



EMPLOYMENT TRIBUNALS

Heard at: London South **On:** 27 to 29 November 2023,
22 and 29 January 2024

Claimant: Mrs L Rooke

Respondent: NHS Blood and Transplant

Before: Employment Judge Ramsden

With members Mrs S Dengate

Mr R Singh

Representation:

Claimant In person

Respondent Miss Crawshay-Williams, Counsel

JUDGMENT

1. The unanimous decision of the Tribunal is that the Claimant's claim of:
 - a) Constructive unfair dismissal is not well-founded and is dismissed;
 - b) Direct disability discrimination is not well-founded and is dismissed;
 - c) Failure to make reasonable adjustments is not well-founded and is dismissed; and
 - d) Detriment on the ground that she had made one or more protected disclosures is well-founded.

REASONS

2. These written reasons are provided at the request of the Claimant following oral reasons given on 29 January 2024.

Background

3. The Claimant worked for the Respondent as a Training and Practice Supervisor from 2 April 2003 until 17 October 2021. At the time of the events with which this claim is concerned, the Claimant worked in the Respondent's Nursing and Care Quality Team, Blood Donation (the **NCQT**). Early conciliation started on 10 November and ended on 21 December 2021. The Claimant presented her Claim Form on 13 January 2022.
4. The Claimant has brought complaints against the Respondent of:
 - a) Constructive unfair dismissal (pursuant to section 95(1)(c) of the Employment Rights Act 1996 (the **1996 Act**));
 - b) Detriment on the ground that she had made one or more protected disclosures (pursuant to section 47B(1) of the 1996 Act);
 - c) Direct disability discrimination (under section 13(1) of the Equality Act 2010 (the **2010 Act**)); and
 - d) Failure to make reasonable adjustments (under sections 20 and 21 of the 2010 Act).
5. The issues to be decided in the substantive hearing to determine the Claimant's claims were set out in the Case Management Orders of Employment Judge Rice-Birchall on **27 June 2023**, and these were refined following a public Preliminary Hearing with Employment Judge Abbott on **15 September 2023**.
6. The Respondent denies the Claimant's claims. The Respondent says that the Claimant's employment terminated by way of resignation in circumstances that do not amount to constructive unfair dismissal, that she did not make any protected disclosures and was not subjected to a detriment for doing so, that it did not know the Claimant was disabled for 2010 Act purposes at the relevant times, and in any event it did not treat her less favourably than it would treat others, and that the adjustment sought by the Claimant to the application of its Leaver's Policy 2019 was not a reasonable one.
7. On 18 September 2023, after a Public Preliminary Hearing on 15 September 2023, Employment Judge Abbott determined that the Claimant did have a disability for the purposes of section 6 of the 2010 Act at the times the claim is about, namely anxiety and low mood.

Claims and Response

8. Specifically, the Claimant avers and the Respondent responds as set out below in relation to each head of complaint.

Constructive unfair dismissal

9. The Claimant says that the Respondent did the following things:

- a) Removed some of the Claimant's duties without consultation in 2021, including:
- (i) The management of the recruitment assessment process and the coordination of cohort induction training for Donor Carers within a defined area;
 - (ii) The development of tailored training plans for their geographical sphere of influence in conjunction with the Regional Lead Nurse;
 - (iii) Participation in Root Cause Analysis events as an expert in education within Blood Donation representing the Nursing Care Quality Team, and sharing lessons learned and promoting best practice;
 - (iv) Contribution to the evaluation of external and accredited training programmes to ensure the needs of the Respondent are met;
 - (v) Responsibility for the recruitment, training, development and maintenance of competency of team-based trainers; and
 - (vi) Supporting the delivery of clinical and non-clinical changes to practice for blood donation teams, so as to ensure their effective embedding within the team,

together, the **Alleged Role Erosions**;

- b) Asked the Claimant to deliver inadequate training to new staff;
- c) Showed apathy, causing the Claimant stress and anxiety, by disregarding and failing to acknowledge the Claimant's email of 18 June 2020 sent to Tracy Green suggesting a new way of working; and
- d) Made the Claimant feel unpopular on the ground that the Claimant made protected disclosures by, on 18 August 2021, Amanda Harber comparing her to Darth Vader,

which was behaviour the Respondent did not have reasonable and proper cause for doing, and that was collectively calculated or likely to destroy or seriously damage the implied term of trust and confidence (also known the "*Malik* term") between her and the Respondent, entitling her to accept that repudiatory breach and, by her resignation, treat that contract as being at an end (the **Constructive Unfair Dismissal Complaint**).

10. The Respondent says:

- a) The duty described in (iv) was temporarily taken away from the Training and Practice Supervisors and given to the Education and Training Hub as a consequence of the Covid-19 pandemic. The Respondent says that the other duties the Claimant cites were not taken away from her;
- b) The training the Claimant was asked to deliver was not inadequate. The Claimant struggled to cope with moving the training forum to a virtual

classroom, and that is the real reason she attacked the quality of the training;

- c) The Claimant's email was not immediately acknowledged, because of the pressures on Ms Green's time (Ms Green was receiving around a hundred emails a day at this time). The Claimant's idea was subsequently implemented, so the Respondent was not at all apathetic in relation to it; and
- d) This incident did happen, but it was in the context of the whole team taking a Myers-Briggs questionnaire with a Star Wars theme, with the output characterising each of them as a Star Wars character. The Claimant was temporarily absent from the room, and upon her return was told that Ms Harber had completed the test on her behalf, which had resulted in her being categorised as "Darth Vadar", which was described as someone who was a very focused individual who brings the team together (the **Darth Vader Incident**). The Respondent says that this was "*plainly not a breach of the implied term of trust and confidence*".

- 11. The Respondent says that none of the Alleged Role Erosions or other breaches amounted to a fundamental breach of the employment contract between it and the Claimant, and the true reason for the Claimant's resignation was the difficulties the Claimant was experiencing caring for her mother. This, the Respondent says, is reflected in the terms of the Claimant's email of resignation, where she said that she was resigning "*Due to personal circumstances*".
- 12. Moreover, the Respondent argues that any breach on its part was affirmed by the Claimant - the last incident was the Darth Vadar Incident, and the Claimant continued to work for the Respondent after it, volunteering to deliver a training workshop, amending the terms of her work-provided car lease, and requesting carer's leave. When she resigned, the Claimant resigned on notice.
- 13. Should the Tribunal find that the Respondent did dismiss the Claimant, the Respondent avers that it was entitled to do so for "some other substantial reason", that being the operational decision to pause the Claimant's post until the outcome of a review undertaken by Ella Poppitt, the Respondent's Chief Nurse – Blood Supply, of the future structure of NCQT.

Direct disability discrimination

- 14. The Claimant says that, because of her disability of anxiety and low mood, the Respondent treated the Claimant less favourably than it would treat a hypothetical comparator by rejecting the Claimant's request to rescind her resignation (the **Direct Disability Complaint**).
- 15. The Respondent says that the decision not to permit the Claimant to rescind her resignation was taken by Helen Escreet (now Beaumont, Associate HR Business

Partner), Andrew Broderick (Deputy Chief Nurse – Blood Supply), Ms Green and Ms Dee, and none of them knew that the Claimant was disabled for 2010 Act purposes at the time.

Failure to make reasonable adjustments

16. In addition, the Claimant says that:

a) In October 2021, being a time when the Respondent knew or could reasonably have been expected to know that the Claimant had the disability of anxiety and low mood, the Respondent:

(i) Had a provision, criterion or practice (**PCP**) of its Leaver's Policy 2019; and

(ii) Applied that PCP to the Claimant,

which put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability in that it took the Claimant longer to reach the decision to ask for her resignation to be retracted than it would for a person who did not suffer from anxiety and low mood;

b) The Respondent failed to take the step of considering the Claimant's request to retract her resignation at a later stage of the Claimant's notice period than the Leaver's Policy 2019 provided for (the **Asserted Reasonable Adjustment**); and

c) It was reasonable for the Respondent to have taken that step.

17. The Respondent says:

a) The Claimant has provided no evidence to support her contention that her anxiety and low mood meant that it took her longer to reach the decision to ask for her resignation to be retracted compared to a person who is not disabled;

b) The Respondent personnel who took the decision not to allow the Claimant to rescind her resignation were not aware that the Claimant was disabled; and

c) It would not have been a reasonable adjustment for the Respondent to have permitted the rescission request, because an operational decision had been made to pause the Claimant's post as a result of the review exercise undertaken by Ms Poppitt.

Protected disclosure detriments

18. The Claimant alleges that she made the following disclosures to the Respondent:

- a) On 24 March 2020 the Claimant wrote on Yammer that she was concerned that session staff were being put at risk by not having personal protective equipment (the **First Disclosure**);
- b) On 12 June 2020 the Claimant wrote an email to Ms Green expressing concerns with regard to the shortcuts in training taking place within the organisation, which the Claimant averred put the safety of blood, donors and patients at risk (the **Second Disclosure**); and
- c) On 20 May 2021 the Claimant informed Ms Harber of an omission in one of the questions on the new Donor Safety Check that was due to “go live” in June (the **Third Disclosure**),

together, the **Disclosures**.

19. The Claimant asserts that each of the Disclosures was a “protected disclosure” for the purposes of section 47B of the 1996 Act, in that she says each:
 - a) Disclosed information;
 - b) Was made by the Claimant in the belief that it was in the public interest, and that belief was reasonable;
 - c) Was made by her in the belief that it tended to show that the health and safety of any individual had been, was being or was likely to be endangered;
 - d) Was a reasonable belief; and
 - e) Was made to the Respondent.
20. The List of Issues which formed part of EJ Rice-Birchall’s 27 June 2023 Case Management Orders indicated that the Claimant was also alleging that one or more of the Disclosures amounted to a “protected disclosure” because it tended to show:
 - (i) That a person had failed, was failing or was likely to fail to comply with a legal obligation; and/or
 - (ii) That the environment has been, is being or is likely to be damaged,but the Claimant clarified in this hearing that she is only asserting that the Disclosures are protected on the basis that each tends to show that the health and safety of any individual has been, was being or was likely to be endangered.
21. The Claimant further avers that, on the ground that the Claimant had made one or more of the Disclosures, the Respondent subjected her to the following detriments:
 - a) The Respondent refused the Claimant’s request to rescind her resignation; and
 - b) The Respondent treated the Claimant with apathy and made her believe she was unpopular by:
 - (i) disregarding and failing to acknowledge the Claimant’s email of 18 June 2020 sent to Ms Green suggesting a new way of working; and

- (ii) making the Claimant feel unpopular as a result of making disclosures by, on 18 August 2021, the Darth Vadar Incident

(the **Protected Disclosure Complaints**).

