EMPLOYMENT TRIBUNALS

Claimant:	**Ms K O'Sullivan**
Respondent:	**(1) Guys & St Thomas's NHS Foundation Trust** **(2) Capita PLC** **(3) Ms Williams** **(4) Central London Community Health NHS Trust** **(5) Mr Abbs**
Heard at:	**LONDON SOUTH EMPLOYMENT TRIBUNAL (IN PUBLIC)**
On:	**08.03.2024**
Before:	**Employment Judge Dyal**
Representation:	
Claimant:	**in person**
Respondent:	**(1), (3), (5) Mr Ohringher, Counsel** **(2) written representations only** **(4) Mr Dar, Head of Employee Relations**

RESERVED JUDGMENT

1. The application for interim relief is refused.

REASONS

Introduction

1. The purposes of the hearing was to adjudicate upon the Claimant's application for interim relief.

The hearing

2. The hearing was listed for 3 hours by videolink. On 7 March 2024, it was converted to an in-person hearing upon the First Respondent's application with which the Claimant was in agreement. The Second Respondent did not attend but made written submissions. Central London Community Health NHS Trust attended briefly with Mr Dar joining by videolink. At the outset of the hearing it was agreed that the application for interim relief did not relate to the Central London Community Health NHS Trust. Mr Dar understandably chose to leave the hearing.

3. *Documents before the tribunal*:

    3.1. Claimant's bundle, 1003 pages;
    3.2. Table from the Claimant indicating key documents within her bundle (sent during the hearing. I have read these documents);
    3.3. Recording of meeting between Claimant and Fiona Williams (sent during the hearing. The Claimant asked me to listen to several passages of this recording - I have);
    3.4. Written submissions of the Claimant (30 pages, single-spaced);
    3.5. Respondent's bundle 663 pages (the first 415 pages comprise essentially pleadings and orders in the 7 extant employment tribunal claims the Claimant has presented). There were difficulties in the Claimant accessing this bundle in advance of the hearing. Mr Ohringer gave her a hard copy at the outset of hearing. In the event very little reference was made to this bundle at the hearing. Such reference as was made, was to the contractual documentation.
    3.6. Witness statement of Pia Larsen;
    3.7. Skeleton argument of the Respondent (8 pages);
    3.8. Written representations from Capita in an email of 7 March 2024.

4. At the outset of the hearing I declared that I had been in chambers (Cloisters) with Mr Ohringer until June 2021 when I became a salaried judge. I indicated that from my point of view that did not affect my impartiality in any way and that it was commonplace for a barrister to appear in front of judge who was or had been a member of the same chambers. I gave the parties an opportunity to make any representations about me hearing the case. Neither had any objection.

5. Reasonable adjustments:

    5.1. We had a discussion at the outset of the hearing as to whether the Claimant would be assisted by any adjustments to the hearing itself. She referred me to the information given at box 12.1 of the claim form (which I had previously read). The Claimant indicated that she may wish to wear sunglasses when reading in view of the fluorescent lighting. I said that would be fine but also that we could simply turn the lights off. There was adequate daylight so that is what we did. She also indicated that she would need some breaks. The hearing began at about 10.45. We took two breaks, one scheduled for 15 minutes (but which lasted a little longer) at about 11.15 and another scheduled for 20 minutes (but which lasted a little longer) at about 12.15.

5.2. After the first break the Claimant indicated that it had been distracting speaking to another claimant in the claimants' waiting room. Accordingly I arranged for her to have her own private room for the next break.
5.3. The Claimant indicated that she may need assistance coming back to the point if she went off at a tangent and that she sometimes spoke at great length. I helped to refocus her to the issue to hand on a few occasions. I am grateful to her for being receptive to that and indeed refocussing.
5.4. The Claimant's written submissions were exceptionally long. They were 30 pages in length, however they were single-spaced with small-sized text. They were about 25,000 words. I spent several hours reading the document in advance of the hearing. I would not ordinarily accept such lengthy submissions for a short hearing of this kind. However, I decided to read them in full since the Claimant says in them that *"my inability to be concise is a clinical impairment".* (N.b. This should not be taken as an indication that in future all documents she provides will be read no matter how long). I also gave the Claimant 30 minutes to address me orally (a period of time she was happy with) and then gave her a brief reply to Mr Ohringer's submissions which were about 10 minutes long.

