EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms R Edgeler	AND	City College Plymouth

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 4 and 5 March 2024

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms R Clarke
Ms V Blake

Representation

For the Claimant: Ms H Ifeka of Counsel
For the Respondent: Did Not Attend

JUDGMENT

The unanimous judgment of the tribunal is that:
1 The claimant was unfairly dismissed, and the respondent is ordered to pay the claimant compensation for unfair dismissal in the sum of £10,316.15; and
2. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case; and
3. The claimant's claim of victimisation is well-founded, and the respondent is ordered to pay the claimant compensation for injury to feelings in the sum of £14,000.00, together with interest in the sum of £905.65.

RESERVED REASONS

1. In this case the claimant Ms Rachael Edgeler claims that she has been unfairly constructively dismissed, and that she has suffered unlawful victimisation. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable, and that there was no victimisation.

2. The respondent's Conduct, Non-attendance, and Rule 47
3. The claimant made an application for these proceedings to be determined in the absence of the respondent under Rule 47. We agreed with that application and allowed it for the following reasons.
4. The respondent has been in repeated breach of tribunal orders throughout these proceedings. Following the commencement of these proceedings the respondent's response on form ET3 was due in early January 2023. The respondent failed to submit a response in time and eventually did so on 20 February 2023. The respondent was allowed a retrospective extension of time and the response was accepted.
5. There was then a case management preliminary hearing on 26 July 2023 before Employment Judge Lang, and case management orders were made by consent. The respondent was ordered to comply with its obligation relating to disclosure of documents by 27 September 2023 but repeatedly failed to do so. It was only when faced with a strike out warning from the tribunal on 4 January 2024 that the respondent complied on 11 January 2024. The respondent had been ordered to agree a bundle of agreed documents by 18 October 2023, but failed to do so until 12 February 2024. The respondent had agreed with the case management order to exchange written witness statements on 15 November 2023, but repeatedly failed to do so until 20 February 2024.
6. Despite the fact that tribunal orders are mandatory, the respondent has continually shown scant regard for compliance with these and/or its obligations in the course of these proceedings. Indeed, it is noteworthy that on considering the agreed bundle of documents these appear largely to have been supplied by the claimant, and very few relevant documents relating to the agreed issues have been disclosed by the respondent.
7. That was the position leading up to this hearing until about 10 days ago, when the respondent made an application to postpone this five-day hearing. This hearing had been listed by consent for five days from 4 March 2024 at the case management preliminary hearing as long ago as 26 July 2023. The reason for the application was that the respondent's representative Mr McNaughton wished to attend a funeral of a family member of a close friend. The claimant strongly objected to any postponement and the inherent delays involved in relisting the matter, which was effectively ready for hearing. By email dated 27 February 2024 Regional Employment Judge Pirani expressed his condolences, but refused to postpone the hearing because there was ample time for the respondent to obtain alternative representation, and because it was not in the interests of justice to delay the hearing any further, and the available tribunal hearing time would be wasted.
8. The respondent then renewed its application for postponement on the morning of Thursday, 29 February 2024. Again, the claimant strongly opposed the application for postponement, not least because it had been renewed for the reasons already rejected by Regional Employment Judge Pirani. The Regional Employment Judge refused this second postponement application by return, for the same reasons as had previously been given.
9. The respondent then made another (third) application for postponement at 1:37 pm on Friday, 1 March 2024, the last working day before the commencement of this listed hearing. I refused this the respondent's renewed (third) application for postponement with reasons by return email timed at 2:22 pm on 1 March 2024. I directed that the application to postpone the hearing could be renewed in person at the commencement of the hearing but required inter alia that any such application should provide evidence of the efforts which had been made to arrange alternative representation (as had been suggested almost a week previously).
10. At 3:23 pm the respondent then replied to review the application to postpone again, this time with information to suggest that various sets of barristers' chambers had been approached and were unable to arrange representation at such short notice. This appeared to suggest that efforts had only just been made to do so, rather than during the course of that week. The respondent suggested that there should be a case management hearing later that afternoon on 1 March 2024. I arranged for the tribunal office to confirm that it was too late to arrange such a hearing and that the full main

hearing remained listed to commence at 10 am on Monday, 4 March 2024 because the repeated postponement applications had all been refused.