22. The Respondent says:

- a) The First Disclosure was not a protected disclosure both because:
 - (i) it was not made to her employer as the Claimant claims (and none of the alternative persons referred to in section 43C to 43F applies); and
 - (ii) it did not disclose information (it expressed a personal opinion);
- b) The Second Disclosure was not a protected disclosure because:
 - (i) it did not disclose information (it was an unparticularised concern); and
 - (ii) it did not tend to show that health and safety of any individual had been, was being or was likely to be endangered; and
- c) The Claimant's description of the Third Disclosure is unclear – it is not clear what she says that she disclosed. In any event, the Respondent says that the Claimant did not explain the risk that could arise from the inconsistency she mentioned, and therefore the disclosure did not tend to show that the health and safety of any individual had been, was being or was likely to be endangered.

23. If the Tribunal does find that any of the Disclosures was a “protected disclosure”, the Respondent says, in relation to:

- a) The refusal to allow the Claimant to rescind her resignation:
 - (i) The treatment of the Claimant in response to her resignation shows that there was no desire to punish the Claimant for any of the Disclosures. The Respondent (in the person of the Claimant's line manager, Ms Crisp) encouraged the Claimant to reflect on her resignation when she submitted it, which was in accordance with the Leavers' Policy;
 - (ii) Ms Dee's evidence was that the decision to “pause” the Claimant's role came before the Claimant sought to retract her resignation, it was not a response to it;
 - (iii) Of the people who jointly decided to reject the Claimant's request to rescind her resignation – Ms Beaumont, Mr Broderick, Ms Green and Ms Dee – there is no evidence to suggest that either of Ms Beaumont or Mr Broderick knew of any of the Disclosures, nor that Ms Dee knew about the First Disclosure or the Second Disclosure. There is no evidence to suggest that Ms Green was seeking to punish the Claimant for making the Disclosures, or indeed any evidence that

she even knew about the First Disclosure. The Respondent avers that there is no evidence that Ms Dee was seeking to punish her for making the Third Disclosure;

- (iv) The actions of Ms Dee in relation to the Third Disclosure had been supportive of the Claimant, and interested in understanding and acting on her suggestions, and not indicative of a desire to punish her for making that Third Disclosure;
 - (v) Mr Neill's evidence was that he knew of another band 5 employee who resigned with a four-week notice period, and when that employee requested to rescind their resignation in week 3 of that period it was also rejected for organisational reasons. The refusal in the Claimant's case was not personal to her, and nor was it in response to the Disclosures;
 - (vi) While the Claimant has pointed out that the Respondent was trying to recruit significantly more Donor Carers who would have required training that she could provide, the Respondent says that the results of that exercise were not known at the time of the Claimant's attempt to retract her resignation; and
 - (vii) The Claimant's grievance did not aver that the Disclosures were the reason the retraction of her resignation was refused, which shows that the Claimant did not perceive them as such at the time;
- b) The alleged disregard shown by Ms Green for the Claimant's suggested new way of working:
- (i) The Respondent refutes that Ms Green's failure to respond to the Claimant's email was the "disregard" the Claimant alleges. Even if it was, there is no evidence to suggest that Ms Green knew about the First Disclosure;
 - (ii) There is no evidence to suggest that Ms Green was upset by either the Second Disclosure or the Third Disclosure (or that she knew about the First Disclosure);
 - (iii) The Claimant did not raise this issue in her grievance, suggesting that she did not consider that she had been subjected to detriment because of whistleblowing; and
 - (iv) This complaint is out of time;
- c) Making the Claimant feel unpopular as a result of the Darth Vader Incident:
- (i) The reason the Claimant was compared to Darth Vader was not because of any protected disclosure but because the results of the questionnaire matched her with Darth Vader;
 - (ii) While Ms Harber filled in the questionnaire, the Claimant has said that she considered it to have been a "general consensus" among

the group, and it is inherently unlikely the group would have sought to subject the Claimant to a detriment because of any alleged protected disclosure, not least because the Claimant's evidence was that a lot of the staff were new;

- (iii) There is no evidence that Ms Harber knew about the First Disclosure or the Second Disclosure;
- (iv) Ms Harber knew about the Third Disclosure, but she supported it and raised it on the Claimant's behalf; and
- (v) The Claimant did not raise this in her grievance, which indicates that she did not consider that she had been subjected to this alleged detriment because of any protected disclosure.

The hearing

- 24. The Respondent was represented in the hearing by Miss Crawshay-Williams, Counsel. The Claimant presented her own case.
- 25. The parties had agreed a hearing bundle of 715 pages, and witness statements had been exchanged ahead of the hearing.
- 26. The Claimant gave evidence in support of her claims, and each of Amanda Dee (who was Regional Lead Nurse, and from April 2021 Regional Matron), Amanpreet Dhesi (who was Head of Strategy) and Dean Neill (Assistant Director – Planning, Performance and Stock Management) gave evidence in support of the Respondent's resistance of the Claimant's claim.
- 27. In light of the short timetabling (the case was anticipated to require four days' of Tribunal time, but only three were available), the Tribunal determined that it will hear evidence in relation to liability only, and a separate remedy hearing will be scheduled if required.
- 28. On the first morning of the hearing, the Panel asked the Claimant about the scope of her claim, in light of her written witness statement seeming to expand considerably on the allegations set out in the List of Issues agreed by the parties at the Case Management Hearing conducted by Employment Judge Rice-Birchall on **27 June 2023**, as refined following a public Preliminary Hearing with Employment Judge Abbott of **15 September 2023**. The Claimant confirmed that she wished to make an application to amend her claim. She was given a short break to prepare that application, not having done so already, and after some discussion with her upon her return, the Tribunal understood that she was applying to add the following allegations:
 - a) Further instances of putative protected disclosures, namely:

- (i) A disclosure in January 2019, which was made to the Claimant's then-line manager, Hannah Perry. The Claimant did not say what this disclosure concerned, save that it raised health and safety concerns;
 - (ii) A disclosure in August 2020, which was made to the Claimant's then-line manager, Fiona Ayres, and related to information that several blood donation staff had pricked their own fingers with blood donation needles and then proceeded to put those needles into the blood donor;
 - (iii) A disclosure to Ms Dee on 5 August, apparently of 2021, about the blood donation teams being overwhelmed with new staff and consequently unable to collect sufficient blood; and
 - (iv) A disclosure to Ms Dee on 25 August, again, apparently of 2021, about blood packs being thrown away unnecessarily; and
- b) Further instances of putative apathy on the part of the Respondent, relevant to her constructive unfair dismissal complaint, namely:
- (i) A failure by the Respondent (clarified by the Claimant to refer to Ms Ayres and Ms Green) to change its training package in light of the August 2020 disclosure;
 - (ii) A failure by the Respondent to respond to the Claimant's suggested new way of working on 21 August 2020. This was the same suggestion made by the Claimant on 18 June 2020;
 - (iii) A failure by the Respondent's management (clarified by the Claimant to refer to Ms Dee and Ms Green) to implement a tailored adjustment tool on the Claimant's return to work on 15 March 2021;
 - (iv) A failure by the Respondent's management (clarified by the Claimant to refer to Ms Green and Ms Dee) in May and June 2021 to respond to concerns raised by the Claimant about donor safety checks and to inform the Claimant that the donor safety check process had been amended in the way the Claimant was suggesting;
 - (v) A failure by the Respondent's management (clarified by the Claimant to refer to Nikki Crisp, her former line manager, and Ms Dee) to respond to new bullying issues raised by the Claimant on 25 June 2021;
 - (vi) A failure by the Respondent's management (clarified by the Claimant to refer to Ms Dee) to support the Claimant's return to work by failing to follow its mental health and menopause policies, and to undertake a stress risk assessment, from March 2021 until September 2021;
 - (vii) A failure by the Respondent's management (clarified by the Claimant to refer to Ms Green, Ms Dee and Ms Crisp) to respond to concerns

raised by the Claimant about the erosion of her job role from 2018 onwards; and

- (viii) A failure by the Respondent's management (clarified by the Claimant to refer to Ms Green, Ms Dee and Ms Crisp) to update the Claimant on the Darren Skinner review from March 2021 onwards.

29. When asked to describe why the balance of injustice and hardship (taking account of matters such as the reason for the late application, the relative prejudice to the parties in allowing/refusing the amendments, whether the changes relate to factual matters already in issue between the parties or new facts, the ability of the Respondent's witnesses to respond to these matters or whether other witnesses would be needed), the Claimant said:

- a) It was hard for her to list them without having the output of her Subject Access Request, which she received after the Case Management Hearing with EJ Rice-Birchall, but before the Preliminary Hearing with EJ Abbott;
- b) She has a much better idea of what her claim is about now;
- c) Because of her disability of anxiety and low mood, it is easier for her to express herself in writing than orally, and so it was difficult for her to make these points in the period prior to the previous two hearings on this matter;
- d) The Respondent was aware of all of the concerns raised by the requested amendments, because the Claimant had insisted on documents relevant to those matters being included in the Bundle, which the Respondent had agreed to; and
- e) As for the August 2020 disclosure, Ms Dee has referred to it in her witness statement.

