claimant lodged her first grievance (G1) this was against the Second Respondent alone. G1 was about the decision by the Second Respondent about Leanne Maganzini not been allowed to accompany the Claimant to an informal meeting on 7 April 2022. Given that the Claimant was taking a grievance against the Second Respondent we noted that the much more significant allegations raised by the Claimant regarding the second meeting on 16 March 2022 were not part of G1. We find that this was a significant factor that lessened what weight we could attach to the account of the meeting given by the Claimant.

59. The Claimant produced no other evidence of the content of the meeting such as emails sent, or notes kept. If there were any emails or notes these were not in the agreed bundle.

60. On the available evidence presented to us we could detect no reason why Henry Nettle would support untruthful evidence from the Second Respondent and the Third Respondent by producing a set of minutes that did not reflect what had happened. There was no evidence to support a conspiracy between the Respondents to fabricate an account of the second meeting.

61. Balancing all the evidence we find that both meetings did take place. We also find that the second meeting took place in the way described in the minutes and by the Second Respondent and the Third Respondent for the reasons set out above.

31 March – 6 April

62. There was no dispute that the Second Respondent did refuse for the Claimant to be accompanied to an informal meeting by a work colleague. On Thursday 31 March 2022 the Claimant was contacted by the Fourth Respondent via email to confirm a meeting had been arranged for the 7 April 2022 with the Second Respondent **[179]**. That day the Claimant spoke to the Second Respondent in person about having Leanne Maganzini present for the 7 April meeting. The Second Respondent said no – but that the Claimant could bring anyone from

outside work or an ACAS rep. We find as a fact that ACAS would not have provided a representative in this situation. We find that the evidence was that the Second Respondent was not aware of this, and this was a mistake on his part to suggest that ACAS would send a representative to an informal meeting.

63. On Thursday 31 March 2022 the Claimant contacted ACAS for advice **[350-351]**. The Claimants evidence was that ACAS advised her to find out the nature of the meeting. The Claimant pursued this with the Fourth Respondent and on Monday 4 April 2022 the Claimant was told that the meeting would be a

"getting to know me better & my conditions".

Following another request to have Leanne Maganzini present the Claimant was told on Tuesday 5 April 2022 that this was refused. The Claimant continued to press for Leanne Maganzini to accompany her to the meeting on 7 April.

64. We find that the 7 April meeting was planned to be an informal meeting with the Claimant and did not form part of any grievance, disciplinary or performance process. The Respondent accepted that they had a PCP which was that work colleagues did not accompany employees to informal meetings due to a desire to keep personal circumstances out of the workplace. The Respondents wished to maintain the privacy of their employees, particularly from each other. We find that the Respondents were open to anyone else attending this informal meeting to support the Claimant if it was not a work colleague.

65. The evidence from the Claimant was that ACAS had advised her to request the presence of Leanne Maganzini as a reasonable adjustment. We accept the Claimants evidence on this point. We do not know the content of the information that the Claimant gave to ACAS to produce this advice.

Events of 7 April and the grievances

66. There was no dispute that the Second Respondent arrived at the Pompey Centre at 1110am on Thursday 7 April 2022 and asked to speak with the Claimant. The Claimant was not expecting a meeting to take place, as she wanted her colleague and friend to accompany her.

67. The Second Respondent raised his concerns about the Pompey Centre figures, a near miss error that the Claimant could not recall having made and then told the Claimant that as of Monday 11 April 2022 she would be moved to the London Road Branch.

68. We find that during this meeting in a patient consultation room the Second Respondent discussed with the Claimant a range of subjects. We find that the matters vii A and B on the Case Management Order were not specific to the Claimant. It was clear on the evidence produced by the Claimant that dispensing errors did happen and that other staff of Lalys had made errors which were recorded as near misses. Such near misses were not an unusual occurrence and not specific to the Claimant. We find that the business matters (A and B) were discussed but were not specifically aimed at the Claimant.

69. We find that the Second Respondent did tell the Claimant that she would be moving to the London Road Branch and that the Second Respondent gave the Claimant the address and contact details for the pharmacist written on a piece of paper. In relation to the refusal to discuss reasonable adjustments for the move to London Road we find that this was not a refusal, and that the Respondent was prepared to discuss this at a later time. This is as set out in the Case Management Order. There was no later time, as the Claimant did not return to work again.

70. The Claimants evidence was that she raised objections to the announcement of her move. The Claimants evidence was that this news had a significant impact on her and that she was unable to finish her shift and left by 1130am. Later the same day, 7 April 2022 the Claimant raised her first formal grievance G1 **[185].**

8 April

71. On Friday 8 April 2022 the Claimant was signed off as unfit for work. She did not return to work again. The Fourth Respondent sent the Claimant confirmation of the move to London Road.

72. On 9 April 2022 the Claimant asked the Fourth Respondent for written reasons for the transfer to London Road. On Monday 11 April the Claimant raised her second grievance G2 **[196-197].** On Tuesday 19 April the Claimant raised her third grievance (G3) **[210-212]**.

73. The Claimant received a grievance hearing letter **[214-215]** and grievance policy **[135 - 147]** on Friday 29 April 2022. The Claimant was uncomfortable with the arrangements for chairing the grievance hearing and sought advice from ACAS [**220]** on Tuesday 3 May 2022.