11. The respondent then failed to attend the commencement of this listed hearing on 4 March 2024. There was no representative, and none of the respondent's witnesses were present to commence the hearing. No explanation was provided by the respondent. By email timed at 10:14 on 4 March 2024 (the first day when the hearing should have commenced) the respondent was notified that we had decided to proceed as follows, namely that the hearing would now commence at 1 pm on Tuesday, 5 March 2024 in order to allow the respondent's representative time to attend, or to arrange alternative representation. Despite the respondent's unauthorised absence from the hearing we decided it was in the interests of justice to allow the respondent one further opportunity to attend as notified.
12. No further communication was received from the respondent until an email timed at 12:03 on 5 March 2024 (in other words within an hour of the commencement of the delayed hearing which was due to start at 1 pm on the second day of the listed hearing) to the effect that the respondent's representative would not be able to attend until about 3:50 pm at the earliest because his dog was unwell, and he had had to rent a car. Ms Ifeka, counsel for the claimant, informed us that they had spoken that morning and the respondent's representative had confirmed that he hoped to arrive by about 3 pm at the earliest, but that in any event he had not prepared his cross examination of the claimant and he would not in a position to commence the hearing until the following day.
13. The position as at 1 pm on 5 March 2024 (the notified commencement time of the delayed hearing) the position was as follows. The respondent's representative was not present, and neither were any of the respondent's witnesses. Counsel for the claimant made the point that it appeared clear that the respondent had no intention of commencing the hearing until 6 March 2024, on the third day, to accommodate his deliberate and unauthorised absence on the first two days, despite knowing over a week ago that the postponement application was refused, and without making arrangements for alternative representation, or even for the respondent's witnesses to attend.
14. The claimant then made an application for the tribunal to hear the claim in the absence of the respondent under Rule 47. By that stage the tribunal had thoroughly read all of the witness statements and the agreed bundle of documents which runs to 256 pages.
15. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Rule 47 provides: "If a party fails to attend or to be represented at the hearing, the tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."
16. We considered in detail the interests of justice and the balance of prejudice between the parties. There was clearly a degree of prejudice to the respondent in proceeding with the hearing in its absence, although that was clearly a predicament of the respondent's own making, given the deliberate and unauthorised absence of its representatives and its witnesses. Against this we balanced the potential prejudice to be suffered by the claimant. She had waited approximately 18 months for the hearing of the claim, and given that the hearing was now unlikely to commence until the third day of the agreed five-day hearing, there was a clear risk of the case not finishing and/or going part-heard, which would have incurred further costs and further delay. We did not consider that to be in the interests of justice, which apply not only to the parties in this case, but also to other tribunal users who are waiting for hearing dates, and the tribunal system itself.
17. We were not satisfied that the respondent's representative would arrive later that day, nor whether he would be ready to commence the hearing having indicated to the claimant's counsel that he was not, and with none of the respondent's witnesses having attended on the first two days of the hearing, and so presumably having been told they were not needed because it would not go ahead.
18. In these circumstances we agreed with the claimant's application, and we unanimously agreed to proceed to hear the claim in the absence of the respondent under Rule 47. In

our unanimous judgment the balance of prejudice favoured the claimant, and the interests of justice dictated that we should proceed.

19. Against this background the claimant gave her evidence in accordance with her written witness statement, and she faced questions on her evidence from the Tribunal. We also considered in detail the evidence of the respondent by way of the written witness statements of its four witnesses, namely Ms Clare Mellor, Ms Rachel Rowing-Parker, Mrs Lorraine Hill and Mr Christopher MacNaughton (the respondent's representative) on behalf of the respondent. We have also read the agreed bundle of documents before us.
20. There was a degree of conflict on the evidence, but we have the following important point to make on the credibility of the parties. The agreed bundle of documents contained a number of contemporaneous documents which addressed the issues to be determined by the tribunal. These were documents which were almost exclusively supplied by the claimant and/or her trade union, and which were contemporaneous documents which supported her case. There was a notable absence of any relevant contemporaneous documents in support of the respondent's contentions in their evidence. This was consistent with the respondent's conduct throughout the interlocutory stages of this claim, which included a repeated failure to disclose relevant documents until faced with a strike out warning. The respondent has simply failed to disclose contemporaneous documents in support of the allegations raised in its witness statements. Against this background we found the claimant's evidence to be entirely credible because her allegations were supported by contemporaneous documents which she and/or her trade union had supplied.
21. Bearing this in mind we found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
22. <u>The Facts:</u>
23. The respondent is a further education college in Plymouth. The claimant Ms Rachel Edgeler commenced employment with the respondent on 3 August 2020. She was a course lead and lecturer in health and social care, and early years education. She performed well and earned promotion. During a review in April 2022 by the respondent's Quality Team, the claimant's teaching was highlighted as an example of high-quality learner-centred teaching and used as an example of best practice during feedback to the team.
24. The claimant's contract of employment did not specify her working times, but it provided that she was expected to work flexibly in accordance with her teaching timetable. For the last semester of 2022 the claimant's classes started at 9:15 am on Mondays and Tuesdays, and on or after 11 am for the rest of her week. There was no requirement, as was subsequently alleged by the respondent, for the claimant to be at work by 8:30 am, although the claimant was usually at work about this time.
25. In mid-November 2021 the claimant contracted Covid. She was away from work on certified sickness absence with Covid related symptoms and stress from 11 November 2021 until 30 December 2021 when she attempted to return to work. This proved unsuccessful and she was later diagnosed with Long Covid. In mid-January 2022 the claimant commenced a successful phased return to work with agreed adjustments. The claimant was assessed by the respondent's Occupational Health Department on 28 January 2022 and recommended adjustments were discussed and agreed on 28 February 2022. The Occupational Health reported that the claimant had previously been fully fit and she was struggling with her mental health and the frustration from the Long Covid symptoms. The report suggested that she was likely to struggle with her normal job duties on a daily basis without significant support from her line managers. The report also suggested that the claimant's fatigue, brain fog and memory struggles could well continue for as long as three to six months, and that this would require her managers to manage her workload carefully, and that the claimant might well fall within the disability provisions of the Equality Act 2010.