Law

Unfair dismissal by reason of Public Interest Disclosures (PIDs)

6. By s.94 Employment Rights Act 1996 (ERA), employees have, subject to certain conditions, a right not to be unfairly dismissed. By s.103A ERA, where the reason, or if more than one, the principal reason, for dismissal is that the employee made a protected disclosure within the meaning of s.43A ERA, the dismissal is automatically unfair.

7. By s.230 ERA, an employee is someone who has entered into or works under (or where the employment has ceased, worked under) a contract of employment. A contract of employment is defined as a contract of service or apprenticeship.

8. Dismissal, for the purposes of a complaint of unfair dismissal, is defined at s.95 ERA:

> *95 Circumstances in which an employee is dismissed.*
>
> *(1)For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—*
> *(a)the contract under which he is employed is terminated by the employer (whether with or without notice),*
> *(b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or*
> *(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

9. In ***Williams v Michelle Brown AM*****,** UKEAT/0044/19/OO at [9], HHJ Auerbach summarised the five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> *'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'*

10. In order for a qualifying disclosure to be a protected disclosure it must be made in accordance with s.43C – 43H.

11. The 'reason' or reasons for dismissal is/are the factor(s) operating on the decision-maker's mind which causes him/her to take the dismissal decision (**Croydon Health Services NHS Trust v Beatt** [2017] ICR 1420). In some circumstances, the net could be cast wider than the person who made the decision to dismiss, such as where the facts known to, or beliefs held by, the decision-maker have been manipulated by another person (***Royal Mail Ltd v Jhuti*** [2019] UKSC 5 and explained further in ***Kong v Gulf International Bank (UK) Limited****,* EA-2020-000357-JOJ).

12. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

> *"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".*

13. It is an implied term of the 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"* (***Malik v BCCI*** [1997] IRLR 462).

14. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

15. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465*.* Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and

confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25] and the authorities cited therein.

16. In a constructive dismissal case, the reason for dismissal is the reason that the employer did whatever it the thing or things that repudiated the contract and entitled the employee to resign. See ***Beriman v Delabole*** [1985] IRLR 305 [12 – 13].

Interim relief

17. Section 128 – 130 ERA 1996 make provision for interim relief. This is a remedy for (certain types of) unfair dismissal. It is worth setting out s.128 in full and part of s.129 ERA:

> ***128 Interim relief pending determination of complaint.***
>
> *(1)An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—*
> *(a)that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—*
> *(i)section…. 103A…*
> *may apply to the tribunal for interim relief.*
> *(2)The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).*
> *(3)The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.*
> *(4)The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.*
> *(5)The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.*
>
> ***129 Procedure on hearing of application and making of order.***
>
> *(1)This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—*
> *(a)that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—*
> *(i)section…. 103A, or*
> *[…]*
>
> *(2)The tribunal shall announce its findings and explain to both parties (if present)—*
> *(a)what powers the tribunal may exercise on the application, and*
> *(b)in what circumstances it will exercise them.*

(3)The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—
(a)to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or
(b)if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

18. Rule 95 provides that the hearing should be conducted as a Preliminary Hearing within Rules 53 to 56. The proper approach is as follows (***Parsons v Airplus*** UKEAT/0023/16/JOJ 4 March 2016 at para [8]):

On hearing an application under section 128 the Employment Judge is required to make a summary assessment on the basis of the material then before her of whether the Claimant has a pretty good chance of succeeding on the relevant claim. The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the "essential gist of her reasoning": this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better not say anything which might pre-judge the final determination on the merits.