4 – 26 May

74. On Wednesday 4 May 2022 the Claimant received a response from the Fourth Respondent that performance issues. The Claimants evidence was that she was completely unaware that there were any performance issues **[223]**. On the same day the Claimant sent Fourth Respondent an email requesting a reasonable adjustment for the grievance hearing. The Claimant received no response **[224].** We find that there was no evidence produced by the Respondents regarding any performance issue about the Claimant or her work.

75. The Fourth Respondent did refuse to change the Second Respondent and the Third Respondent as arbiters of the Claimants grievance. The Fourth Respondent did tell the Claimant that she had disrupted operations by cancelling her grievance hearing at a late stage. The Fourth Respondent did tell the Claimant that “performance elements were on hold”. The Fourth Respondent did ask the Claimant if she intended to keep working for the Respondent.

76. On 11 May the Fourth Respondent confirmed to the Claimant that the Second Respondent and the Third Respondent would still hear the grievance on the rearranged date of 17 May 2022. There was then further correspondence about the grievance hearing and the Claimant told the Respondents to go ahead in her absence. The Claimant sent a written statement instead of attending **[238-241].** On Wednesday 18 May 2022 the Claimant received an email from the Fourth Respondent with an attachment of minutes taken from meeting **[242-244].**

77. On 23 May the Claimant did receive the outcome of her grievances; they were not upheld. On 24 May the Claimant had it confirmed that she was now on the payroll system as working in London Road. We find that this was an administrative step to make sure that the Claimant would continue to be paid. We find this based on the evidence of the Fourth Respondent. The Claimant then raised her fourth grievance on 26 May 2022 **[255-257].**

Summary of Grievances

	Raised	Against	Summary
G1	7 April	Second Respondent	For refusing to allow Leanne Maganzini to sit in on 7 April meeting
G2	11 April	Second Respondent	Regarding the impromptu meeting on 7 April
G3	19 April	Second Respondent and Third Respondent	Harassment at 16 March meeting
G4	26 May	Second Respondent, Third Respondent and Fourth Respondent	Respondent's failures toward the Claimant.

Findings on adjustments generally

78. We find that there were adjustments in place for the Claimant. These were the adjustments in the Adjustment Passport **[160].** We find that the Claimant was of the view that the adjustments that had been agreed amongst the Lloyds staff, prior to the transfer to Lalys were also in place. We find that this was not the case. The only adjustments that transferred with the Claimant from Lloyds were those set out at page 160.

79. We can understand how confusion may have arisen in the mind of the Claimant and Leanne Maganzini. They were still in their usual place of work. The physical location had not changed for them, it was their employer that had changed. We find that the evidence shows that they were used to things as they had been up until 31 January 2022. Workstations, equipment and practices were all in place until these all changed after 1 February 2022. We find that only the items listed on page 160 were effective adjustments.

80. We find that the Claimants situation was not improved because of her decision not to share her Adjustment Passport with line managers such as Prin Suksom or with her new colleagues at Lalys. It was the Claimants position, which she repeated in cross examination that it was the Respondents obligation or duty to deal with the Adjustment Passport and to tell other staff. This was despite what the wording of the Adjustment Passport clearly said.

81. We find that the Adjustment Passport could have been updated by the Respondent. We also find that this would have necessarily taken time and it is reasonable to infer that input from suitable professionals would have been sought before any adjustments could be agreed. We find that the available time for the Respondent to deal with any updating of the existing Adjustment Passport must be seen in the context of the period during which the Claimant was in work (approximately 34 days) and against the background of the changes required by the takeover. We find that the deliberate actions of the Claimant in not providing her existing Adjustment Passport to her line managers, or her colleagues, did not help her circumstances.

Findings on each adjustment as set out in the Adjustment Passport [160]

Set work pattern is in place and only works at base branch (Mon - Thurs 28hrs/week)

82. We find that there was a set working pattern in place and this was maintained following the transfer. We will return to the base branch issue

Support with lifting and carrying from members of the team

83. We find that there was no evidence that any members of the team had refused to support the Claimant with lifting and carrying. The Claimant and Leanne Maganzini confirmed this in their oral evidence.

If operationally practicable, the ability to sit for short periods after prolonged standing to help reduce physical fatigue

84. We find that there was a stool in the pharmacy. We also find that there was evidence of a chair in the staffroom. We find that some stools had been removed after 1 February 2022. We find no evidence that the Claimant was, if operationally practicable, prevented from sitting down for short periods of time after prolonged standing to help reduce physical fatigue.

Jenna to report to manager when Brain fog is experienced for awareness that she may need additional time to complete tasks

85. We find that there was no evidence that the Claimant reported in this way to a manager. The Claimants decision not to tell her line managers about her Adjustment Passport would have not assisted the Claimant in implementing this adjustment.

Jenna to report to manager when having a bad day for awareness for increased mental breaks

86. We find that there was no evidence that the Claimant reported in this way to a manager. The Claimants decision not to tell her line managers about her Adjustment Passport would have not assisted the Claimant in implementing this adjustment.