26. On 14 February 2022 following a lecture which the claimant had given in her sociology class, a student raised a complaint against the claimant in connection with what she perceived to have been an inappropriate and offensive transgender comment. The complaint was raised to Ms Evans the Programme Leader in the relevant department, who referred it to another manager Ms Julie Wheeler. Ms Wheeler and the claimant then discussed the complaint in detail. The claimant was concerned that the student was upset, but otherwise felt that the complaint was unfounded. Ms Wheeler appeared to reach the same conclusion because we accept the claimant's evidence that she confirmed to the claimant at that time that she need not worry, and that that was the end of the matter, and that no further action would be taken.
27. On 3 March 2022 the claimant was notified by the Police that her estranged husband (who was the father of her two young children then aged eight and six) had died. On 7 March 2022 the claimant applied for and was granted 10 days compassionate leave, to be taken shortly thereafter. These events coincided with the appointment of Ms Rachel Rowing-Parker as the claimant's new line manager with effect from 1 March 2022.
28. On 28 March 2022, while the claimant was attending her late husband's funeral and was on compassionate leave, Ms Rowing-Parker contacted the claimant asking her why she was not at work. The claimant found that approach to been intrusive and disrespectful. She returned to work on 31 March 2022, and immediately after her arrival was summoned by Ms Rowing-Parker to attend her office to discuss her absences. She objected to what appeared to be an informal absence review on no notice, and objected to the fact that Ms Rowing-Parker should not be considering her certified Covid absence and/or agreed compassionate leave as being absence which should trigger any review. Ms Rowing-Parker's response was to the effect that this was no excuse, and she stated words to the effect: "Now you are a single parent, maybe you should look for another job". The claimant found these comments distressing.
29. In addition, Ms Rowing-Parker criticised the claimant's timekeeping at that meeting, to the extent that the claimant was not at work by 8:30 am. Ms Rowing-Parker criticised the claimant for having to use the lift and seemed to belittle her ongoing Covid related symptoms. The claimant referred to the Occupational Health report which Ms Rowing-Parker said she would need to consider this with another manager, Ms Roberts, and they would need a meeting in 10 minutes. The claimant attended and was told that the agreed adjustments from the earlier Occupational Health report would continue only until the end of that week and a review would subsequently take place. The respondent did not subsequently put any such review in place.
30. The claimant found these events so distressing that one of her colleagues, Ms Sedgeman, was sufficiently concerned to walk past the office several times to check that she was coping and well. Ms Sedgeman subsequently provided an internal statement to this effect when the claimant later raised a grievance.
31. On 20 May 2022 the claimant used a work WhatsApp group to notify her colleagues that she was running late because of roadworks. Ms Rowing-Parker responded with a number of abrupt and unsupportive comments on a work WhatsApp group involving other work colleagues. Despite the fact that the claimant's contractual hours did not require her to attend work at 8:30 am, and despite the fact that other colleagues in the group were also late and were not chastised, and also regardless of the Occupational Health report recommendations that the claimant should receive increased support from her managers, Ms Rowing-Parker chose to criticise the claimant publicly. She stated: "Maybe leave home earlier as that's the third time this week"; and when roadworks were mentioned, she posted: "That's not an excuse. Find an alternative route. Other people live that way. You would not be able to do that with any other employer."
32. The claimant was a member of the University and College Union (UCU), and she sought advice from her union. On 24 May 2022 she requested an informal meeting to discuss a potential grievance and an informal grievance meeting took place on 14 June 2022. The claimant's UCU representative Mr Banks sent an email on 15 June 2022 confirming the discussions which had taken place during that informal meeting. The complaint was to the effect that the claimant was vulnerable, the actions of Ms Rowing-Parker could be

seen to be bullying and harassment, and that the respondent should not disapply the reasonable adjustments which had been recommended by the Occupational Health Department.