19. Interim relief should be ordered only if it appears that it is likely that on determining the complaint the tribunal will find that the reason or principal reason for the dismissal was a proscribed ground: s.129 ERA. There is judicial guidance on the meaning of "likely" in this context:

19.1. a "*pretty good chance of success*": ***Taplin v C Shippam Ltd*** [1978] IRLR 450 [23]; ***Wollenberg v Global Gaming Ventures (Leeds) Ltd*** (UKEAT/0053/18));
19.2. "*something nearer to certainty than mere probability*": ***Ministry of Justice v Sarfraz*** [2011] IRLR 562 at [19];
19.3. a *"good arguable case*" is not enough: ***Parsons v Airplus*** UKEAT/0023/16/JOJ 4 March 2016.

20. The hurdle which the Claimant must clear is set relatively high. There is good reason for this. As the EAT noted in ***Dandpat v University of Bath*** UKEAT/0408/09, 10 November 2009 unreported:

"20. … We do in fact see good reasons of policy for setting the test comparatively high, in the way in which this Tribunal did, in the case of applications for interim relief. If relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of proceedings: that is not [a] consequence that should be imposed lightly".

21. The tribunal cannot be criticised for concluding that matters are not sufficiently clear cut at the interim relief stage for it to have sufficient confidence in the eventual outcome to grant interim relief: ***Parsons*** at [18].

Discussion and conclusions

Who was the employer?

22. There is a written agreement between the Claimant and the First Respondent titled 'contract of employment', dated 24 January 2022. It is for a fixed term of two years and identifies the Claimant as an apprentice. It sets out various terms as would be expected such as her remuneration, rights to holiday and so on.

23. There is also an apprenticeship agreement signed by three parties on 26 January 2022. In essence this identifies the First Respondent as the employer, the Second Respondent as a training provider and the Claimant as the apprentice. It gives an estimated apprenticeship end date of 12 January 2024

24. Based on these agreements, together with the general description of how things worked in practice that I discerned from the Claimant's written and oral representations, as well as the documents I read, I do *not* think it is at all likely that the Second Respondent was the Claimant's employer within the meaning of s.230 ERA. It did have a role to play in her apprenticeship – essentially that of an education provider. Its role was delivering the learning plan for the qualification aspect of the apprenticeship (CIPS Level 4 Diploma in Procurement and Supply). The indications are that the First Respondent was the employer. It was the First Respondent for whom the Claimant worked and it was the First Respondent who was responsible for, e.g., paying the Claimant.

25. A claim of s.103A unfair dismissal is not likely to succeed against the Second Respondent, not least because it is not likely that it was the Claimant's employer.

Public interest disclosures (PIDs)

26. For the purposes of this application the Claimant relies upon 6 putative public interest disclosures (PIDs). These are set out at paragraph 10 of her written submissions (and at p350 of the hearing bundle). The Claimant addresses each of these PIDs in her written submissions. She does not always address each legal test in a precisely correct way but she makes an impressive case. There is no need for me to say anything more than that I think it is likely that the Claimant disclosed information in each of the six PIDs and that one or more of those disclosures was indeed a protected disclosure.

Respondent's case as to dismissal

27. There are competing cases as to how the Claimant's employment came to an end. Ultimately this matters a lot because it has a significant bearing on whether there was a dismissal and if so what the reason(s) for it was/were and whose mental processes it is that need to be analysed to ascertain the reason(s) for it.