Finding regarding the base branch adjustment

87. The Lloyds contract and the Respondents contract both contained flexibility or mobility clauses. The Respondents contract we found was clear about the possibility of a move if required for business reasons. We found that the 30-day notice period was not applicable if moving a staff member to another branch but in the same job. We found that the reason for this move was as set out in the evidence **[243]**

> "BL highlighted about recent mistakes on medication dispensing for JB. As a result of business need for the pharmacy group, BL confirmed it would be better suited for JB to train further at the London Road, Portsmouth branch.
>
> A discussion was held regarding the operational challenges at Pompey Centre as previously highlighted on 16th March and difficulties that were arising at this respective branch. It was deemed sensible for JB (and other staff of Pompey Centre) to get further training within the Lalys Portsmouth branches.
>
> JB has high skill value in medication trays therefore it was appropriate to transfer JB to the London Road Branch. This would ensure better understanding of the working practice and culture at Lalys Pharmacy. Use of the dispensing robot for medication trays was also different compared with Lloyds hence gaining an understanding in this respective branch."

88. The reason for the move was not to do with the Claimants disabilities. The Respondents had identified a training need for the Claimant and other staff who had transferred from Lloyds. We found that there was no evidence that this move was intended by the Respondents to be permanent. The Respondents did continue to offer to discuss matters with the Claimant after her return to work.

The move to the London Road branch did not actually take place as the Claimant did not return to work after 7 April 2022.

89. We find that although the Claimant asked for relevant information this was not provided by the Respondent. We find that the Respondents could have performed better here and provided information to the Claimant on 7 April 2022 to clarify the nature of the move and other related information.

Finding regarding meeting adjustment

90. We find that the Claimant did make a request for a reasonable adjustment for Leanne Maganzini to accompany her to the meeting and in doing that she was following the advice of ACAS. While it is open to an employee to request a reasonable adjustment to be considered it is clear, even on the wording of the Claimant's own Adjustment Passport that the employer may need time to consider such a request and is likely to require evidence in the form of occupational health or other reports. The Claimant had been involved with occupational health referrals while employed by Lloyds. Although we heard no evidence about this, we find that it is reasonable to infer that the Claimant was aware of the process of such referrals and the potential time that such referrals may require. We find that the purpose of the meeting was to get to know the Claimant better, it was an informal meeting. The Respondent was content for the Claimant to be accompanied by anyone other than a work colleague. We find that this request from the Claimant to have a reasonable adjustment to be accompanied by her work colleague Leanne Maganzini must be viewed in the context of the overall time scale of the claim, the period of transition from one business to another business and the newness of the relationship between the Claimant and the Respondents.

Findings on harassment

91. The allegations of harassment were largely uncontested in the sense that there was no issue that they had taken place. The notable exceptions to this were iv and vii. Our findings of fact in relation to the particulars of the harassment claim are set out above.

Findings on Constructive Dismissal

92. The constructive unfair dismissal claim is based on a breach of the implied term of trust and confidence or an express breach of the contract in respect of the Claimant's transfer to a different branch. The transfer is relied upon as the last straw in the implied term claim.

93. In relation to the breach of an express term of the Lalys contract – we find that there was no such breach. Our understanding of the Claimant's case was that the 30-day notice period was the major reason for saying that there was an express breach. We have found that the 30-day notice period did not apply to the Claimant's circumstances.

94. In relation to the breach of trust and confidence we have found that this was built upon the Claimant's assertions that her adjustments had been removed, not complied with or refused. We have found that this was not the case here. Based on that finding the C cannot rely upon the move to London Road as a last straw.

The procedures of the Respondent

95. We observed that the way that the Respondent communicated with the Claimant at times was not as clear as it could have been. There were also delays in communicating with the Claimant. In terms of providing information, there were also shortcomings as highlighted by the Claimant in terms of her asking for the investigation notes relevant to her grievances. There also appeared to be a lack of notes taken of calls and other contacts from the Claimant to the HR department. However, these factors did not change our overall view of the case.

Legal Framework

Failure to make reasonable adjustments

96. Section 20 Equality Act 2010 provides: -

> "(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.

97. Section 21 Equality Act 2010 provides that a failure to comply with the three parts of s20 is a failure to comply with a duty to make reasonable adjustments, which is an act of discrimination. In other words, the employer must take reasonable steps to alleviate the substantial disadvantage where 'substantial' means "more than minor or trivial" (section 212(1) Equality Act 2010).

98. An employer is not liable in respect of a failure to make reasonable adjustments unless it knows or is reasonably expected to know that a PCP will place the employee at a substantial disadvantage. *Schedule 8 Equality Act 2010* deals with in work reasonable adjustments. *Paragraph 20(1)(b)* includes employees by virtue of the definition of an 'interested disabled person' in *Part 2 of Schedule 8*. *Paragraph 20(1)(b)* reads (together with *20(1)*): -

> *"A (employer) is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement"*.

99. A holistic approach should be adopted when considering the reasonableness of the adjustments, and may include factors such as the effectiveness of the steps, the cost, the practicability, and the nature and size of the employer's undertaking *(Burke v The College of Law and another [2012] EWCA Civ 87 CA*.

Harassment related to disability

100. *Section 26 Equality Act 2010* provides: -

"(1) A person (A) harasses another (b) if –

(a) *A engages with unwanted conduct related to a 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; and*

(c) *Whether it is reasonable for the conduct to have that effect."*

101. 'Disability' is a protected characteristic because it appears in the list of protected characteristics at *section 4 Equality Act 2010*.

102. Under *section 136(2) Equality Act 2010*, the claimant needs to show on the balance of probabilities that there are facts from which the Tribunal can decide that harassment related to disability has occurred. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (*section 136(3) Equality Act 2010*). This means that the claimant will need to show more than simply she was disabled at the time any unwanted conduct occurs (*Private Medicine Intermediaries Ltd v Hodkinson EAT 134/15*.