33. Nonetheless, shortly after that meeting, on 14 June 2022 Ms Rowing-Parker called the claimant to her office and notified her that she was required to attend work each day by 8:30 am. We accept the claimant's evidence of what was then said to her, because she confirmed this in a contemporaneous email. Ms Rowing-Parker told the claimant in summary that heavy traffic was not an acceptable excuse, she was required to be at work at 8:30 am every day, the occupational health report and the reasonable adjustments agreed were not in force and in any event had only been suggested for one week, and she said to the claimant wordsto the effect "Maybe she should look for another job with a work-life balance"
34. The claimant waited for a satisfactory response to the informal grievance discussions on 14 June 2022, without success. She therefore lodged a formal grievance in order in order to seek formal resolution of the matters raised, and in particular her complaint against Ms Rowing-Parker. On 4 July 2022 the claimant was certified as being unfit for work for nine days for work related stress. A colleague of the claimant, Ms Burrows, subsequently heard Ms Rowing-Parker state in the Care Office, which is an open office in the presence of other colleagues, that the claimant's sickness absence was "fraud".
35. At about this time in early July 2022, the HR Department had asked Ms Rowing-Parker to sign off the claimant's teacher pay scale promotion, but Ms Rowing-Parker refused to do so. We were not the reason for this decision.
36. On 15 July 2022 the claimant received the outcome to her formal grievance. The investigation was undertaken by an HR consultant Ms Claire Mellor, who has provided a statement for the respondent. The allegation that Ms Rowing-Parker had bullied or harassed the claimant by asking why she was absent during her husband's funeral was not upheld because there was no deliberate attempt to cause distress. The claimant's complaint about the return to work meetings in March 2022 and criticism of the claimant's Long Covid symptoms were not upheld on the basis that the motives and intentions of Ms Rowing-Parker were correct, even though there was a negative effect on the claimant. The claimant's third complaint that the WhatsApp messages put on the group by Ms Rowing-Parker were unacceptable from a manager to a team member was upheld. The report concluded that the comments were "unacceptable for a manager to a team member" and that "derogatory comments about a team member in front of their colleagues does constitute bullying behaviour". The final complaint about the comment made in the Care Office to the effect that the claimant's sickness absence was a fraud was not upheld on the basis that Ms Burrows must have misheard it.
37. The claimant raised a formal appeal against the rejection of her grievance by letter dated 20 July 2022. The basis of the appeal was that Ms Rowing-Parker had effectively lied to the investigation and the respondent had failed (as requested) to interview both Ms Jones and Ms Sedgeman who had witnessed the comments made. In addition, the claimant complained that various comments made by Ms Rowing-Parker were confirmed to have been made but not treated as bullying, harassment or discriminatory when they were a clear breach of the claimant's right to dignity at work. In addition, the comments from Ms Rowing-Parker about the claimant's lateness and attendance showed a complete disregard to the Occupational Health report and its recommendations. In addition, with regard to the part of the grievance which was upheld, namely the offensive comments made by Ms Rowing-Parker on the WhatsApp group, no action had been taken against Ms Rowing-Parker.
38. Two days later on 22 July 2022 the claimant received an email acknowledging her appeal. Shortly thereafter she was handed a hard copy of this in an envelope, as well as a copy of the respondent's disciplinary procedure. She questioned whether she should have been given a copy of the grievance procedure. About 30 minutes later she was handed a second envelope, which she did not open, but which she assumed to be a copy of the grievance procedure. On 25 July 2022 the claimant then received an email informing her that she was required to attend a disciplinary investigation meeting. She

then opened the second envelope to find it contained a letter notifying her that she was now subject to a disciplinary investigation.