30. The Respondent resisted the Claimant's application, arguing that the balance of injustice and hardship lay strongly against allowing her requested amendments. Specifically, Miss Crawshay-Williams averred that:

- a) The Claimant's application lacked the necessary specificity, for example, with vague descriptions, sometimes suggesting that emails had not been replied to, with the dates not clarified in some instances, and in relation to the newly-alleged protected disclosures failing to specify the detriment that attaches to those;
- b) These are substantial amendments not in the list of issues discussed at the previous two preliminary hearings, relating to matters within the Claimant's own experience (of making a disclosure or of feeling ignored), and so these amendments could and should have been described or applied for at an earlier point than the first day of the final hearing. Even if the matters that are the subject of these amendments only came to light after receipt by the Claimant of the Subject Access Request, she received that material on 10

July 2023, more than two months before the Preliminary Hearing with EJ Abbott;

- c) The amendments relate to the Claimant's constructive unfair dismissal and detriment on the ground of protected disclosure complaints, which are subject to stricter time limits than her discrimination complaints. The Respondent posited that it was reasonably practicable for the Claimant to have made this application earlier;
- d) If the Claimant expresses herself better in writing, she could have made this application at any point by letter or email ahead of the final hearing;
- e) The Respondent had not understood the Claimant's request for certain documents to be included in the Bundle to be a precursor to entirely new allegations being pursued by her;
- f) A number of the Respondent personnel involved in the events that are the subject of the amendments have since left the Respondent's employment, namely Ms Crisp, Ms Ayres and Ms Perry, and Ms Green has only recently returned to work after long-term sickness absence;
- g) The Respondent would incur considerable costs in responding to these new allegations, as it would need to revisit its disclosure exercise, redraft its witness statements, amend the agreed Bundle and prepare a third version of its Grounds of Resistance; and
- h) While Ms Dee has referred to the putative August 2021 disclosure, that does not mean that the Respondent understood that that was being put by the Claimant as an alleged protected disclosure. The Respondent had not understood that to be the case because the Claimant had not, until this point, said so.

31. The hearing was adjourned for the Tribunal to consider the amendments, and on the parties' return took some time to explain why each was rejected:

- a) None of the matters raised by the sought-after amendments appeared to the Panel to depend on the output of the Claimant's Subject Access Request: she is alleging that she made disclosures that are protected, and that she experienced apathy on the part of the Respondent that contributed to her belief that the duty of trust and confidence was breached by the Respondent. These are matters that should have been within the Claimant's own knowledge, and she has had three clear opportunities to raise them (when filing her Claim Form, and at each of the two Preliminary Hearings), as well as nearly two years since the filing of her Claim Form to the date of this hearing to raise these matters in writing;
- b) These allegations are all considerably out of time, in light of the fact that the Claimant's employment ended more than two years ago;

- c) The application the Claimant made lacked the necessary specificity, despite the Tribunal spending some time with the Claimant attempting to understand the points she was looking to make, and encouraging her to set them out in the same way as the allegations already in the list of issues;
- d) The Respondent would, in the Tribunal's view, be significantly prejudiced were these new allegations to be permitted, by:
 - (i) the work involved in amending its hearing preparation;
 - (ii) the passage of time meaning a fading of memories and involving some loss of personnel involved in the events the Claimant now complains about; and
 - (iii) the work involved in understanding what occurred and forming its response, given the Claimant agreed that nearly all of the amendments sought relate to facts not already set out or referred to in the list of issues,

and this would likely necessitate a postponement of this hearing. Any postponed hearing would likely not be accommodated until 2025, and this would prejudice the Respondent still further, with "memory fade" and the possible further attrition of the personnel involved in these matters; and

- e) Two of the amendments did not need to be made, as the Claimant has already complained about the alleged erosion of her job role, and the apathy she refers to on the part of the Respondent in relation to her suggested new way of training on 21 August 2020 was a repeat of a suggestion made on 18 June 2020 which is already pleaded.

The Panel was of the firm view that the balance of injustice and hardship lay firmly in rejecting the Claimant's application.

- 32. The first day of this hearing was spent dealing with the amendment application and reading. Miss Crawshay-Williams estimated that she would need the best part of a day to cross-examine the Claimant, and the Claimant considered she would need two hours to cross-examine all three of the Respondent's witnesses, and so the remaining two days of the hearing were timetabled accordingly, with submissions to follow the Respondent's evidence on the third day.
- 33. In terms of adjustments to the hearing:
 - a) the Claimant, who suffers from the disability of low mood and anxiety, asked to be able to use her handwritten notes when under cross-examination. She said that her anxiety may mean that she does not give the fuller answers that she would wish to, for example, in relation to the detail of how her job worked. Miss Crawshay-Williams raised concerns about this, particularly in light of the lack of medical evidence as to why that should be necessary. The Employment Judge explained that if the Claimant needed a short break, or needed to take more time to provide her answer, that could be

accommodated, and that she could use re-examination to clarify answers given to questions if she felt they were relevantly incomplete or misleading in any way. The Claimant was not permitted to use her handwritten notes when under cross-examination;

- b) the Respondent asked that Ms Dee be permitted to use a concentration aid, being a “pop it” rubber strip shown to the Panel, to help her answer questions in light of her dyslexia, which was permitted; and
- c) the Respondent explained that Ms Dee has post-traumatic stress disorder, which can cause her to freeze and make a noise that might not otherwise be explicable to the Panel if she is triggered. No adjustments, just understanding, were required to accommodate this, and the Panel emphasised that that was fine.

Facts

- 34. The Claimant started working for the Respondent on 2 April 2003, ultimately moving into a role in the Education and Training department, where the Claimant worked in the East Region.
- 35. In 2018, the department the Claimant worked in underwent consultation, and her role was upgraded from band 4 to band 5.
- 36. It is not long after that restructure, in the period 15 March 2021 to the Claimant’s resignation on 17 September 2021, that the Claimant says her job role began to be eroded. The Claimant avers, in particular, that the Alleged Role Erosions occurred. Ms Dee, who has worked for the Respondent since 2000, disagrees. This is the First Disputed Fact considered in the Disputed Fact section below.
- 37. By March 2020, the Claimant’s elderly mother was showing signs of dementia, and the Claimant was finding it difficult to get a diagnosis for her (given the Covid-19 pandemic). Moreover, the Claimant’s mother’s partner was diagnosed with lymphoma, and his health problems meant the Claimant had sole responsibility for caring for her mother.
- 38. On 24 March 2020, the First Disclosure occurred. Specifically, the Claimant replied to a comment written by a colleague on Yammer. The colleague had written:

“Can anyone shed any light on when/if we are going to be provided with additional PPE...masks in particular? Triage is great but donors could be carrying the virus with no symptoms”.

The Claimant replied:

“I am becoming more concerned that blood donation staff are being put at risk I have been sitting in a booth all afternoon with a trainee donor carer and also the donor...no social distancing. cleaning hands and equipment is no defense against the aerosol generated when screening a donor, pricking their finger, inserting a needle. As donors could be infected without knowing, triaging does not keep staff

safe. One donor carer could be screening an infected donor breathing in aerosol, then move to another donor, take a needle out, sit with their colleagues during their break, sit together on the mini bus back to base, the risk of cross infection continues, are we actually saving and improving lives or accelerating the spread of the virus? Are we then infecting other donors who in turn will take that virus home and the spread continues? Suitable new masks have been made available to pharmacists, GP surgeries, care homes, and other front line staff. Our donors may appear fit and well but since asymptomatic carriers can be shedding virus particles for a number of days, that is not a given. Spreading the donation chairs and waiting chairs out does not address the issue of donor carers moving from donor to donor. The screening process is conducted in an intimate manner in order to maintain confidentiality. I don't feel safe doing my job."

39. On 12 June 2020, Ms Green emailed various people, including the Claimant, in anticipation of a meeting the following Monday, setting the agenda for that meeting. Ms Green said: "*Any other items you wish to cover please send to me today.*" The Claimant replied:

"I would like to raise the issue of all the short cuts taking place on sessions where these 2 week trained learners are. Do we not have standards anymore? Should we drop the 'Care' and 'Quality' from our job title?"

40. Ms Green's reply included the following:

"Whilst I am happy to have a conversation about the fast track DC programme it falls entirely outside of our remit as the NCQT Team and we have not been involved in their training or competency sign off. I would be hard pressed to answer anything to be honest".

41. The Claimant replied in turn, which included:

"I would still like to raise my concerns with you on Monday if that's ok? Or is there someone else I should raise them with? I don't agree that we are not involved...".

This second email from the Claimant on 12 June 2020 is the Second Disclosure.

42. On 18 June 2020, the Claimant sent an email to Ms Green, copying various other members of the Respondent's staff, which included the following text:

"I understand that virtual classrooms are going to be the way forward even after the Covid 19 pandemic and I can see the financial benefits off this although I don't accept that it is the ideal learning environment for the following reasons.

The learners are advised to turn their camera off so it is difficult to gauge whether they are absorbing the information you are giving them. In a classroom environment you are able to read a person's body language. We talk about the difference between hearing and listening during pre-donation screening training and how you can tell whether someone is engaged or not... The learners are able to write their questions in the comments box but if someone is being left behind by the rest of the group this wouldn't be evident. At the end of the VP classroom,

learners are given an assessment which they can do in their own environment and time with no invigilation. I don't agree that this is an assessment of their understanding of the training as they can simply google the answers at their leisure. I personally found that the lack of interaction from the learners and the bombardment of information from the facilitator very draining and not easy to follow...one of the leaners was having technical issues so I'm not sure how that is addressed.

That said, I can see some advantages, obviously primarily financial and with this in mind I would like to make a suggestion to improve on this and add other benefits. My suggestion is that we pre-record all the packages... The potential would be that only one facilitator is required to be on hand to interact with the learners rather than two... It would also free up more facilitator time to support learners on session which, with the diluted training is a priority".

43. Around August 2020 the Claimant's line manager changed from Ms Green to Fiona Ayres. She was still experiencing difficulties with getting her mother's dementia diagnosed.
44. The Claimant was unfit and absent from work from 14 September 2020 to 14 March 2021 due, according to her fit notes, to:
 - a) "work related stress and low mood" (the fit note for the period 14 to 28 September 2020);
 - b) "Low mood and stress" (according to GP notes of the fit note issued for the period 25 September to 30 November 2020);
 - c) "LOW MOOD AND STRESS" (the fit note for the period 26 November 2020 to 21 January 2021); and
 - d) "LOW MOOD AND STRESS" (the fit note for the period 21 January 2021 to 14 March 2021).
45. At the end of 2020, Ms Ayres left the Respondent's employment and Ms Green became the Claimant's line manager again.
46. In January 2021, Ms Poppitt sent an email to the NCQT, informing them of a planned engagement exercise by an external Human Resources Consultant, Darren Skinner, about the future structure of the department, as a precursor to the Respondent determining what that structure should be. Effectively, the question being grappled with by the Respondent, which Mr Skinner's engagement exercise would inform, was whether the Respondent had the right people in the right place (with this review exercise referred below to as the **Poppitt Review**). It was anticipated that Mr Skinner would be conducting that exercise over a period of around three months, and that that engagement exercise would be followed by a period of reflection by the Respondent before an announcement was made of its decision regarding the future structure of the department.