28. The Respondent's primary position is that the Claimant was dismissed as follows:

    28.1. The mechanism of the dismissal was the expiry of the Claimant's fixed term contract. It was due to end on the expiry of its 2 year term which had commenced on 24 January 2022 and it in fact did so.
    28.2. The Claimant had been out of the workplace for a very long time because of a combination of ill-health and suspension related to disciplinary matters. The disciplinary process concluded with a final written warning given by letter dated 21 December 2023.
    28.3. The intention was for the Claimant to return to work but the return needed to be carefully managed because of concerns about the Claimant's conduct in the workplace and a likely need for reasonable adjustments.
    28.4. Ms Pia Larsen therefore sought to meet with the Claimant prior to the end of the term of the contract to discuss those matters. She wrote to the Claimant on 10 January 2024 seeking to set up such a meeting.
    28.5. The Claimant declined to meet with her and wanted the matter dealt with in writing. Ms Larsen did not think that was a suitable way of resolving matters and persisted in trying to arrange a meeting.
    28.6. Ms Larsen was due to be on leave between 19 and 26 January so she extended the Claimant's contract to 7 February 2024 to give the Claimant time to decide if she would attend a meeting with her. During her annual leave the Claimant emailed her 61 times. Among other things she indicated that she would not meet with her.
    28.7. Although the Respondent's contemporaneous position was that the contract terminated on 7 February 2024, Mr Ohringher accepted and averred that was not so. He agreed with the Claimant (as do I) that the contract could not have been unliterally extended, i.e., extended without the Claimant's agreement. Accordingly, he says it ended on 24 January 2024 at the end of its term.
    28.8. Mr Ohringer submits that the reason for the dismissal is the reason, from the employer's side, that the contract was not extended. Essentially that was because the Claimant would not meet with Ms Larsen where a meeting was a necessary perquisite to returning to work and would not agree to the contract being extended. It was for those reasons that Ms Larsen was not willing to extend the contract (at least not beyond 7 February 2024).
    28.9. Most importantly, Ms Larsen had no more than passing knowledge of the Claimant's putative PIDs and they formed no part at all in her decision not to extend the Claimant's contract.

29. If the Claimant was dismissed by the limiting event in her fixed term contract (the two year term), then I certainly cannot say it appears likely based on the materials before today that the reason for the dismissal was that the Claimant made one or more protected disclosures. On the contrary, the impression today is the opposite:

    29.1. The fixed term contract was coming to the end of its term;
    29.2. Ms Larsen was actively trying to extend it;
    29.3. The Claimant was unhappy with the way in Ms Larsen went about she did this, and the terms proposed to do this on, and had fixed and largely inflexible views about what needed to happen;

29.4. There was dispute about whether to meet or not and if so on what terms;

32. In my view, there is not a clear cut case or anything anywhere near close to it linking the non-extension of the contract to any PIDs. If the contract ended by the above mechanism I do not think it is likely that the tribunal will find it was because of any PID. It is possible it will, but not likely.

Claimant's case

33. The Claimant considers that in fact she was constructively dismissed and that the reason for dismissal was her PIDs. I follow her arguments in this respect but I cannot say she is likely to succeed.

34. The Claimant relies upon a very long list indeed of alleged breaches of the express terms of her contract and of the implied term of trust and confidence. To illustrate how factually intricate her case is, it is worth setting out in full the allegations of breach as she described them in her written submission:

> A. Breaches in Express Terms of Contract:
>
> 1. The breach of express terms within the Apprenticeship Agreement (Commitment Statement for the
> Employer)-
> ▪ To provide on the job training of specified hours to complete the apprenticeship
> ▪ To provide work experience
> 2. Breach of the ESFA Apprenticeship Funding Rules 2021/22 in the manner of the 'Break in Learning' was implemented. This has been a continuous breach as the BIL spanned a period of time. The breach was notified to the training provider and the employer, and I have never affirmed the breach, and have maintained that I have worked in protest, in the period where I remained employed.
> 3. Breach of the Apprenticeship Regulations 2017, Regulation 5 concerning practical period and sections 3 to 5 of Part 2 of the Act by enforcing a break in learning with no agreement and consultation, and enforcing a suspension that blocked or prevented the requirements to provide practical work experience and on the job training.
> 4. Breach of the Apprenticeship, Skills, Children and Learning Act 2009 sA1(3) subsection (b) – 'provides for the apprentice to receive training in order to assist the apprentice to achieve the approved apprenticeship standard"
> 5. Breached Common Law rights inferred via authorities and the ERA 96 (falling under s230) and having additional rights on termination
> 6. Breach in unilateral attempt to extend the employment contract period, as the break in learning is time bound and the Apprenticeship agreement is time bound, an extension of the employment contract with no confirmation that the apprenticeship status will be conserved, amounts to a fundamental and substantial change in the employment contract and employment relationship, transitioning from a contract with the primary purpose to train and acquire a trade to a generic, less favourable FTC with the primary purpose of working, not