39. This was a letter dated 22 July 2022 notifying the claimant that she was to face disciplinary proceedings in connection with three allegations which if proven could constitute gross misconduct. The three allegations were (i) the earlier student complaint about the allegedly trans-phobic comment; (ii) a further complaint about "alleged bullying" which the claimant assumed related to an exchange with another student in January 2022 the claimant had been informed that the student had "extenuating circumstances"; and (iii) the creation of a WhatsApp group in which the claimant was said to have posted allegedly negative and offensive comments about Ms Rowing-Parker.
40. The claimant was then absent from work on certified sick leave from 25 July 2022 for "stress and depression" and "work-related stress". The claimant was then emailed repeatedly regarding the disciplinary investigation whilst she was off sick, but the respondent has failed to disclose these emails. The claimant did not receive any checks on her welfare from the respondent during this time.
41. The claimant then attended a further Occupational Health assessment on 6 September 2022 and this followed a stress risk assessment which she had completed on 9 August 2022. The conclusion of the Occupational Health report was that the claimant was likely to be disabled for the purposes of the Equality Act 2010 by reason of the severity of her symptoms of stress and depression. It recommended that the claimant should be contacted for essential reasons only, and that she was not currently fit to return to work or to attend any work-related meetings.
42. On 14 September 2022 the claimant's access to the respondent's IT system was cut off without warning. The respondent has suggested that the claimant and her UCU representative were informed of this in advance, but it is clear to us from the contemporaneous documents which have since been disclosed that there was no advance warning to the claimant or her union representative.
43. The claimant then resigned her employment by letter dated 26 September 2022. The letter made it clear that the claimant felt that she had no choice but to resign and that there was a constructive dismissal following disability discrimination, harassment, bullying and victimisation. She asserted that there had been a fundamental breach of contract by reference to "continued bullying, victimisation and harassment by my line manager". She complained that her attempts to pursue a complaint by way of both informal and formal grievance had been ignored, and following her appeal, she was subjected to retaliation by way of a disciplinary investigation in connection with alleged incidents which had happened six months previously. She complained of the severe effect these issues had continued to have on her health. She argued that the decision to cancel her access to college email and digital platforms being cut off without warning or explanation was the last straw because she was left isolated from colleagues and unable to access any information with regard to her employment. She felt ostracised and isolated from the college community which had worsened her work-related stress and depression.
44. The respondent accepted the claimant's resignation by letter dated 28 September 2022 in reply. There was no attempt to discuss any "cooling off" period, nor any suggestion that the claimant should reconsider her decision.
45. The claimant then commenced the Early Conciliation process with ACAS on 14 October 2022, and the Early Conciliation Certificate was issued on 3 November 2022. The claimant presented these proceedings on 29 November 2022.
46. Having established the above facts, we now apply the law.
47. <u>The Law:</u>
48. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
49. If the claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair

(having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

50. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
51. This is also a claim alleging victimisation under the provisions of the Equality Act 2010 ("the EqA"). The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
52. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
53. For the constructive dismissal claim we have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; and Upton-Hansen Architects ("UHA") v Gyftaki UKEAT/0278/18/RN.
54. For the victimisation claim we have considered the cases of Warburton v Chief Constable of Northamptonshire Police [2022] ICR 925 EAT, applying Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL; Nagarajan v London Regional Transport [2000] 1 AC 501; Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 .
55. The Issues in This Case:
56. Following a case management preliminary hearing on 26 July 2023, Employment Judge Lang set out an agreed list of issues which was to be determined at the hearing in a case management order dated 26 July 2023 ("the Order"). These issues relating to the claims for constructive unfair dismissal and for victimisation are set out respectively below. The claimant specifically confirmed that she was not pursuing any claim for disability discrimination.
57. The Unfair Constructive Dismissal Claim:
58. The claimant relies on 11 specific allegations which are said to amount individually or collectively to a fundamental breach of the implied term in her a contract of employment relating to mutual trust and confidence. The 11 allegations are set out in subparagraphs 2.1 (a) to (k) in the Order, and our findings of fact in each case are as follows.