103. Harassment claims must be determined by considering evidence in the round, looking at the overall picture. Although the knowledge and perception of the characteristic on the part of the alleged perpetrator is relevant, it is not necessarily determinative *(Hartley v Foreign and Commonwealth Office Services [2016] ICR D17)*. This means that the determination of the words 'related to' is a finding the Tribunal should make drawing on all of the evidence before it to account of the possibility, for example, that the alleged perpetrator may be displaying a sub-conscious bias which affects the recipient even if they do not know of the protected characteristic (*Tees Esk and Wear Valleys NHS Foundation Trust v Aslan and another [2020] IRLR 495 EAT*).

Direct disability discrimination

104. *Section 13(1) Equality Act 2010* provides: -

"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 claimant must establish that she was objectively treated in a 'less favourable' way. It is not sufficient for the treatment to simply be 'different' *(Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL*). The person(s) with whom the comparison is made must have *"no material difference in circumstances relating to each case"* to the person bringing the claim (*section 23(1) Equality Act 2010*). The comparator should, other than in respect of the protected characteristic, *"be a comparator in the same position in all material respects as the victim" (Shannon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL)*. If there is no such comparator in reality, then the Tribunal should define and consider how a hypothetical comparator would have been treated if in the same position as the claimant save for the fact that they would not have the protected characteristic relied upon *(Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA)*.

106. The phrase 'because of' is a key element of a direct discrimination claim. In *Gould v St John's Downshire Hill [2021] ICR 1 EAT*, Mr Justice Linden said, in respect of determining 'because of': -

> *"It has therefore been coined the 'reason why' question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of. In need not be the sole ground for the decision… the influence of the protected characteristic may be conscious or subconscious."*

107. It is a defence for a respondent to show that it had no knowledge of the protected characteristic relied upon, on the basis that the protected characteristic it did not know about could not have caused the treatment complained of (*McClintock v Department for Constitutional Affairs [2008] IRLR 29 EAT*. However, this defence does not apply where the act itself is inherently discriminatory (such as differentiation on the grounds of a protected characteristic), and in such cases whatever is in the mind of the alleged perpetrator of the discrimination will be irrelevant (*Amnesty International v Ahmed [209] ICR 1450 EAT*).

108. Under *section 136(2) Equality Act 2010*, the claimant needs to show on the balance of probabilities that there are facts from which the Tribunal can decide that direct disability discrimination has occurred. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (*section 136(3) Equality Act 2010*).

Discrimination arising from disability (Equality Act 2010 section 15)

109. Summarising section 15 EQA 2010, a person discriminates against a disabled person if they treat them unfavourably because of something arising in consequence of their disability and they cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if the employer shows that they did not know, and could not reasonably have been expected to know, that the employee had a disability.

110. In Secretary of State for Justice and anor v Dunn EAT 0234/16 the EAT (presided over by Mrs Justice Simler, its then President) identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

(1) there must be unfavourable treatment

(2) there must be something that arises in consequence of the claimant's disability

(3) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

(4) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

111. Section 15 does not require the disabled person to show that the treatment suffered was less favourable than that experienced by a comparator. A claimant is required to show that he or she has suffered something broadly akin to a detriment without having to show that somebody else who does not suffer from the same disability would have been treated differently. In considering a claim under S.15(1), a tribunal should always take care when identifying the alleged unfavourable treatment. In T-Systems Ltd v Lewis EAT 0042/15 the EAT held that an employment tribunal had erred in law in finding that the unfavourable treatment was a mental process leading the alleged discriminator to behave in a certain way. In the EAT's view, unfavourable treatment is what the alleged discriminator does or says, or omits to do or say, which then places the disabled person at a disadvantage.

Constructive dismissal

112. An employee is entitled to treat themselves as constructively dismissed where they terminate their employment contract following the employer seriously breaching that contract in a way which goes to the root of the employment contract (Western Excavating (ECC) Ltd v Sharp [1978] QB 761). The serious, or repudiatory, breach of contract may be to express provisions of the employment contract or to provisions which are implied into the contract by case law. All employment contracts contain a term that "the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" (Malik v BCCI SA (in Liquidation) [1998] AC 20, as amended by Varma v North Cheshire Hospitals NHS Trust [2007] 7 WLUK 116).

113. Whether or not there has been a breach of the implied term of trust and confidence is an objective question and the employer's intentions are irrelevant. If the employer commits conduct which is likely to destroy or seriously damage mutual trust or confidence, then it will be deemed to possess the subjective intention (Leeds Dental Team Ltd v Rose [2014] ICR 94) and the employee is likely to be able to accept that repudiatory breach and terminate the employment contract (Morrow v Safeway Stores Plc [2002] IRLR 9).

114. The determination as to whether a breach is sufficiently serious as to constitute a repudiatory breach is an objective test, and it does not matter that the employer might genuinely believe a breach to not be repudiatory (Tullett Prebon Plc v BCG Brokers LP [2011] EWCA Civ 131). The overall repudiatory breach may be a single act or a collection of smaller breaches or a series of events which are not individually breaches but which amount to a breach when put together (Garner v Grange Furnishing [1977] IRLR 206.