training. The act, especially when attempted as a unilateral act imposed upon, constitutes a repudiatory breach in addition to the breaches defined above.
7. B the express term of date of expiry. The contract has express wording stating that "the contract will expire on 23/01/2024, unless extended". However, the legal basis of that contract term does not allow for the employer to unilaterally decide and impose a different expiry date or to extend the contract term without consensual agreement of the employee. The Respondent therefore breached, or communicated an intention or anticipatory breach of the express term of the FTC employment end date.
8. The enacting of the 2 week extension without written particulars being confirmed or provided breached statutory rights per ERA s1.
9. On two dates, I was denied my statutory right to be accompanied by a TU rep at meetings where this would be a right. On the 23rd March 23, I was instructed to attend an 'icebreaker' meeting with a disciplinary investigator which went on for 3 hours, but was not given the opportunity to seek TU representation. On the 15th December 23, (the impromptu meeting), a formal HR suspension meeting was imposed on me with not only no notice, but no TU representation, of which would be required given my disability status, communication supporting needs and my conditions subjecting me to a substantial disadvantage in not being accompanied.

B. Breaches amounting to the repudiatory breach of the implied term of mutual trust (Malik
Term): Claimant relies on the following as breaches in the implied term of trust and confidence by the employer:
1. At the date of termination/resignation, numerous grievances remain unresolved and not replied to
2. Employer instructed the apprenticeship training provider (Capita Plc) to place the apprentice on a 'break in learning' without consulting the apprentice, informing the apprentice or asking the apprentice – when the Government funding rules stipulated that the break in learning can only be implemented upon consultation and agreement of the apprentice
3. The Employer deliberately lied (and concealed a failure to meet a legal obligation to provide adjustments under s21 of the EQA10) in a meeting on the 6th December 23 that the reasonable adjustments requested (Livescribe) were in fact installed on the work laptop, when it was not installed.
4. Failed to provide any reasonable adjustments at all for the full period of the 2 year employment for the claimant to use. The purpose of adjustments are for them to be used and so if they are not made assessable to the employee – any adjustments being claimed to be 'in place' but kept out of reach of the claimant is not meeting the obligation under s21 which says to make provisions to lessen the disadvantage, which means handing over any kit and tools and allowing the claimant to utilise the adjustments in the workplace.
5. Used the reasonable adjustments request to 'tease' and 'make a joke' of claimant by stating adjustments were 'in place' but locked away out of reach and therefore not able to be utilised
6. Subjected claimant to an unfair and unreasonable 'combined disciplinary & grievance' investigation (see below itemisation list of investigation breaches)
7. Subjected claimant to a 13 months suspension from 16th December 22 until 23rd January 24 for no justified reason

8. Failed to provide CCTV footage covering the 15th December 23 10:20am-10.50am events that were requested by the claimant
9. Grievance letter dated 7th August 23 about the investigation failures ignored, not investigated and not replied to
10. personal email(s) addresses were blocked from contacting any member or group email within the my employers organisation at all.
11. blocked from accessing work email address, any intranet or HR system containing pay-slips and HR policies, staff notice board remotely and removed access to my allocated work laptop
12. Assess and attempts to access/download my personal email accounts into a GSTT Trust work Microsoft 365 account/outlook email client after the allocated work laptop was returned to my employer
13. Blocked my personal email(s) addresses that were used by me to communicate with the employer from being able to email any member or group email within the my employers organisation, apart from 4 nominated email accounts, as per letter on 17th January 24.
14. In blocking my personal email addresses from being able to email GSTT NHS email addresses, my access to clinical teams or email addresses within the GSTT NHS Trust was blocked – potentially impacting my ability to access public healthcare provisions (The Trust is the largest hospital in London)
15. Failed to provide information, employment particulars, terms of the employment contract extension referred to in the letter 17th January 24
16. Failed to ask me whether I consented or agreed to the employment contract extension referred to in the letter 17th January 24 ('the last straw').