59. Allegation 1: This is subdivided into four separate allegations: (i) on 28 March 2022 Ms Rowing-Parker asked the claimant to explain why she was not at work; (ii) on 31 March 2022 Ms Rowing-Parker made comments such as “now you are a single parent maybe you should look for another job”; (iii) on 20 May 2022 Ms Rowing-Parker chastised the claimant on a staff WhatsApp group; and (iv) on 14 June 2022 Ms Rowing-Parker during an announced appraisal, said to the claimant: “maybe you should look for another job with a work life balance”.
60. For the reasons set out in our findings above we find that each of these allegations is upheld, and we accept the claimant’s evidence that Ms Rowing-Parker committed the impugned conduct complained of.
61. Allegation 2: The claimant asserts that the matters raised in Allegation 1 amount of bullying.
62. We agree with that conclusion. The respondent had in place an Occupational Health report and recommendations to the effect that the claimant was vulnerable and was in need of considerate and increased support from managers. Instead of this her line manager Ms Rowing-Parker subjected her to a course of intimidating and bullying behaviour. This included a requirement to attend work at 8:30 am when this had never been a contractual requirement which had applied to the claimant. Many of the comments made were simply offensive. Even the full report into the claimant’s grievance (which otherwise bizarrely seems to have exonerated Ms Rowing-Parker) had upheld a complaint that some of the messages were “unacceptable for a manager to a team member” and that “derogatory comments about a team member in front of their colleagues does constitute bullying behaviour”.
63. Allegation 3: The claimant submitted a grievance on 29 June 2022 saying she had been bullied and subjected to discrimination on the grounds of a disability.
64. This is an accurate statement, but it is not of itself a breach of contract by the respondent.
65. Allegation 4: On 4 July 2022 Ms Rowing-Parker publicly disclosed information concerning the claimant’s fit note and made comments that Long Covid was a fraud.
66. For the reasons set out in our findings of fact above, we accept the claimant’s allegation that Ms Rowing-Parker had publicly suggested that the claimant’s absences through Covid related reasons were a fraud.
67. Allegation 5: On 15 July 2022 the respondent provided the outcome to the grievance (which was rejected).
68. This is an accurate statement, but it is not of itself a breach of contract by the respondent.
69. Allegation 6: On 20 July 2022 the claimant submitted an appeal again referring to disability discrimination.
70. This is an accurate statement, but it is not of itself a breach of contract by the respondent.
71. Allegation 7: On 22 July 2022 the respondent notified the claimant that she was subject to disciplinary investigation.
72. This is an accurate statement, but it is not of itself a breach of contract by the respondent.
73. Allegation 8: Two of the allegations raised against the claimant related to student complaints from six months earlier, which the claimant believed had been closed.
74. We accept the claimant’s evidence for the reasons set out in our findings of fact above that the complaint relating to the alleged transphobic comment by the claimant had already been investigated and concluded, with the conclusion that no further action would follow. The decision to proceed with the disciplinary investigation including this allegation at this stage was clearly inappropriate.
75. Allegation 9: On 25 July 2022 the claimant visited her GP and was diagnosed with depression arising from the impact of the disciplinary investigation.
76. This is an accurate statement, but it is not of itself a breach of contract by the respondent.
77. Allegation 10: The respondent pressed the claimant to attend a disciplinary hearing and on 6 September 2022 received an Occupational Health report.
78. This is an accurate statement, but it is not of itself a breach of contract by the respondent.
79. Allegation 11: On 14 September 2022 the respondent cancelled the claimant’s IT access without prior warning. This last alleged breach is said to have been the “last straw” in a series of breaches.

80. We accept the claimant's evidence that neither she nor her UCU officer were given any indication in advance that this was to take place. We have also accepted the claimant's evidence that the decision to cancel her access to college email and digital platforms being cut off without warning or explanation was the last straw because she was left isolated from colleagues and unable to access any information with regard to her employment. She felt ostracised and isolated from the college community which had worsened her work-related stress and depression.
81. Against this background we apply the principles relating to constructive dismissal as follows.
82. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
83. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
84. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. It need not be the predominant, principal, major or main cause for the resignation.
85. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment 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: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

86. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
87. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
88. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.
89. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
90. As re-emphasised by the EAT in the decision of Upton-Hansen Architects ("UHA") v Gyftaki, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissal.
91. We have no hesitation in concluding that the respondent acted in fundamental breach of the implied term in the contract of employment between the parties to the effect 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.
92. Despite the fact that the respondent had in place an Occupational Health Report and recommendations for adjustments which included extra support for the claimant, the claimant was subjected to a course of intimidating and bullying behaviour by her new line manager Ms Rowing-Parker. This included (but was not limited to) (i) an unnecessary and new requirement to attend at 8:30 am every morning despite the fact that there was no contractual requirement to do so, and despite the fact that the claimant's performance was beyond reproach; (ii) a peremptory and incorrect assertion that the Occupational Health recommendations would apply for the remainder of that week, and would otherwise be discontinued or reviewed; (iii) offensive and bullying comments about the claimant in a public WhatsApp group; (iv) offensive and incorrect comments in front of other members of staff to the effect that the claimant's sickness absence was a fraud (when of course it had been certified by her GP and accepted as valid by the Occupational Health Department).
93. Other examples of breaches of the implied term of trust and confidence are these: (v) the respondent's failure to investigate fully the claimant's grievance; (vi) the conclusion in the

grievance report to the effect that Ms Rowing-Parker was effectively exonerated, despite a finding of intimidating and bullying behaviour; (vii) the response to the claimant's appeal against the rejection of her grievance by way of a disciplinary investigation threatening dismissal for gross misconduct which included allegations from six months previously, and in respect of at least one of the allegations the claimant had been told that no further action would be taken; and (viii) the removal of the claimant's IT access without prior notification.