Burden of proof – section 136 Equality Act 2010

115. Section 136 of the Equality Act 2010 provides:

'(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the [employment tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.'

116. This provision recognises that discrimination is frequently covert, unintentional or subconscious and therefore can present special problems of proof. Broadly speaking, its effect is that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent to prove a non-discriminatory explanation.

117. At the first stage, the claimant has to prove facts from which, in the absence of any other explanation, the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then shifts to the respondent to prove, on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA.

118. There is a distinction between an employer's explanation for allegedly discriminatory treatment (which should be left to the second stage) and 'material facts' adduced by the employer to counter or put into context the claimant's evidence (which it is permissible for the tribunal to consider at the first stage) – Laing v Manchester City Council and anor 2006 ICR 1519, EAT. Material facts relevant at the first stage may include evidence adduced by the employer which rebuts or undermines the claimant's case – Efobi v Royal Mail Group Ltd 2021 ICR 1263, SC. Something more than a mere finding of less favourable treatment is required before the burden of proof shifts onto the employer. Lord Justice Mummery in Madarassy v Nomura International plc 2007 ICR 867, CA, stated:

'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

119. At both the first and second stage of the analysis, it is the mental processes of the alleged discriminator which are in play, not the mental processes of others who may have provided information but did not make the relevant decision – Reynolds and ors v CLFIS (UK) Ltd 2015 ICR 1010, CA.

120. In Martin v Devonshires Solicitors 2011 ICR 352, EAT, Mr Justice Underhill (then President of the EAT) stressed that while *'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'*. This view was endorsed by the Supreme Court in Hewage v Grampian Health Board 2012 ICR 1054 and Efobi v Royal Mail Group Ltd (above).

Discussion and conclusions

Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

121. The Respondent accepted that the Claimant was disabled. The Claimant's case was founded on the alleged substantial disadvantage caused by the following PCPs of the Respondent:

i. That the Claimant needed to be able to lift and carry in her role.
ii. That the Claimant should stand whilst undertaking her role
iii. That the Claimant should complete tasks in a specified time
iv. That the Claimant could be moved to any branch
v. Not permitting a representative / workplace colleague at internal meetings

The Claimant had an Adjustment Passport in place which had been put into writing the day before the Claimant transferred to the Respondent. The Claimant had made a conscious decision not to tell her line managers or new colleagues

about her Adjustment Passport or her disabilities. The Adjustment Passport had the following provisions:

1) Set work pattern is in place and only works at base branch (Mon - Thurs 28hrs/week)
2) Support with lifting and carrying from members of the team
3) If operationally practicable, the ability to sit for short periods after prolonged standing to help reduce physical fatigue
4) Jenna to report to manager when Brain fog is experienced for awareness that she may need additional time to complete tasks
5) Jenna to report to manager when having a bad day for awareness for increased breaks

122. The Claimant's evidence was that she did need to be able to lift and carry in her role but that a lot depended on what she had to lift and carry. There was no evidence that the members of the team had refused to support the Claimant with lifting and carrying. There was no evidence that this PCP put her at a substantial disadvantage.

123. The Claimant did need to stand while undertaking her role, but not continuously. There was at least one stool in the pharmacy and a chair. There was no evidence that the Claimant had been prevented from sitting down. There was no evidence that the Claimant was prevented from sitting for short periods after prolonged standing to help reduce physical fatigue, if operationally practicable. There was no evidence that this PCP put her at a substantial disadvantage.

124. The Claimant was required to complete some tasks in a specified time. There was no evidence that this placed the Claimant at a substantial disadvantage. Her Adjustment Passport had a provision to cover situations when brain fog may require her to have extra time. However, the Claimant had decided that she was not going to tell her line managers or new colleagues about this she had undermined her own adjustment.

125. The Respondents did have a mobility clause in the contract of employment. The Claimant was due to be moved to the London Road branch for training purposes and on the available evidence this was a temporary move. Her colleagues who had transferred from Lloyds were also going to be moved to facilitate their training. As there were inevitably going to be new systems and

processes to learn it should not have been unexpected for the former staff of Lloyds to be moved around for training. The Claimant herself volunteered to go to a different branch for till training which she found to be a good change. The Respondent has maintained a set working pattern of days and hours. The London Road branch was not a longer distance for the Claimant to travel to. The temporary move for training purposes did not place the claimant at a substantial disadvantage.

126. The Respondent did have a PCP that meant that work colleagues could not accompany work colleagues at some internal meetings. The Respondent was content that the Claimant could bring anyone else she wanted to bring. This PCP did not place the Claimant at substantial disadvantage. She could have been accompanied to the informal meeting by anyone apart from her colleague and friend Leanne Maganzini. Instead, the Claimant, having been refused her choice of person, then sought to have that person as a reasonable adjustment on the advice of ACAS. In our view it was not unreasonable for the Respondents to want to progress matters with the Claimant by holding an informal meeting. Ultimately the Claimant took out a grievance having been denied the person she had chosen to accompany her.

127. We do not consider that the Claimant was at a substantial disadvantage because of the PCPs and there was no duty on the Respondent to make any further adjustments beyond those set out in the Adjustment Passport.

128. Consequently, this aspect of the claimant's overall claim fails and is dismissed.

Harassment related to Disability (Equality Act 2010 s. 26)

129. To succeed in her claim for harassment related to disability, the unwanted conduct must relate to the claimant's disability. In our judgment, some of the individuals who committed the unwanted conduct, did not know that the claimant was disabled. This is because the Claimant had made a conscious choice not to tell those people about her Adjustment Passport or her disabilities.