47. By mid-January the Claimant's mother's partner was needing her support to take him to and from medical appointments, and the Claimant (as per her witness statement) felt she could not cope "*with what felt like madness at work (with the on-going pandemic and changes to the training process) and the madness at home, (being the sole carer for my mum)*". She emailed Ms Green on 21 January 2021 saying that.
48. An occupational health (**OH**) report of 1 February 2021 (the **First OH Report**) contains the following:
- a) "*Mrs Rooke is currently absent from work due to personal and work related stress issues*";
 - b) "*She attributes her work stress issues to be related to the changes at work, the constant disorganisation, conflict with the training with gaps between practice and teaching, coping with teaching online, mistakes being made, and coping with the issues. She then had personal stress issues which relate to looking after her mother who has recently been diagnosed with dementia and Alzheimer's*";
 - c) "*A mental health assessment tool used today indicates that Mrs Rooke is suffering with moderate anxiety symptoms*";
 - d) "*Mrs Rooke's recovery to return to work will depend on her home situation and I suggest that management have a discussion about her work options available to her*";
 - e) "*My interpretation of the relevant UK legislation is that Mrs Lorna Rooke's condition/impairment is unlikely to be considered a disability because it:*
 - *has not lasted longer than 12 months*
 - *is not having a significant impact on her ability to undertake normal daily activities*".
49. The Claimant returned to work on 15 March 2021. The Respondent says that, on that date, Ms Green and Ms Dee held a return to work meeting with the Claimant, but the Claimant disputes that this meeting took place. The notes the Respondent disclosed of this meeting (dated 15 March 2020, which Ms Dee says was a typo as regards the year) include the following extracts:
- a) "*Talked about phase return but I am happy to get on with it, I think I have to get on with it, issues I have at home are not going away... Tracy – we are happy to take your lead, with a phase. Need to do what is right with you...*";
 - b) "*Is there anything that we can put in place to help and support you coming back. Lorna, no, I think I will just have to ask questions*";
 - c) "*Tracy – Stress risk assessment, you do one and Amanda dose one. Discussion around work based stress. Amanda to send form. Amanda and Lorna to have a meeting to make a plan. There is no pressure to hit the ground running... Lorna if you need anything let me know*";

- d) *“Butterfly – maybe good to get involved in a team that is rolling this out to see what is happening”*; and
- e) From Amanda: *“Agreed I can be contacted at any time, ensured Lorna has my number and will meet again at catch up meeting.”*

50. The Claimant’s line manager then changed from Ms Green to Ms Dee.

51. A further OH report was produced in respect of the Claimant on 23 March 2021 (the **Second OH Report**). That report contained the following extracts:

- a) *“Mrs Rooke is currently at work completing full time adjusted duties, I understand she had a period of absence from 25th September 2020 to 15th March 2021. The absence resulted from symptoms of mood change and anxiety”*;
- b) *“It is reported that initially her absence resulted from increased symptoms reactive to workplace stressors. Then whilst absent she experienced increased domestic pressure in relation to her Mothers health and this impacted her symptoms”*;
- c) *“Today she is experiencing ongoing mild symptoms of anxiety and low mood... Intermittently she can experience ongoing symptoms including interrupted sleep, increased anxiety and apprehension”*;
- d) *“Based on assessment today I am of the opinion that Mrs Rooke is fit for full time hours”*;
- e) *“In relation to her perceived work related issues I have discussed the importance of completing her stress risk assessment and reporting any arising issues or increasing symptoms to you directly”*;
- f) *“Mrs Rooke had an episode of anxiety and low mood reactive to both home and work related events. In my opinion she may be vulnerable to relapses in the future however hopefully this vulnerability may be reduced with access to good counselling and GP support to enable regular and effective service at work”*; and
- g) *“My interpretation of the relevant UK legislation is that Mrs Lorna Rooke’s condition is unlikely to be considered a disability because it:*
 - *has not lasted longer than 12 months nor is likely to last longer than 12 months*
 - *is not having a significant impact on her ability to undertake normal daily activities”*.

52. In April 2021, the Claimant filled in a stress risk assessment form, and discussed it with Ms Dee. The Claimant’s comments on that stress risk assessment form included:

- a) *“I think that my role has been changed stealthily and this has led to feelings of anxiety and lack of trust”*;

- b) *“Not understanding my role and feeling isolated due to covid and shortage of staff”;*
- c) *“Major concerns about diluted training and consequences, Having to field complaints from learners, team trainers and team managers about the inadequate training”;*
- d) *“Feeling bullied into training that wasn’t fit for purpose”;*
- e) *“Not being listened to regarding the inappropriate out of date training programmes. Feeling I was being expected to endorse unsafe practice”;*
- f) *“Feeling de skilled, not trained in current practices. Not confident with new IT and not having time to learn necessary skills ... I don’t feel too confident with I T but can get by”;*
- g) *“Bad internet and telephone reception at home can be frustrating at times”;*
- h) *“Being under so much pressure at times, not wanting to say no when I can’t keep all the balls in the air. This is not the case currently as the recruitment has died down”;*
- i) *“Change being implemented without planning and adequate communication, leading to the feeling of being on the backfoot all the time”;*
- j) *“Afraid to raise concerns as made to feel stupid”;*
- k) *“I began not to report issues through fear of being branded a troublemaker, even though I felt that I was working in the best interest of the organisation. I feel that the organisation doesn’t reflect on things that have gone badly in the past and the lack of experience and continuity in higher management means that ‘lessons are never learnt’”;*
- l) *“Being disempowered and told to take any ideas and solutions ‘offline’, and then finding that my ideas were implemented, without recognition”;*
- m) *“I was off sick for exactly 6 months suffering from wor related stress and anxiety. It makes me feel anxious and stressed if I am not prepared for a training day”;* and
- n) *“Constantly being questioned by line manager, creating feelings of working in a combat zone. No collaboration or trust”.*

- 53. Ms Dee held regular catch up meetings and telephone calls with the Claimant between 24 March and 18 May 2021.
- 54. Nikki Crisp, Regional Lead Nurse, became the Claimant’s line manager from May 2021 onwards, and continued the regular catch-ups with the Claimant. Ms Dee became Ms Crisp’s line manager.
- 55. The Claimant’s oral evidence was that she had had a telephone call with Ms Harber on 18 May 2021, raising a query on a draft of a new Donor Safety Check (**Draft DSC**) form. The Claimant followed-up on that call by way of email correspondence

with Ms Harber on 20 May 2021. The revised DSC was due to “go live” in June. The Claimant queried whether one of the questions in it would prompt disclosure of all relevant information to check the safety of the donor’s blood, as the Draft DSC enquired about whether the donor had had sex in the preceding three months with anyone who had gonorrhoea, hepatitis, syphilis or anyone who is HIV positive, but it did not prompt disclosure of whether the donor *themselves* had symptoms or treatment for those conditions. Specifically, there are two emails the Claimant identifies as amounting to the **Third Disclosure**, those being:

At 16:21 on 20 May 2021:

“Hi Amanda

I’m still confused. The question is have you had sex in the last 3 months with anyone that has had.....not that they have gonorrhoea or that they themselves are still being treated for it, or are showing any symptoms? I can’t see how the other questions will capture it as it’s about the person they have had sex with not the donor themselves???”; and

At 17:35, after a response from Ms Harber to her 16:21 email:

“Hi Mandie

I’m afraid I’m still not convinced, what does everyone else think on the team? [The email correspondence between them also involved 13 other people]

Question 12 on the regular DSC asks in the last 3 months have you had sex with anyone who has gonorrhoea hepatitis, syphilis or anyone who is HIV positive? On the New and Returning DSC Question 21 asks in the last 3 months have you had sex with anyone who has hepatitis, syphilis or anyone who is HIV positive... The two questions are about the person you have had sex with not about whether you have had symptoms/treatment etc. I feel they should both say the same and be consistent.

Open to ideas

Kind Regards

Lorna”.

56. The Claimant says that later that same evening (20 May 2021), she spoke to Ms Harber on the telephone, and that Ms Harber had contacted the team dealing with the Draft DSC about the Claimant’s question and had been told that she was a bad representative of NCQT. The Claimant’s witness statement observes that *“I was saddened by this as it was a genuine concern that she was raising on my behalf”*.
57. On 24 May 2021 the Claimant:
- a) emailed Gwyneth Everett, who had been in the production of the Draft DSC; and
 - b) raised the matter at the Regional Care Meeting.