4.4B (6) Further lists making up item 6 above on investigation detriments.
List of Investigation breaches
The goal of 'combined grievance and disciplinary' investigation was to provide a distraction or alternative to providing adjustments to a claimant who whistleblew at the start of her employment, therefore punishing the initial whistleblowing and grievance no 1.
a. The investigation was conducted in an unreasonable manner in all respects:
i. subject to excessive delays
ii. basic essential reasonable adjustments (e.g. the correct colour of paper required to read written content) was not provided during the investigation-blocking claimant's ability to contribute or read the investigation questions/materials put to her
iii. the EQA10 and its provisions/obligations for disabled persons was not applied during investigation proceedings and the consequential report could only be derived at if one ignores or contradicts the EQA10.
iv. The investigator breached several data/privacy acts, including the Access to Medical Records Act, changing passwords on formal medical documents with no consent or authority to do so, uploading documents to a digital file depository I did not consent to, and locking me out of my own medical documents by changing passwords, all during investigation proceedings
v. The investigator was evidenced having access to a draft OH report that I refused consent for anyone to access
vi. The investigator conducted her role as if she were a 'substitute' for a manager referred OH assessor, conducting a covert shadow intervention into my medical provision and healthcare with no authority, no training, nor consent

to do so. I had already obtained a OH report upon attending an official OH assessment. This 'intervention', for want of a better phrase, was a dangerous, unethical one, putting my health and safety at risk. This went beyond the asserted role of workplace investigator, appointed to look into reasonable adjustment grievances and therefore required to assess only documents I rely on in requesting reasonable adjustments, and not for any other reason. I was also given written assurance that this investigator was not involved or appointed by the employer to take part in current litigation proceedings that were well underway before her appointment.
vii. The investigator orchestrated defaming and substantially untrue witness statements, relying on obviously discriminatory and false witness statements to draft a formal disciplinary investigation report.

(Note: Employer's 'disciplinary investigation witness statements contain discriminatory or harassing statements that are unlawful and inappropriate considering my conditions and the legal obligations under s15 of the EQA10. More than half of the witnesses knew of the conditions, but those witnesses who did not know about the conditions, the investigator knew of conditions, yet she failed in her duty to check that witness statements were not self-evidently discriminatory. She published witness statements that weaponised disabilities (with no adjustments) and harassed me per s26 of the ERA by 'name calling' and vilifying symptoms. The statements are ableist and discriminatory – yet my 'conduct' is judged when the known mitigations and reasonable adjustments are not made available for me to use, in keeping with the very purpose they are designed, to actually lessen the disadvantage in the workplace (see section 15 and 21 of the EQA10).
viii. The investigation commissioner was informed of investigation failings in grievance letter on the 7th August 23.
ix. The investigation blocked my contribution and ability to defend myself or present evidence proving I did not act aggressively, shout or behave the way as the employer alleges, or witnesses report. The witness statements are false and defamation proceedings are underway with notification of such.
x. In any case, the employer and investigator were unwilling to accept that one act of shouting as an outburst in reaction to improper impromptu meetings that obviously placed me at a substantial disadvantage (given the mix of conditions) knowingly intimidated, bullied and harassed me, and would not justify a suspension of 13 months, a formal disciplinary and a sanction of a formal final warning.
xi. It was never questioned whether Fiona William's conduct in insisting 'impromptu meetings' took place were 'reasonable management instruction(s)' – assessing the 'reasonableness', or indeed compliance with the obligations under the EQA10.
xii. The investigator is evidenced attempting to edify my (draft) autism report that I had not shared with anyone apart from the legal counsel and Tribunal under privilege as part of claim proceedings - (unless the Respondent's legal counsel breached legal privilege in sending it to her). In any case, no one should be editing my autism report apart from the qualified author of that report, being a qualified clinician whom I consented to doing a GP referred autism assessment, not an employer referred autism assessment. The particular edit was not attempted or made by the qualified author of that report.