130. The question then is whether there is any other evidence that will allow us to conclude that the harassment related to disability on a prima facie basis (i.e.

that there are facts from which we could draw the inference that the harassment occurred). In her evidence, the claimant said it was her perception that the treatment from the respondent here was related to her disability. We do not accept that. We do not find that there was any other evidence that will allow us to conclude that the harassment related to disability on a prima facie basis

131. For each of the instances, we accept that the conduct of the line manager (Prin) and the Respondents in question, was conduct which the claimant did not want. In each case the Claimant has been given instructions, decisions or information that she did not want to receive. Telling a member of staff to switch to new tasks, that they had made an error in dispensing, that they could not be accompanied by a work colleague and so on are matters that may be communicated by an employer to an employee in the day to day running of a business. The acts complained about were due to non-discriminatory considerations. Following the format of the issues in the Case Management Order:

> i. On 14 March 2022 “Prin” told the Claimant she would no longer be working in nomad trays
>
> ii. On 14 March 2022 “Prin” told the Claimant that Ms Maganzini would be undertaking the Claimant’s job going forward as she was “quicker that the Claimant and made less mistakes”
>
> iii. On 14 March 2022 the Claimant took over Ms Maganzini’s tasks, which were more onerous and caused greater mental stress and physical pain on account of the claimant’s disability.

132. In relation to these three matters on 14 March, Prin did not know about the Claimant’s disabilities due to the decision of the Claimant not to tell Prin about the Adjustment Passport. The Claimant had the disability and unwanted conduct occurred. We do not consider that the two are linked. The unwanted conduct was not related to the Claimants disabilities.

> iv. On 16 March the Second Respondent and the Third Respondent held a meeting with the Claimant in which he / she said... (allegation set out in full above).

133. We find that the second meeting on 16 March did not occur in the manner set out by the Claimant. On the available evidence we preferred the account of the Respondents. Accordingly, we find that this meeting was not harassment and was not related to the Claimants disabilities.

v. On 31 March 2022 the Claimant was refused permission by the Second Respondent to be accompanied to an internal meeting.

134. The Second Respondent knew that the Claimant was disabled, and the unwanted conduct did occur. There was no evidence that the conduct was related to the disabilities. Nor was there any evidence that the reason behind the conduct was related to the disabilities. The unwanted conduct was not related to the Claimants disabilities.

vi. On 5 April 2022 the Fourth Respondent told the Claimant that she was not able to be accompanied by Ms Maganzini.

135. The Fourth Respondent knew that the Claimant was disabled, and the unwanted conduct did occur. There was no evidence that the conduct was related to the disabilities. Nor was there any evidence that the reason behind the conduct was related to the disabilities. The unwanted conduct was not related to the Claimants disabilities.

vii. On 7 April 2022 the Second Respondent told the Claimant in a patient consultation room that:

A) He was worried about the figures the Claimant's branch was producing;

B) He was worried about the Portsmouth Centre branch and felt he needed to do something drastic;

C) That on 31 March the Claimant had made a dispensing error telling the Claimant that if it had not been noticed it would have led to an angry patient.

D) That as of 11 April 2022 the Claimant would be working at the London Road branch entering data at the back of the branch.

E) That he was unwilling to discuss reasonable adjustments that might be put in place at London Road at that time.

136. The Second Respondent knew that the Claimant was disabled, and the unwanted conduct did occur. There was no evidence that the conduct was related to the disabilities. Nor was there any evidence that the reason behind the conduct was related to the disabilities. The unwanted conduct was not related to the Claimants disabilities.

viii. On 8 April the Fourth Respondent sent the Claimant confirmation of the change of workplace.

ix. On 4 May the Fourth Respondent refused to change the Second Respondent and the Third Respondent as arbiters of the claimant's grievance despite the Claimant asserting that the grievance was about their conduct.

x. On 5 May the Fourth Respondent telling the Claimant that she had disrupted operations by cancelling her grievance hearing at a late stage.

xi. On 5 May the Fourth Respondent telling the claimant that "performance elements were on hold". The Claimant was unaware that she was under a performance review formal or otherwise.

xii. On 5 May the Claimant being asked if it was her intention to continue working for the First Respondent as her current actions did not give that impression (Fourth Respondent).

xiii. On 11 May confirming that the Second and the Third Respondent were still going to hear the claimant's grievance on the rearranged date 17 May (Fourth Respondent)

xiv. The grievance outcome on 23 May 2022.

xv. Confirmation on 24 May 2022 that the claimant had been taken off the original branch's payroll and moved to London Road.

137. These eight instances all relate to the Fourth Respondent who knew that the Claimant was disabled, in each instance the unwanted conduct did occur. There was no evidence that the conduct was related to the disability. Nor was there any evidence that the reason behind the conduct was related to the disabilities. In relation to the Fourth Respondent, we find that she was passing on information to the Claimant about decisions that had been made by the other Respondents or was communicating about the Claimant's grievances. The instances at x, xi and xii were examples of the Respondents poor procedures in our finding, rather than harassment. In any event, we did not find that any of the eight instances were related to the Claimants disabilities.