58. A colleague of the Claimant's working in the NCQT West Region contacted her on 9 June 2021 to inform her that he had seen the new DSC, and it had been amended and now addressed the issue the Claimant had raised on 20 May.
59. On 15 July 2021 the Claimant attended a team meeting in Cambridge, and was heard to comment that:
- a) she wanted to retire; and
 - b) she "*couldn't be arsed anymore*".
60. Ms Crisp telephoned the Claimant on 16 July 2021 to check on the Claimant's well-being in light of those comments. Notes of that call indicate that the Claimant told Ms Crisp:
- "Says she gets frustrated - feels her suggestions are not valued... Has no job satisfaction and wonders if NCQT right job for her. Has thought about moving to different dept... also thought about taking a year off unpaid... Has lease car until November so committed to stay until then – then review"*.
61. On 23 July 2021, Martin Hill, Health, a Safety and Wellbeing Advisor for the Respondent, completed a stress risk assessment with the Claimant. Many of the qualitative comments in that assessment were the same as the April 2021 stress risk assessment. Mr Hill concluded that:
- a) The risk that damage could occur if there are no controls in place was "unlikely", and the realisation of that risk would have a "moderate" impact; and
 - b) With controls in place (those already having been actioned, including the fact that the Claimant was taking medication to support the menopause, that new line management was "*instilling new methods of support and inclusion*"), the final risk likelihood grading was "*rare*", and the realisation of that risk would have a "*moderate*" impact.
62. The Claimant says that, also on 23 July 2021, she told Ms Crisp that she was going to raise her concerns about the inadequate training and consequences with the Freedom to Speak up Guardian and that she was going to look at the Respondent's Whistleblowing policy. The policy directed the Claimant to raise those concerns with her line manager first of all, which she did.
63. On 30 July 2021 the Claimant had a catch up meeting with Ms Crisp. Ms Crisp's notes of that meeting include:
- "enjoying training – still wonders if in the right job... Wants to contact pension dept to find out her options"*.
64. The Claimant emailed Ms Dee and others on 5 August 2021 raising concerns about the quality of training provided to new recruits.
65. On 18 August 2021, at a team building exercise at a team meeting, members of the team completed a personality-type questionnaire with a Star Wars theme. The

Claimant did not participate in this, as she had temporarily left the meeting in response to a personal telephone call. When she returned to the meeting Ms Harber had apparently completed this questionnaire on her behalf, with the outcome that the Claimant's personality was found to be Darth Vader.

66. On 27 August 2021 the Claimant had a catch-up with Ms Crisp, and told her that she felt like her head was exploding over matters relating to her mother:
 - a) Her brother had reported to her to social services for mismanagement of medicines with her mother;
 - b) There were concerns that the Claimant's brother may have been taking their mother to her bank and accessing her savings, and the Claimant had been looking in to how to evict him from their mother's house; and
 - c) The Claimant felt like her mother was being turned against her.
67. During the week of 30 August 2021, the Claimant's mother was taken to hospital by ambulance.
68. In the second week of September 2021 the Claimant began seven days' annual leave to look after her mother following her discharge from hospital. The Claimant returned to work on 14 September 2021.
69. On 16 September 2021, the Claimant volunteered to help Ms Crisp with some training.
70. On 17 September 2021:
 - a) At 9:41 am the Claimant emailed supervisors on the Tunbridge Wells team asking to shadow someone in a new process that was being rolled out on the blood collection teams;
 - b) The Claimant resigned from her employment by email to Ms Dee and Ms Crisp at 12:27. The Claimant's resignation letter said: *"Due to personal circumstances I feel that I am unable to continue in my role as Training and Practice Supervisor and I know that there are plenty of people that would like to given the opportunity waiting in the wings"*;
 - c) Ms Crisp emailed the Claimant back, saying *"I am really sorry to hear this but completely understand your reasons for this decision. Your well-being and your family come first"*; and
 - d) Ms Crisp spoke to the Claimant by telephone. Ms Crisp asked the Claimant if she wanted more time to think about her decision to resign. Ms Crisp's notes record:

"[The Claimant] Says she has made her mind up – has been thinking about it for some time. Wants to do the right thing for her mum & also says she has good pension & her mum could pay her to be carer. I asked Lorna if she wanted to wait at least for the weekend before I processed her termination but she said she was sure... Lorna will explore pension & lease car options".

71. Ms Dee made enquiries about commencing a recruitment process to replace the Claimant.
72. Ms Poppitt took the decision to pause recruitment into the Claimant's role from the time of the Claimant's resignation.
73. The Claimant and Ms Crisp were in very regular contact in the days following the Claimant's resignation, often with multiple telephone conversations per day.
74. On 22 September 2021 Ella Poppitt, Chief Nurse – Blood Donation, sent an email to various teams, providing an update on matters which had occurred since an engagement exercise carried out by Darren Skinner. Essentially, that update indicated that the process of considering the restructuring of the team (i.e., the Poppitt Review) had been slowed but was still ongoing, and Ms Poppitt would provide an update at a later date.
75. On 30 September 2021 the Claimant spoke to Ms Harber in private and became tearful. She told Ms Harber that she hadn't wanted to resign.
76. The Claimant spoke with Ms Crisp about her resignation on 4 October 2021.
77. Ms Crisp's notes record that, on 6 October 2021, she spoke to the Claimant who was "*still not happy about her settlement fee with lease car. Said if she had waited until November she wouldn't have to pay so much*".
78. On 7 October 2021 the Claimant spoke with Mark Rowland, Area Manager, a previous line manager of the Claimant's. Mr Rowland told the Claimant that she could speak to her manager and seek to rescind her resignation.
79. On 8 October 2021 the Claimant sent an email and a WhatsApp message to Ms Dee on 8 October 2021 seeking to rescind her resignation.

"Hi Amanda

Would it be possible to withdraw my resignation and look at other options such as reducing my hours or flexible working? I have been too sad at the prospect of giving it all up, and too panicky about the prospect of not having an income! This week I have realised that I do still have something to offer NHSBT and having spent the week saying goodbye to old colleagues and learners that I have trained, I'm not ready to walk away, plus I don't want to let our team down when we are about to face new challenges."

80. Following receipt of this email, Ms Dee contacted Ms Green and Mr Broderick to find out what the options were. They gathered on a Teams call, with Ms Beaumont. Ms Dee's unchallenged evidence was that, at that meeting, she was informed of the decision to "pause" recruitment for the Claimant's role because of the Poppitt Review, though that decision had apparently been taken at an earlier point in time, and applied to the Claimant's post from the time of the Claimant's resignation. The conclusion of that meeting was to reject the Claimant's request to rescind her resignation. Ms Dee informed the Claimant of this by telephone on 8 October 2021.

The Claimant and Ms Dee agree that Ms Dee explained that this was because the Claimant was three weeks into a four-week notice period.

81. The Claimant says she spoke to Ms Beaumont on 11 October 2021, who told her that:
- a) The Respondent was not under any obligation to allow her to rescind her notice; and
 - b) Because the Claimant was more than 50% of the way through her notice period, it was unreasonable to expect them to.

The Claimant asked Ms Beaumont to send her a copy of where this was stated, and Ms Beaumont then sent her the Leavers' Policy and the FAQs document.

82. On 12 October 2021 the Claimant raised a grievance against the decision to reject her request. This included the following:

"At the time I resigned I was suffering from mental anguish due to a personal trauma that I was unable to discuss with my manager as she has only be in post for 6 months and is under a lot of pressure herself... I have been totally let down by NHSBT, having been diagnosed by my GP with anxiety and work related stress I would have expected my line management to show a level of understanding, empathy and concern at my sudden resignation, rather than ignore me and leave me to feel that my knowledge, skills and 18 years length of service have no value to NHSBT."

83. That grievance was heard by Ms Green and Ms Beaumont on 15 October 2021, who determined not to uphold the Claimant's grievance, i.e., not to allow her to rescind her resignation. The Claimant was told this orally on the day, and she requested that it be set out in writing. Ms Green wrote to her on 18 October 2021, saying:

"NCQT, following the policy, has decided to take this opportunity to pause this post in order to consider further options, with the potential expansion of PFM [Plasma for Medication project] and unknown impact on NCQT and alongside other changes in BD it is prudent to future proof the team for the changing environment.

As we discussed on our call NHSBT is under no obligation to accept the rescinding of a staff members notice. Taking into account the above NHSBT is not in a position to accept your retraction of notice."

84. The Claimant's employment ended on 17 October 2021, and she raised a further grievance on that date. That grievance ran to five pages, but the key points from it include:
- a) Referring to her resignation, the Claimant said *"A build up of events both at work and home had occurred during that time, not all of which I could share with my line manager"*;
 - b) *"I had hoped that my Area RLN [Ms Dee] would phone and ask if I was okay, and try to convince me that I WAS able to do my job, bearing in mind that*

she was aware of my pressures and anxieties and that I had been off work between September 2020 and March 2021 with work related stress. I heard nothing from her regarding my resignation until the day I tried to retract it”;

- c) *“The management of my mother’s care for Alzheimer’s, vascular dementia and diabetes had started to settle into a more stable routine by the second week following my resignation. However, in the month leading up to it a series of events led to me being completely psychologically overloaded. [The Claimant then described the issues involving her brother and mother, which resulted in a safeguarding incident being raised by social services and the police being called on two occasions, and in the meantime her mother was admitted to hospital twice]”;*
- d) *“Unrealistic expectations of new training methods that I had never had training in”;*
- e) *“In week three of my notice period, by which time the situation with my mother had settled into a routine, I went to Ashford to say goodbye to my colleagues”, and thereafter she tried to retract her resignation;*
- f) *“I have realised that I am an asset to the organisation.. I challenge bad practice and errors which makes me unpopular with some, but I am acting in the best interest of NHSVT to strive to be the best organisation that it can be”;* and
- g) *“My job role has not changed between me resigning and trying to retract my resignation”.*

85. On 6 November 2021, Ms Green and Ms Beaumont prepared a response to the Claimant’s grievance. In relation to the Claimant challenging bad practice and errors, they wrote:

“At the informal meeting on 15 October [the Claimant] gave the example of the DSC error and [Ms Green] explained that multiple people within NHSBT had also raised this issue and they were listened to and the amendment made... [The Claimant] was informed that it is not practical for authors to respond personally to multiple requests to changes in documents.”