35. I am simply unable to make any meaningful assessment of the merits of the Claimant's case that the First Respondent/Second Respondent was in repudiatory breach of contract. Having regard to the particulars of breach they are intensely fact sensitive in a case that has a vast number of disputes. I am certainly not able to say it is likely to succeed.

36. To give a few examples:

    a. It is said the First Respondent was in breach of the terms of the apprenticeship agreement to provide the job training of specified hours to complete the apprenticeship and to provide work experience. I can accept the Claimant is likely to prove (indeed that it will be agreed) she did not complete the specified hours. After all she was on sick leave or suspended for most of her employment. However, there is no way of taking a view on the allegation that this was a breach without a full understanding of why it is that the Claimant did not complete the hours of on the job training and get the work experience the contract envisaged. It is impossible to do that on a summary assessment – it is simply incredibly factually intricate and there are wide disputes between the parties. It is highly doubtful that if the Claimant's absence from the workplace resulted from matters that the Respondent was not culpable for, that the Respondent was in breach of the agreement or if it was in breach that the breach was repudiatory. I simply am in no position to say what is likely to be found at trial. It involves so many contested, complex factual matters and variables.
    b. The Claimant says that there were failures of consultation with her about the break in learning. However, she also says that she would probably have agreed to a break in learning had she been consulted. If this amounted to a breach it is impossible for me to say whether it was a repudiatory breach without a full understanding of the full factual context in which this happened. A failure of consultation will certainly not in every instance be a repudiatory breach.
    c. Blocking the Claimant's email addresses: whether this was any kind of breach is hugely fact specific. It depends on a detailed analysis of things like the emails that the Claimant had been sending, to whom, what instructions she had been given, what she did after the instructions, why her emails were blocked, what avenues of communication remained open, to whom and much more.

37. I absolutely cannot say as at today that she is 'likely' to succeed in proving a repudiatory breach.

38. A further issue is whether the Claimant actually resigned prior to the contract reaching its term.

39. On 23 and 24 January 2024, the Claimant sent several pieces of correspondence to the Respondent (p1 – 23 of the Claimant's bundle). Altogether this correspondence is really quite hard to follow and to know what to make of.

40. On the one hand, there are places where the Claimant appears to be resigning. For example, in an email on 23 January 2024 she wrote at 18.18: "*E.G. I resign effectively immediately - today was my last day and I will not be working tomorrow*." That is all the email said. However, it needs to be set in context. It proceeded another email at 18.02 in which the Claimant said (among other hard to follow things)

> *"As such, I believe my contract ends tomorrow and I will be claiming unfair dismissal by virtue of automatic unfairness but on several counts and many angles. I will then also be free to argue I was dismissed by a rather unseemly wearing down of the contract but whilst in absolute brazen breach of every section of the EQA10 and in breach of section 43 a whistle blowing section and victimisation. Obviously you have breached the training agreement and to simply assume you can 'instruct' that this is 'replaced' by a two week extension is so far sufficient, it is unacceptable."*

41. She did not appear to be resigning in this email of 18.02 but stating her contract would come to end at its term.

42. It is also relevant to consider what the Claimant said in a subsequent email on 24 January 2024 at 15.47. She said, among other things:

> *I dont want to be 'A level student does……Law….A level student does accounting etc'. I am incredibly frustrated because without considering the evidence I hold or have willing to see my side, that I simply want a fair job and my EQA10 rights and the actual offer and apprenticeship I agreed (but was breached), someone could be forgiven that I spend my time in my den twiddling my fingers thinking 'how am I going to catch my employer out today?" I dont. I really dont. Please believe me. But I have checked and checked the basics of this and Anna, come forward and confirm, that when I point out to Pia, Kemi and everyone that in fact I am not employed and I have not resigned, and the real legal position is that I have counter offered Pia's offer - and rejected it - but counter offered it, I am right. I am right. I am right. I know I am right. Legally I am not employed as of today, and I have not agreed as such. I have not outright rejected Pia's extension. I have alerted that it was managed in a way that infringed my rights and I asserted my non-agreement and I requested more information. The technical absolute correct application of employment contract law is that my contract has expired, I have been dismissed and an offer that breached my basic rights were put forward, but because of a lack of information - I counter offered that offer. I did resign. I did not reject the offer. Employment contracts operate under contract laws as well as employment law.*

43. In this email she appears to be saying both that she had and that she had not resigned.

44. In short the correspondence is confused and confusing and the impression is of someone writing at a time of deep distress that is not being entirely clear about what they saying.

45. I think the true meaning of the correspondence and whether it amounts to a resignation can only properly be discerned when the full facts are heard and found. This is what is needed to take a view on whether a reasonable bystander in the Respondent's position would have understood the words of resignation that were used to be seriously meant/really intended/said by someone in their "right mind" (see the discussion in *Omar v Epping Forest District Citizens Advice* [2023] EAR 132).

46. Although I do think there is a good arguable case that the Claimant resigned, I would not put it much higher than that. I would put it a little short of 'likely'.

47. Even if the First/Second Respondent was in repudiatory breach and even if the Claimant resigned in response to the breach such that she was constructively dismissed, I am not persuaded that it is likely the reason or principal reason for the dismissal was that she had made PID(s).

48. Ultimately, although I have considered the Claimant's lengthy submissions about there being a causal link between her putative protected disclosures and dismissal, I do not think she has come close to establishing that it is likely that the reason or principal reason for dismissal was that she made one or more protected disclosures.

49. The Claimant says this in her written submissions:

> *The claimant makes a variety of arguments making out causal links, but the strongest argument is a rather simple one, that the breach of the apprenticeship agreement in placing the claimant on a 'break in learning' is a separable breach from a breach by the employer in failing to provide the on-the-job training and work experience (being an express term of the Apprenticeship agreement) but that the second breach is an inevitable consequential second beach arising, directly and causally arising from the initial breach about the break-in-learning, should the employer fail to intervene and ensure the obligations of work experience and practical training are provided. An analogy can be the 'single bullet theory' where one bullet goes on to cause two fatalities by ricochet bullet or a car crashing twice, first into one car and then rebounding into another. The first crash of the car is a casual factor of the second car crash. The causal link is self evident when put like this, as in the one breach is such a natural consequence of the other, the causal (cause and effect) relationship needs little further explanation. The argument states that the employer omitted to act to prevent the second breach, which would have been foreseeable, and the omission to act was evidently because of how the PID concerning the 'break in learning breach' was badly received and perceived as 'trouble making' or a matter to conceal (brush under the carpet).*

50. I understand the general point she is making about the first alleged breach causing the second. The key issue is what the relationship is between breaches and any PID. The Claimant asserts that it was 'evidently because of how the PID' was received and perceived. However, that is little more than an assertion (and one that is repeated in different words later in the written submission.) Again, this is a case in which the labyrinthine, contested, factual tapestry is such that I cannot say that it is likely that any alleged breach was because or principally because of any PID.

51. The same is true of the other points the Claimant makes seeking to link the alleged breaches of contract with her PIDs. The facts in this case are so many, so complex, so intricate, so disputed and so susceptible to interpretation in different ways that it is impossible to form any clear view now on what the reason was for any of the alleged breaches.

52. Thus, *even if* the Claimant was constructively dismissed, I do not accept it is likely that the reason or principal reason for the dismissal was that she made one or more PID.

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Employment Judge Dyal
Date 10 March 2024