138. The question then is whether there is any other evidence that will allow us to conclude that the harassment related to disability on a prima facie basis (i.e. that there are the facts from which we could draw the inference that the harassment occurred). In her evidence, the claimant said it was her perception that the treatment from the respondent here was related to her disability. We do not accept that. The Claimant had the disability and unwanted conduct occurred. We do not consider that the two are linked. In those circumstances, we do not consider that the claimant has established facts that would shift the burden on to

the respondent to show that the conduct complained of was not harassment related to disability. The actions relied upon by the Claimant were not related to the claimant's disability, or to the protected characteristic of disability generally.

139. We do not find that the conduct had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The Tribunal took into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

140. We have made a positive finding that the Claimant's disability was not a factor in her treatment and that the acts complained about were due to non-discriminatory considerations. This necessarily means that the burden of proof in section 136 of the Equality Act – even if it had transferred to the Respondent – has been discharged.

141.Consequently, this aspect of the claimant's overall claim fails and is dismissed.

Direct Disability discrimination (Equality Act 2010 section 13) (In the Alternative to the Harassment Claims)

142. The claimant relies on the issues set out in the harassment section of the Case Management Order plus the Claimant's constructive dismissal as what she says is less favourable treatment, as outlined in the list of issues above. We have found as facts that fourteen out of fifteen of those instances did occur. The respondent, through the individuals involved, did subject the claimant to the treatment complained of. However, to succeed in this claim, the claimant must show that the treatment is less favourable treatment than that which would have been given to those without the claimant's disability. In other words, if the respondent would have treated those who did not have Claimant's disabilities in the same way, then the direct disability claim cannot succeed. The Claimant has not named anyone who she says was treated better than she was and therefore relies upon a hypothetical comparator.

143. In relation to i-iii above, we find that the Respondents would have treated those who did not have the Claimant's disabilities in the same way by requiring them to take on new tasks as part of their role in the business.

144. Regarding v and vi above, we find that the Respondents would have treated those who did not have the Claimant's disabilities in the same way as the

Respondents would not permit work colleagues to attend informal meetings with other staff of the business.

145. The impromptu meeting referred to at vii above is a situation where we find that the Respondents would have treated those who did not have the Claimant's disabilities in the same way. The Second Respondent would have impromptu meetings with any member of staff. Equally the Second Respondent would, we find have raised whatever issues he decided were relevant with his staff. As part of staff development, the Second Respondent would, and did, expect staff to move between branches for training purposes.

146. In relation to vii –xv above we find that Respondents would have treated those who did not have the Claimant's disabilities in the same way. These were examples of the Respondent business communicating with a member of staff about matters such as location, payroll and the grievances the staff member had raised.

147. Having found that there is no less favourable treatment, there is no need to consider whether the treatment was related to the claimant's disabilities. It follows that the claimant has not established any facts from which an inference may be drawn that there was any disability discrimination. Consequently, there is no need for the respondent to justify the treatment on the grounds of something other than discrimination. In any event, we consider that the claimant was treated the same as everyone else without any different treatment for the claimant.

148. Consequently, this aspect of the claimant's overall claim fails and is dismissed.

Discrimination arising from disability (Equality Act 2010 section 15)

149. The first requirement under S.15(1) of the Equality Act 2010 is that the disabled employee must have been treated 'unfavourably'. This term is not defined in the Equality Act 2010 although the Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') states that it means that the disabled person 'must have been put at a disadvantage'

150. Did the Respondent treat the Claimant unfavourably by all matters under (i) –(iv) inclusive, (vii-viii) inclusive, (xii) and (xv).

i. On 14 March 2022 "Prin" told the Claimant she would no longer be working in nomad trays

ii. On 14 March 2022 “Prin” told the Claimant that Ms Maganzini would be undertaking the Claimant’s job going forward as she was “quicker that the Claimant and made less mistakes”

iii. On 14 March 2022 the Claimant took over Ms Maganzini’s tasks, which were more onerous and caused greater mental stress and physical pain on account of the claimant’s disability.

We have already found that the period after the transfer was a time of change for all the former Lloyds staff. Our findings were that Prin did not know of the Claimant’s disabilities. The Claimant was of the view that she had been put at a disadvantage by having her work changed in this way. We concluded that the Claimant had not been treated unfavourably by the points set out above. We found that the Claimant did not undertake all Ms Maganzini’s tasks and not all the tasks caused her greater stress and pain. In any event there was no evidence that the Claimant was prevented from sitting down or from requesting help from colleagues.

iv. On 16 March the Second Respondent and the Third Respondent held a meeting with the Claimant

151.We have previously found that the Second Respondent and the Third Respondent knew that the Claimant was disabled. We also found that the meeting on 16 March did not take place in the terms that the Claimant gave evidence about. Accordingly, we find that there was no unfavourable treatment here.

vii. On 7 April 2022 Second Respondent told the Claimant in a patient consultation room that:

A) He was worried about the figures the Claimant’s branch was producing;

B) He was worried about the Portsmouth Centre branch and felt he needed to do something drastic;

C) That on 31 March the Claimant had made a dispensing error telling the Claimant that if it had not been noticed it would have led to an angry patient.

D) That as of 11 April 2022 the Claimant would be working at the London Road branch entering data at the back of the branch.

E) That he was unwilling to discuss reasonable adjustments that might be put in place at London Road at that time.