94. We find that all of these examples were breaches of the implied term that an employer will 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, both individually and collectively. They amounted to a repudiatory breach of the employment contract between the parties. The claimant accepted that repudiatory breach of contract and resigned her employment in response. We unanimously find that the claimant's resignation is construed to have been her dismissal, and that she was constructively dismissed.
95. The respondent has not made out any potentially fair reason for dismissal. In paragraph 21 of its Grounds of Resistance it suggests that: The respondent asserts that there was a potentially fair reason to dismiss, should the allegations against the claimant be proved true, as the evidence obtained appear to support." This appears to suggest that the respondent is relying on the potentially fair reason of conduct, but we do not accept that the respondent has made out any claim to the effect that the claimant was fairly dismissed by reason of her conduct. As confirmed by the EAT in Upton-Hansen Architects ("UHA") v Gyftaki, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissal.
96. Accordingly, we find that the claimant was dismissed, and bearing in mind the size and administrative resources of this employer, we find that the claimant's dismissal was not fair and reasonable in all the circumstances of the case. The claimant claim for unfair dismissal is well-founded and we make a declaration that she was unfairly dismissed. The appropriate remedy is dealt with further below.
97. The Victimisation Claim:
98. Under section 27 EqA, a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The burden of proof will shift if the worker proves that the employer has done a protected act, and that the worker has been subject to a detriment.
99. What constitutes a detriment under the victimisation provisions was recently set out by the ET in Warburton v the Chief Constable of Northamptonshire Police. The key test is encapsulated in the question "is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" That precludes an unjustified sense of grievance from amounting to a detriment. The test is not a wholly objective one given the alternatives that the reasonable worker would or might take the prescribed view. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes.
100. The test of causation is similar to that for direct discrimination. Whether a detriment is because of a protected act should be addressed by asking why A acted as they did, and not by applying a "but for" approach. The protected act must be a real reason for the treatment – see Chief Constable of Greater Manchester v Bailey. Put another way, the correct legal test to the causation or "reason why" question is whether the protected act had a significant influence on the outcome - see Warburton, applying

Chief Constable of West Yorkshire v Khan; Nagarajan v London Regional Transport and Chief Constable of Greater Manchester v Bailey.

101. The claimant relies on one protected act, namely the combination of her grievance dated 29 June 2020 and her grievance appeal dated 20 July 2022. The respondent concedes that this was a protected act for the purposes of section 27 EqA.

102. The claimant relies upon one detriment, namely the respondent instigating the disciplinary investigation against her on 22 July 2022. We find that this was treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his or her detriment, and we therefore find that the claimant suffered a detriment for the purposes of section 27 EqA.

103. The key question to be addressed is therefore whether or not the respondent instigated the disciplinary investigation against the claimant because she had done the protected act of raising and pursuing her grievance, in the sense that the protected act had a significant influence on the outcome.

104. It can be easy to overcomplicate these issues, but one thing is striking in this case, which is the coincidence of the timing. The requirement for the claimant to attend a disciplinary investigation for gross misconduct which might have resulted in her dismissal was within two days and immediately after the claimant had notified her intention to pursue a formal appeal against the grievance decision. Two of the allegations which the respondent relies on for triggering the disciplinary investigation were between five and six months out of date, and the main allegation (that of the alleged transphobic comment) related to a matter which had already been investigated by a senior manager and discussed with the claimant, and as a result of which the claimant was informed that the matter had been closed and that there was nothing for her to worry about. Other than an approved absence for compassionate leave the claimant had been at work between January to July 2022. If there had been any genuine intention to subject the claimant to disciplinary proceedings for these issues this could easily have been done before the claimant's grievance or even after the respondent had provided the initial outcome. No satisfactory explanation has been provided by the respondent as to why this only happened immediately after the claimant's detailed appeal. In addition, such contemporaneous documentary evidence as has been provided by the respondent, suggests that the respondent's investigation which led to the requirement to attend the disciplinary delivery investigation only commenced towards the end of July 2022 and after the claimant's grievance appeal.

105. In our judgment the claimant has made out a prima facie claim of victimisation so as to shift the burden of proof to the respondent. The respondent has failed to provide a non-discriminatory explanation for the timing of its decision to commence the disciplinary process. We find that at the very least the claimant's grievance appeal and her continued pursuit of her complaints (which is the protected act relied upon) had a significant impact on the respondent's decision to subject the claimant As re-emphasised by the EAT in the decision of Upton-Hansen Architects ("UHA") v Gyftaki, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissalto the detriment of the disciplinary investigation. For these reasons we find that the claimant's claim for victimisation is well-founded, and we make a declaration to that effect.