86. Early conciliation began on 10 November 2021.

87. On 16 December 2021, Amanpreet Dhesi, Head of Strategy, heard the Claimant’s formal grievance. Beth Cutting, People and Culture Partner, was also present, and the Claimant was accompanied by a work colleague, Sally Davies. The notes of the meeting taken by one of the panel members refer to:

- a) Ms Cutting as having asked the question about the reason she left, to which the notes record the Claimant as having replied: *“was not work is personal in relation to mother, why left could not mention that”;*

- b) Management as having explained about the decision to pause the post: “So post has been paused the post – as per the policy to step back and look at interdependences around NCQTY team
- *Still in the pause point – TG had to reiterate this and the ask outside blood and PFM and look at budget builds etc*
 - *If [the Claimant] had not resigned - would be in pause point*
 - *Yes, opportunity that [the Claimant] resigned and to look back and see what happens.”*

88. On 20 December 2021, Mr Dhesi wrote to the Claimant to confirm that her grievance was not upheld. The Grievance Panel concluded that the Leavers’ Policy was followed appropriately.
89. Early conciliation ended on 21 December 2021.
90. The Claimant appealed the outcome of her formal grievance on 5 January 2022, raising allegations not included in her initial grievance of whistleblowing, bullying and harassment.
91. The Claimant filed her Claim Form on 13 January 2022.
92. The Claimant’s appeal was heard on 7 February 2022 by a panel chaired by Dean Neill, Assistant Director – Planning, Performance and Stock Management. Also on the panel were Victoria Gauden, National Quality Manager – OTDT, and Daryl Hall, People and Culture Partner (Quality and Finance). It was held via Teams due to COVID-19 restrictions. The Claimant was accompanied by Ms Davies. Mr Dhesi and Ms Cutting attended on behalf of the Respondent’s management team. The outcome of her appeal was communicated orally to the Claimant at the end of the meeting – it was not upheld. Specifically, the Panel concluded that the Leavers’ Policy had been applied correctly and reasonably.
93. Mr Neill wrote to the Claimant on 15 February 2022 communicating that outcome.
94. On 2 March 2022 the Respondent advertised for a Training and Practice Supervisor in the East Region. Ms Dee’s unchallenged evidence was that this vacancy arose because another Training and Practice Supervisor left the Respondent’s employment on 7 January 2022, and that there was an increase in work at the Respondent’s Shepherds Bush and Stratford Donor Centres. Ms Dee’s evidence was that the need for this work would not have been known at the time of the Claimant’s Grievance Appeal hearing on 7 February 2022.
95. A preliminary hearing for case management took place on 23 June 2023 with Employment Judge Rice-Birchall, and EJ Rice-Birchall made Case Management Orders on 27 June 2023.
96. A further (this time, public) preliminary hearing took place with Employment Judge Abbott on 15 September 2023. On 18 September 2023 EJ Abbott determined that the Claimant was disabled at the time of the events her disability discrimination

claim is about by reason of “anxiety and low mood”, and he made some further Case Management Orders on 19 September 2023.

Disputed Facts

The First Disputed Fact: Were some of the Claimant’s duties removed without consultation in 2021?

97. Taking each alleged erosion in turn:

- a) *“The management of the recruitment assessment process and the coordination of cohort induction training for Donor Carers within a defined area”*. An email from the Claimant to Ms Dee (among others) on 5 August 2021 included the following:

“We also need to consider how many new learners are recruited to a team at once so that they are able to be fully supported and monitored. If teams are overwhelmed with new staff that can’t be supported then the consequences are at best that the learners leave and the cycle begins again, and at worst mistakes are made and it is a danger to the organisation. When we had control of the cohorts we were able to manage this to a point and stagger some of the staff so that they had more of a chance of support”.

Ms Dee’s witness statement denies that the management of the recruitment process was removed from the Claimant’s role, and she refers to:

- (i) Correspondence between the Claimant and Karl Grover (Senior Charge Nurse – Blood Donation) which indicates that Training and Practice Supervisors were still involved in recruitment – but that correspondence was on 29 July 2020, and so pre-dates the period when the Claimant said some of her duties were removed; and
- (ii) An email from Paul Cumbers (Training and Practice Supervisor), enquiring whether the Claimant would be the deputy in the clinical skills lab management, which Ms Dee says would have given the Claimant more ownership over the training environment and induction. This correspondence took place on 7 June 2021, and so pre-dated the 5 August 2021 email above.

However, Ms Dee also refers to a national project organised by Mr Broderick, who was partially responsible for the Respondent’s response to the Covid-19 pandemic. Ms Dee says that this involved recruiting 250 temporary donor carers, where recruitment and induction was undertaken at a national level rather than regionally (as was the norm). This is supported by evidence in the Bundle, where Ms Green refers in an email dated 12 June 2020 to the fact that the NCQT Team *“have not been involved in [the] training or competency sign off”* of the fast track DC programme. This email is outside of the window that the Claimant referred to, but in light of Ms Dee’s

witness statement, it appears that that fast track programme was continuing in 2021.

This leads the Tribunal to conclude that management of the recruitment process was taken away from people performing the Claimant's role, but as a temporary Covid-19 response. No evidence has been offered by the Respondent that any consultation was undertaken in respect of that.

- b) *"The development of tailored training plans for their geographical sphere of influence in conjunction with the Regional Lead Nurse"*. The Panel found the Claimant's evidence on this difficult to follow. The Respondent pointed to an email chain between the Claimant and Grace De Lira, wherein Ms De Lira asks for some help with training a member of staff who had been making some specific errors (arterial punctures). The Claimant said that she was happy to help, and asked about the individual's schedule so that she could put a plan together for her. This appeared to the Panel to be a training plan tailored for the individual. We find, on the balance of probabilities, that the Claimant has not proven that this duty was removed from her role.
- c) *"Participation in Root Cause Analysis events as an expert in education within Blood Donation representing the Nursing Care Quality Team, and sharing lessons learned and promoting best practice"*. Again, the Claimant's evidence on this was scant – she did not tell the Panel what the previous practice was, or how it had been changed, she simply said that *"the nurses were doing it"*, and that *"a lot of our team meetings were taken up with talking about job erosion"*. By contrast, the Respondent has pointed to an email from the Claimant's then line manager, Ms Crisp, on 6 July 2021, where she refers to assigning each team member a geographical region or regions, and that team member being *"invited to attend any relevant RCA [root cause analysis meeting]"*. The Claimant was assigned to the Tunbridge Wells, Ashford and Horsham regions. Ms Dee acknowledged in her witness statement that there were logistical challenges with being able to fit everybody in a room, which have been resolved post-Covid. It seems – from the very limited evidence provided to us on this point - as if there were difficulties with coordinating the meetings, but the duty was not removed from the Claimant in the period she talks about, as shown by Ms Crisp's email. Moreover, the logistical challenges were being rectified, as shown by the team minutes from 15 July 2021, which record that: *"RCA: moving forward after any RCA there will be a debrief with Amanda as to what should be our next move"*.
- d) *"Contribution to the evaluation of external and accredited training programmes to ensure they meet the needs of the Respondent"*. The Respondent agreed that this responsibility had been removed from the Claimant, but said that it was not personal to her and was team-wide, and that it was only temporary. Ms Dee's evidence was that a decision had been taken to temporarily reassign this responsibility to the Education and

Training Hub because of the Covid-19 pandemic, so as to encourage the Respondent to recruit and train donor carers quicker for the convalescent blood plasma programme.

- e) *“Responsibility for the recruitment, training, development and maintenance of competency of team-based trainers”*. Again, the Claimant’s evidence on this point was confusing, as she also complains about being tasked with delivering “inadequate” training. We find that she retained this job duty, but the way in which the training was delivered was changed (for her whole team).
- f) *“Supporting the delivery of clinical and non-clinical changes to practice on blood donation teams ensuring such changes are effectively embedded within the team”*. The Claimant failed to offer any evidence to support her assertion that this duty was removed from her role in 2021. By contrast, Ms Dee pointed to the fact that when the Claimant returned to work in March 2021 she was asked to assist with the roll-out of training for a “butterfly” device for blood collection. The Panel finds she retained this duty.

98. The burden of proof to evidence these assertions falls on the Claimant to show us that, on the balance of probabilities, these aspects of her role were removed in 2021 (as she alleges). We find that she has discharged that burden in three cases, being (a) management of the recruitment and induction processes for Donor Carers within her region, (c) participation in Root Cause Analysis, and (d) the evaluation of external training programmes – but each of these changes was temporary, in response to the Covid-19 pandemic and the additional needs it created and challenges it posed for the Respondent. They were not removed from the Claimant’s role on a permanent basis.

The Second Disputed Fact: Was the Claimant asked to deliver inadequate training to new staff?

- 99. Again, the burden of proving this sits with the party alleging it, i.e., the Claimant, and she simply has not put forward evidence to support this contention.
- 100. The Claimant talked in oral evidence about the fact that an induction programme that had previously taken six weeks had been reduced over time, but the word “inadequate” is key to this allegation, and she simply did not show us qualitatively what changed, or why the training programme that she was asked to deliver was inadequate.
- 101. Consequently we find, on the balance of probabilities, that the Claimant was not asked to deliver inadequate training to new staff.

The Third Disputed Fact: Did the Respondent disregard and fail to acknowledge the Claimant's email of 18 June 2020, sent to Tracy Green suggesting a new way of working?

102. The 18 June 2020 email was where the Claimant suggested pre-recording certain training videos. The email is quoted in the Facts section above, but the conclusion of the email is simply a further statement of the merit of the suggestion (*"It would also free up more facilitator time to support learners on session which, with the diluted training is a priority"*). There was no question posed in that email.
103. On the first part of this disputed fact, whether Ms Green disregarded the Claimant's email, the Claimant herself points out that her suggestion was in fact implemented, as the Respondent did move to pre-record aspects of the training – so the Claimant's suggestion was not disregarded at all.
104. As for the second part of this disputed fact, that Ms Green failed to acknowledge the Claimant's email: while Ms Green is not a witness in these proceedings, Ms Dee has said that she understands that, at this time, Ms Green was receiving around 100 emails per day. The Respondent therefore suggests that Ms Green may not have seen it immediately, and/or that because the terms of the email did not seek a response, Ms Green did not think one was required. The Tribunal agrees, and so would not characterise Ms Green's failure to email the Claimant as Ms Green 'failing to acknowledge' the Claimant's email.
105. We find that the Claimant has failed to prove this fact.

The Fourth Disputed Fact: Why did the Claimant resign?

106. The Claimant says that she resigned because of:
 - a) The erosion to the duties of her job;
 - b) The fact that she was asked to deliver inadequate training to new staff;
 - c) The apathy and disregard shown by the Respondent and its failure to acknowledge the Claimant's email of 18 June 2020 sent to Ms Green suggesting a new way of working; and
 - d) The fact that she was made to feel unpopular by Ms Harber when, on 18 August 2021, Ms Harber told the Claimant that the results of her Star Wars personality test (where Ms Harber had filled in the form on behalf of the Claimant) was that she came out as a Darth Vader-type personality.
107. The Respondent says that the Claimant's resignation was prompted by:
 - a) The struggles the Claimant experienced with the move of training from being in-person to being delivered online, and learning new technological processes; and
 - b) The difficulties the Claimant experienced caring for her mother.