152. We find that the Claimant was not treated unfavourably in relation to the points above (A –E). Points A and B were not specific to the Claimant and did not

put her at a disadvantage. She was only one employee at the branch and was not in a position of supervision or management. Point C was a matter of feedback and we concluded, from the available evidence, that dispensing errors were not an infrequent event and such errors were made by many members of staff. In any event we find that a company director and Superintendent Pharmacist such as the Second Respondent would raise errors in dispensing medicines as part of his duties. This was feedback and did not put the Claimant at a disadvantage. We found that the move to the London Road branch was a temporary training move and that there was no disadvantage to the Claimant. Also, we found that the Claimants former Lloyds colleagues would be moving to similar training posts.

> viii. On 8 April Fourth Respondent sent the Claimant confirmation of the change of workplace.
>
> xii. On 5 May the Claimant being asked if it was her intention to continue working for the First Respondent as her current actions did not give that impression (Fourth Respondent).
>
> xv. Confirmation on 24 May 2022 that the claimant had been taken off the original branch's payroll and moved to London Road.

153. We find that the Claimant was not treated unfavourably in relation to the points above (viii, xii and xv). A confirmation of the change of workplace was confirmation of a temporary change we found. Asking an employee what their intentions were regarding returning to work was not less favourable treatment in our judgment. In relation to the payroll change we found that the evidence from the Fourth Respondent was that this change was a matter of the payroll systems needing to be updated to ensure that the Claimant continued to be paid while she was unfit for work.

154. Having found that the Claimant was not treated unfavourably there is no need to continue the analysis under section 15. Consequently, this aspect of the claimant's overall claim fails and is dismissed.

Constructive Unfair Dismissal

155. We understand that the claimant was distressed by the time she took out her first grievance. She would not have raised a grievance if not distressed. It follows that she is more likely than not to be unhappy with a grievance process if it is not resolved to her satisfaction. However, the test for constructive dismissal involves a much higher bar than the claimant being unhappy with such events at work and then choosing to resign because of the grievance/upset. The claimant needs to show us that the Respondent has acted in a manner which is calculated or likely

to destroy or seriously damage the implied term of mutual trust and confidence, without having had proper cause to have done so.

156. For this part of the claim, the claimant relies on allegations which she says individually or collectively amounted to a breach of the implied term of mutual trust and confidence. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of an express term / implied term of the contract (mutual trust and confidence). The conduct / treatment breaches that amount to the breach of mutual trust and confidence is the treatment set out in the discrimination section (whether found to be discriminatory or not) plus a meeting with other TUPE transferees on 16 March which the Claimant describes at the bottom of page one of the attachment to her Claim form. The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law, was confirmation that she had been transferred to another branch for the reasons given (which the Claimant also asserts is a breach of an express term).

157. We have considered the treatment set out in the discrimination section, which we have found not to be discriminatory. Having considered those fifteen allegations and the evidence from both parties, we do not find that any of these matters or any combination taken together was a breach of the implied term of mutual trust and confidence. We have already made findings in relation to these allegations. We conclude that asking the Claimant to take on new tasks, attend a meeting with her employer and correspond with her employer about matters that in some instances she had initiated, do not amount to breaches of the implied term of mutual trust and confidence.

158. In relation to the meeting on 16 March we do not find that this meeting either alone or taken alongside some or all the other allegations is sufficient to constitute a breach. The Respondent, like any employer, must be able to tell staff honestly what they think of the performance of that part of the business. Such communication, even if robust, is necessary for change to take place and for the business that employs the staff to succeed.

159. We have made findings in relation to the contract. The Claimant at one point sought to argue that the new Lalys contract was illegal. But, at the same time also sought to rely on that contract to establish a breach that either alone or taken as the last straw would be a fundamental breach for the purposes of constructive dismissal. We have found that the 30-day notice period was not required in the circumstances here. The transfer of the Claimant for training purposes was not a breach of an express term in our judgment. As we have found that the other allegations are not singly or, when taken together a fundamental breach, that means that the transfer cannot be relied upon as a last straw.

160. In our judgment, none of the above issues breached the implied term of trust and confidence individually. The Respondents did not run a perfect grievance process, and the claimant is unhappy about that and about the outcome of the process. But the Respondents are not required to run a perfect grievance process. They are only required to run a process which is not so poor that the Tribunal considers, on an objective basis, that the implied term of mutual trust and confidence was destroyed or likely to have been seriously damaged. We do not consider that the Respondents acted in such a way.

161. We find that the Respondents did not behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondents.

162. Having made the conclusions in respect of each aspect above, it follows that we do not consider, objectively on these facts, that there was a repudiatory breach of contract which would have allowed the Claimant to terminate the contract either as an individual incident or as a collection of matters taken as a whole. This aspect of the Claimant's overall claim fails and is dismissed.

163. The test for constructive dismissal is rightly a difficult one to succeed with. Repudiatory breaches are by their nature serious and should be starkly apparent to the Tribunal. Nothing that the Respondents did can be said to have been calculated or likely to damage the implied term of mutual trust and confidence in an objective sense, as we look at it as a Panel in the Tribunal. It is not enough for the Claimant to be unhappy or upset with a series of things that happened to her in this employment. Consequently, this aspect of the claimant's overall claim fails and is dismissed.

164. None of the claimant's claims are well founded and so all are dismissed because of our unanimous judgment.

Employment Judge Barton
Date: 29 November 2023

Reserved Reasons sent to the parties: 01 December 2023

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

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