106. Remedy – Unfair Dismissal

107. In this case the claimant does not seek reinstatement or re-engagement, and she seeks compensation for her unfair dismissal. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. The basic award is calculated in accordance with s119. The compensatory award is dealt with in section 123.

108. The claimant was born on 1 December 1973, and she was aged 48 at the date of termination of her employment. The claimant's gross annual salary was £30,000 plus pension benefits. Her gross weekly pay was £576.92. She had completed two years' service. Her basic award consists of 1 ½ week's pay for each of two years' service, which

is three weeks' pay, subject to the statutory cap of £571.00 per week. The basic award is therefore £1,713.00.

109. For the compensatory award we first make an award for loss of statutory rights in the sum of £500.00. The claimant was able to secure alternative employment immediately after the termination of her employment with the respondent which is on a comparable salary to her previous employment. She does not seek any award for loss of earnings, save in respect of the difference in the two pension schemes.

110. When she was employed by the respondent, the respondent made annual pension contributions of 9% of her salary of £30,000.00, which is an annual sum of £2,700.00, or £51.92 per week. For the 75 weeks between the termination of her employment and this tribunal these contributions would have totalled £3,894.00. She was able to join a less valuable pension scheme with her new employer, but only with effect from 1 January 2023, and the contributions made on her behalf by her new employer were at the lower level of £28.85 per week. There were 62 weeks from 1 January 2023 to the date of this tribunal which amount to contributions made of £1,788.70. The claimant therefore claims the difference in her employer's pension contributions from dismissal to the date of this tribunal in the sum of £2,105.30.

111. In addition, the claimant claims ongoing loss. The differential in these two pension contributions from £51.92 per week down to £28.85 per week, is an ongoing weekly loss of £23.07 per week. This is £1,199.64 per annum. The claimant claims five years' future loss at this rate. Given the difficulty nowadays of finding employment with generous final salary pension schemes, we agree that this is a reasonable period.

112. We therefore make a compensatory award in the sum of £8,603.50 (£500 for loss of statutory rights; pension loss to date of £2,105.30; and five years' future pension loss in the sum of £5,998.20). Together with the basic award of £1,713.00 this is total compensation for unfair dismissal in the sum of £10,316.50.

113. We therefore order the respondent to pay the claimant compensation for unfair dismissal in the sum of £10,316.50, which we consider to be just and equitable in all the circumstances of the case.

114. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case.

115. Remedy - Victimisation

116. The remedies available to the tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate recommendation. In addition the tribunal may also award interest on any award pursuant to section 139 of the EqA.

117. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation. Following the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013 the rate of interest payable is 8%.

118. We have considered the cases of Vento v West Yorkshire Police [2003] IRLR 102 CA; Da'Bell v NSPCC [2010] IRLR 19 EAT; Simmons v Castle [2012] EWCA Civ 1039; De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879; and the Sixth Addendum dated 23 April 2023 to the Presidential Guidance on awards for injury to feelings and psychiatric injury dated 5 September 2017.

119. The claimant has given evidence as to injury to her feelings. She had a successful career with the respondent with no criticism of her performance (indeed she

was promoted) until the appointment of her new line manager. As a result of the matters set out above in our findings of fact she became extremely distressed following the treatment which she had received, which exacerbated her physical illness. She was trying to recover from Long Covid. She suffered the loss of her estranged husband and she had to deal with that loss and her two young children. She was then signed off as being unfit for work with stress and depression and she was prescribed antidepressants. She was a single parent in difficult circumstances trying to cope with her work, and then found herself in a position where she felt she had no option other than to resign her employment.

120. The claimant claims the sum of £14,000.00 for injury to feelings, which is an award at the lower end of the middle Vento band. We unanimously agree that that claim is reasonable, and we award the claimant compensation for injury to feelings of that amount.

121. We also award interest the annual rate of 8% on £14,000 which is a daily rate of £3.07. The midpoint between the act of discrimination on 25 July 2022 until the date of calculation of this tribunal is 295 days. This is total interest of £905.65.

122. We therefore order the respondent to pay the claimant compensation for injury to feelings in the sum of £14,000.00, together with interest of £905.65.

123. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 1and 56; the findings of fact made in relation to those issues are at paragraphs 22 to 45; a concise identification of the relevant law is at paragraphs 48 to 54, 82 to 90, and 98 to 100; how that law has been applied to those findings in order to decide the issues is at paragraphs 91 to 96 and 101 to 105; and how the amount of the financial award has been calculated is at paragraphs 107 to 122.

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Employment Judge N J Roper
Dated 6 March 2024