108. A key piece of evidence as to why the Claimant resigned is her resignation email, which does not refer to any of the Claimant's putative reasons, but instead says "*Due to personal circumstances I feel that I am unable to continue in my role*". None of the reasons the Claimant now gives for why she resigned were cited in her resignation email.
109. Moreover, the reason the Claimant did cite, of "*personal circumstances*", was readily understood by her line manager, Ms Crisp. Ms Crisp's response to the Claimant's resignation indicates that she understood the reference to "*personal circumstances*" to be a reference to the pressure the Claimant felt because of her responsibilities for her mother: "*I am really sorry to hear this but completely understand your reasons for this decision. Your well-being and your family come first*". That understanding must have been informed by her conversations with the Claimant on her wellbeing and concerns in the lead-up to the Claimant's resignation. This is supported by the notes of Ms Crisp's meetings with the Claimant in the period from August to after her resignation. Those notes are dominated by references to the Claimant's difficulties with her mother and brother, and record that the Claimant has used the Employee Assistance Programme to seek support for that difficult family situation. The entry prior to the Claimant's resignation included: "*Lorna feels like her head is exploding, feels mum being turned against her...*".
110. The Claimant's oral evidence to the Tribunal was that the reason her resignation email only referred to "*personal circumstances*" was because, at the time, she felt "*overwhelmed*", and that by "*personal circumstances*" she meant her "*mental health*", and her "*inability to cope*". The Claimant's witness statement notes that she had emailed earlier in the day to ask the supervisors on the Tunbridge Wells team asking to shadow them in a new process that was being rolled out on the blood collection teams. That statement goes on to say:
- "That morning in the mental state I was in, I was experiencing overwhelming anxiety at the prospect of having to learn yet another new process. At 12.27 I sent an email to Nikki Crisp and Amanda Dee tendering my resignation.*
- The spontaneous action of sending my resignation email was sparked by my mental impairment. I couldn't see a way forward, it was the only course of action that entered my head to deal with the overwhelming anxiety I felt. I felt that being unable to cope with how I was feeling, was a failing in me, and reflection on my capability which is why I refer to personal circumstances in my resignation email. In reality, once I was able to think clearly I realised that the employment relationship, over time, had been seriously damaged by a course of actions by my employer...*
- It was the cumulative effect of an unsupportive workplace culture, my concerns over health and safety breaches, and a failure to accommodate reasonable adjustments in a timely and effective manner which led to me feeling that I was*

unable to continue in my role as Training and Practice Supervisor. I resigned as a response to these matters”.

111. The Tribunal observes that the Claimant resigned on 17 September 2021, and that she was due to shadow someone on another new process, Session Solutions, the following day. The Claimant explained in oral evidence that when conducting donor safety checks, there are three dimensions to check: sample tubes, donation bags and the paperwork. These dimensions must all be reconcilable. Previously the process of checking they were reconcilable was done by paper. However, the process was being converted to a digital process using a handheld electronic device.
112. The Claimant became extremely agitated when describing to the Tribunal the lead up to that training. This extreme agitation was observed by the Panel, but some of what the Claimant said also indicates the significant part that expectation that she deliver training online played in her decision to resign:
- a) *“Part of my disability is that I feel I have to be really prepared, otherwise I feel incompetent”;*
 - b) When talking about juggling her symptoms of menopause and thinking about the impending training the next day the Claimant said, of her mental state on 17 September: *“I was desperate”;*
 - c) *“I wasn’t familiar with the tech, and where I live, the signal is poor. I always have to plan for the worst case scenario, and I was worried signal would drop out and I would let people down”;*
 - d) *“I felt I was a failure in the fact that I couldn’t – the virtual classrooms”;* and
 - e) In an eConsult document dated 14 September 2020, when the Claimant began her sickness absence, she described her problem in the following terms: *“I can’t cope with work and looking after my mum who is waiting for a diagnosis of dementia. I’m a trainer for the NHS and my training has changed to Virtual classrooms. I’m having panic attacks when I switch on my work computer.”* It is clear that she also experienced this level of panic when anticipating having to learn Session Solutions.
113. The Panel is of the firm view that the temporary changes to the Claimant’s job role she has cited played no part in her decision to resign – otherwise it is difficult to understand why she would want that job back when, as she said in her further grievance on 17 October 2021, *“My job role has not changed between me resigning and trying to retract my resignation”*. By contrast, the thing that had changed was the situation with her mother:
- “The management of my mother’s care for Alzheimer’s, vascular dementia and diabetes had started to settle into a more stable routine by the second week following my resignation. However, in the month leading up to it a series of events led to me being completely psychologically overloaded. [The Claimant then described the issues involving her brother and mother, which resulted in a*

safeguarding incident being raised by social services and the police being called on two occasions, and in the meantime her mother was admitted to hospital twice], and

“Unrealistic expectations of new training methods that I had never had training in, and yet was I was expected to deliver these confidently and competently, and recently been informed that I would be observed in this process by staff from the onboarding team”.

114. We do not consider that the Darth Vader Incident was an operative one on the Claimant’s decision to resign. If the Claimant had, as she suggests, been made to feel unpopular by it, it does not make sense that the Claimant would open-up to Ms Harber on 30 September 2021 – the very person whose assessment of the Claimant’s personality had aligned the Claimant with Darth Vader.
115. We find that the Claimant resigned because of the overwhelm she felt dealing with the immensely difficult situation with her mother and brother, and because of her panic about shadowing her colleague about a new technological development which was due to commence the following day.

The Fifth Disputed Fact: Did the Respondent know the Claimant was disabled, and if so, when?

116. Employment Judge Abbott determined in September 2023 that the Claimant was disabled for 2010 Act purposes at the time of the events her disability claim concerns by reason of anxiety and low mood. EJ Abbott was not asked to determine whether the Respondent knew of this fact and if so when, and nor did he make a finding in this regard.
117. The Claimant says that the Respondent knew she was disabled. In support of this contention she points to:
 - a) The fact that her line managers (Ms Green, Ms Dee and Ms Crisp) each knew about her menopause symptoms; and
 - b) Her statements of fitness to work in the period 14 September 2020 to 14 March 2021 each cite “*low mood*” as one of the reasons for the Claimant being unfit to return to work.
118. The Respondent answers these as follows:
 - a) Knowing about the Claimant’s menopause and related symptoms is not the same as knowing that the Claimant was disabled. The Claimant’s oral evidence was that Ms Dee had not considered whether she was disabled: “*I don’t think Amanda had considered it either*”;
 - b) The Claimant said in oral evidence that she did not regard herself as disabled at the time, and so it unreasonable to expect the Respondent to have done so;

- c) While there are fit notes referring to the fact that the Claimant was not fit to return in part due to “*low mood*”, those certificates cover a period of six months, and thereafter the Claimant reported to her line manager that:
- (a) When she was managed by Ms Dee, “*Lorna is fine*” (6 April 2021), “*says she OK, stress levels are fine*” (4 May 2021), and “*Lorna says she is fine*” (18 May 2021);
 - (b) When she was managed by Ms Crisp, “*Lorna feels she has her fight back. Has more support from new managers and has help with her mum... Has learnt that she cant always manage, is a control freak, never felt she could say no – people pleaser... Has treatment for menopause symptoms – improved*” (29 June 2021). Ms Crisp writes, in relation to the 16 July 2021 meeting, that she called the Claimant “*to check on her well-being as she was overheard to make several negative comments at yesterday’s team meeting. Said she wanted to retire and @couldn’t be arsed@ anymore*”. On 23 August 2021, the Claimant is recorded as having said “*she is ok*”, and then talks about her family situation with her mother and brother. The 27 August 2021 meeting notes refer to “*Lorna feels like her head is exploding*”, but they go on to describe aspects of the issues involving her mother and brother;
- d) Moreover, even during the Claimant’s six-month absence, there were strong indicators given to the Respondent by the Claimant that the factor inhibiting her return to work was her caring responsibilities for her family:
- (i) Indicating in an email to Ms Green on 21 January 2021 that she: “*was hoping to be back at work by now but things have taken a turn for the worse as my mums partner who is 94 was admitted to hospital last week and had surgery to bypass his bowel which has left my mum solely dependent on me... I can’t deal with both the madness at work and the madness at home currently*”; and
 - (ii) The First OH Report stated that the Claimant was absent “*due to personal and work related stress issues*” – neither low mood nor anxiety was given the as reasons. Moreover, the “*personal stress issues*” are clearly expressed as pertaining to the Claimant’s mother. Moreover, the First OH Report advised the Respondent that OH did not consider it likely that the Claimant was disabled;
- e) Following her return to work, the Second OH Report dated 23 March 2021 did refer to the Claimant's “*experiencing ongoing mild symptoms of anxiety and low mood*”, but that report also advised the Respondent that OH did not consider her disabled for 2010 Act purposes because of the duration and the fact that her day-to-day activities were not significantly adversely impacted;

- f) The July 2021 stress risk assessment identified the risk of damage without controls as “*unlikely*”, and the realisation of the risk would have only a “*moderate*” impact. With controls in place, the risk was “*rare*”, and again only a “*moderate*” impact would be expected from that risk occurring;
- g) The fact that the Claimant had not taken any sickness absence since her return to work; and
- h) The Claimant said, in her 17 October 2021 grievance, that “The only person who was aware of my mental state was a colleague who was going to be on annual leave the following week” – referring to a same-level colleague, Sally Davis.

119. The weight of evidence is very clearly in the Respondent’s favour. We find that the Respondent – including Ms Dee - did not know the Claimant was disabled for 2010 Act purposes at the relevant times.

The Sixth Disputed Fact: Why did the Respondent reject the Claimant’s request to rescind her resignation?

120. The Claimant has said that she cannot understand why the Respondent rejected her request to rescind her resignation – she was a strong performer, with 18 years’ experience, who had shown her passion for the role and her expertise (e.g., by spotting errors on the draft DSC). Moreover, the Claimant points to the fact that the Respondent was shortly to:
- a) begin an exercise seeking to recruit a Training and Practice Supervisor in the same region as the Claimant had worked (and two people were in fact recruited into these roles); and
 - b) begin a separate exercise targeting 354 former Donor Carers who, if they sought to return to the Respondent, would need training by people in her role, and would be performing roles the Claimant could have performed.
121. The Claimant has offered two reasons why her request to rescind her resignation was not accepted:
- a) Her disability of anxiety and low mood; and/or
 - b) Her “speaking up” in the form of the Disclosures.
122. By contrast, the Respondent says that the reason it did not allow her to rescind her resignation was that the Poppitt Review was ongoing, and the Respondent consequently did not know the shape of the Training and Practice Supervisor resource it would need, or the localities in which that resource would be needed.
123. The Respondent says that neither the law nor the terms of its Leavers’ Policy obliged it to permit her to rescind her resignation, and that while its Leavers’ Policy indicated that management would consider a request to rescind in the “*day or so*” after a person’s resignation, it did not set an expectation that such requests would

be considered after that point. In any event, the Respondent maintains that it *did* give the Claimant's request consideration, even though it was much later through her notice period than the Leavers' Policy anticipates such consideration would be given.

124. As for the recruitment exercises it undertook, the Respondent says that:

a) The Training and Practice Supervisor recruitment:

- (i) Was in the same region as the Claimant had left, but in quite a different geographical location, being central London, as opposed to the Claimant's work areas which were Ashford, Tunbridge Wells, Maidstone and Horsham; and
- (ii) Was not seeking to replace the Claimant, but was rather a response to another member of the Claimant's team leaving the Respondent's employment on 7 January 2022 (so some months after the Claimant left its employment, but before the conclusion of the Claimant's grievance appeal); and

b) The Donor Carer recruitment exercise:

- (i) Was recruiting to a very different (and much more junior) role than that the Claimant had performed. It was seeking to recruit people to collect blood donations, whereas the Claimant trained people to collect blood donations;
- (ii) Involved the central administrative team of the Respondent – not the people who considered the Claimant's request to retract her resignation - contacting (or trying to contact) 354 individuals, to ask if they would be interested in returning to work for the Respondent, but actually only anticipating low numbers of responses;
- (iii) This exercise, Mr Neill for the Respondent stated, was a response to the fact that the Respondent's blood collection teams were struggling with turnover, which was not the case for Training and Practice Supervisors. Indeed, Ms Dee's evidence was that, at the time of writing her witness statement (the Claimant did not ask her about this under cross-examination), the Respondent had a "budget deficit" for Training and Practice Supervisor roles, especially within the East region where the Claimant worked, i.e., they had more people in roles than the Respondent's budget provided for; and
- (iv) Involved (as described by Mr Neill) a "mailshot" to a list of people generated by certain criteria entered into a computer, those being: (I) Donor Carers, (II) who left the Respondent's employment voluntarily, and (III) who left between 1 July 2021 and 30 June 2022. While the Claimant would have satisfied the last two criteria, she had not been employed as a Donor Carer at the time of leaving the

Respondent, and so the computer selection would not have included her.

125. The Respondent says that the decision to pause recruitment into the Claimant's role was taken by Ms Poppitt (Ms Dee gave oral evidence to that effect), and the decision to reject the Claimant's request to rescind her resignation was made jointly by Ms Green, Ms Beaumont, Mr Broderick, Ms Poppitt and Ms Dee.
126. There is a total absence of documentary evidence of the management decision to freeze recruitment into the Claimant's role. The Tribunal considers this surprising, as a general recruitment "freeze" of Training and Practice Supervisors would, in the Panel members' experience typically be announced to managers by some means (e.g., email), and likely referred to in internal correspondence, perhaps when a manager is seeking to establish an exceptional case for recruitment, or staff are complaining about lack of resource and the recruitment freeze is offered by way of explanation. In an organisation of the Respondent's size, it is particularly remarkable that there is no documentary evidence from the Respondent to support Ms Dee's contention that there was a *general* recruitment freeze, rather than one that was particular to the Claimant's position. The only correspondence disclosed by the Respondent on this subject are references to the freeze referred to in correspondence regarding the Claimant's attempts to retract her resignation – there is no wider reference to a recruitment freeze, or a description of its parameters.
127. Moreover, Ms Dee's witness statement of 10 November 2023 indicates that the Poppitt Review had not, by that time, reached a conclusion – i.e., it had been going on for nearly three years. The recruitment of the Training and Practice Supervisors in London was permitted to happen within that period, which seems at odds with a general recruitment freeze to those roles.
128. The Tribunal finds this odd, in the circumstances the Claimant describes and Ms Dee supports, that the Claimant was a high performing individual with 18 years' experience. While the Panel acknowledges that the Respondent was certainly under no contractual obligation to accept the Claimant's attempts to withdraw her resignation, nor did any non-contractual policy indicate that requests to retract resignations would be considered more than a "*day or so*" after the individual's resignation, it does not make sense that the Respondent would not:
 - a) allow her to return to her role – given there is no evidence of a recruitment freeze that is not particular to the Claimant; or
 - b) try to identify a role for the Claimant to go into, even a much more junior role (such as a Donor Carer) that the Respondent might have expected her to reject .
129. There was also confusion at the time for the reason for rejecting the Claimant's request.

- a) The Claimant said that, on 8 October 2021, she spoke to a member of the HR Administrative team, Maria Pineda, who the Claimant says “*seemed confident that it wouldn’t be a problem [for the Claimant to retract her resignation] as the organisation were desperate for staff*”. Ms Pineda did not know about the recruitment freeze.
- b) Nor did Ms Dee, who said in oral evidence to the Tribunal that it was not until the Claimant asked to retract her resignation, prompting Ms Dee to meet with Ms Green, Mr Broderick and Ms Beaumont on 8 October 2021, that she learned of the recruitment freeze.
- c) The Claimant says that when she spoke to Ms Dee on 8 October 2021, Ms Dee told her that her notice could not be retracted because:
 - (i) The Respondent had already begun the process of replacing her; and
 - (ii) The Claimant was more than 50% of the way through her notice period.

Ms Dee confirmed in oral evidence to the Tribunal that she gave those two explanations to the Claimant on that date.

- d) On 11 October 2021 the Claimant spoke to Ms Beaumont, who the Claimant says said that:
 - (i) The Respondent was not under any obligation to allow her to rescind her notice; and
 - (ii) Because the Claimant was more than 50% of the way through her notice period, it was unreasonable to expect them to.
- e) On 15 October 2021, following a meeting the Claimant had with Ms Green and Ms Beaumont on her last working day, the Claimant requested that they set out why it was that they were not permitting her to retract her resignation. Ms Green emailed the Claimant on 18 October 2021, which included:

“NCQT, following the policy, has decided to take this opportunity to pause this post in order to consider further options, with the potential expansion of PFM and unknown impact on NCQT and alongside other changes in BD it is prudent to future proof the team for the changing environment.

As we discussed on our call NHSBT is under no obligation to accept the rescinding of a staff members notice. Taking into account the above NHSBT is not in a position to accept your retraction of notice.”
- f) On 28 October 2021, Ms Beaumont spoke to the Claimant to confirm the decision not to allow her to rescind her notice. Ms Beaumont’s notes of this call record that the reasons she gave the Claimant were:
 - (i) The Respondent was still deciding the best way forward to replace the role;

- (ii) It was three weeks into a four week notice period; and
- (iii) The Respondent was under no obligation to consider the Claimant's request.

130. The Tribunal considers that either there was some considerable confusion among the relevant Respondent personnel at the time, or there was some obfuscation on their part in their communications with the Claimant.
131. Indeed, the Tribunal notes that Ms Dee's two-fold explanation to the Claimant on 8 October 2021 (that she had already begun recruiting her replacement and that the Claimant was more than halfway through her notice period) contradicts the real reason which she told the Tribunal in oral evidence that she learned on that same day (that there had been a recruitment freeze imposed).
132. A further point that we had to consider was the truth of Ms Dee's assertion that, in the 8 October 2021 meeting, she advocated for the Claimant to be retained by the Respondent, with the possible creation of a new Education and Training Facilitator role, working for Mark Rowland (who had previously line managed the Claimant). This is significant, because if this had occurred it would indicate that there was no concern on Ms Dee's part with the Claimant remaining with the organisation, and would be a point against the Claimant's contentions that the Respondent's refusal to permit her to retract her resignation was connected to her disability and/or her Disclosures.
133. Again, there is no evidence besides Ms Dee's witness evidence to support this contention – and Ms Dee did not mention this in her witness statement at all – it was only discussed in cross-examination. There is no record of what was said or discussed at the 8 October 2021 meeting – despite its importance to the Claimant, and despite the fact that Ms Beaumont, an Associate HR Business Partner, was present. If the creation of a new post was explored, we would have expected to see email correspondence between Ms Dee and Mr Rowland about the business case for the role, correspondence exploring or recording the outcome of discussions about budget for the position, and correspondence or notes recording the conclusion of a management decision about whether or not that post was to be created. If it was simply explored and “shot down” in the 8 October 2021 meeting, we would expect there to be a record of that fact. No such evidence has been provided to the Tribunal.
134. To summarise, we find that:
- a) There is a paucity of evidence to support the position that the Respondent now asserts, and began to assert on 15 October 2021, that there was a recruitment freeze;
 - b) It is unclear whether that recruitment freeze was generally applied to the Claimant's role, all Training and Practice Supervisors, or to NCQT generally, but there is evidence that more Training and Practice Supervisors were in fact recruited in March 2022, with the advert for those roles released on 2

March 2022, which suggests that any freeze was just of the Claimant's particular role;

- c) There is an absence of documentary evidence to support Ms Dee's assertion that she advocated for the Claimant to return to her existing post or for a new position to be created for the Claimant, so as to retain her within the Respondent's employment, and that absence is surprising given the presence of a senior member of the Respondent's HR team in that meeting, who would be conscious of the value of good note-taking;
- d) There were differing explanations offered to the Claimant at the time for why the Respondent would not allow her to retract her resignation; and
- e) There is also no direct evidence to support the Claimant's contentions, that the real reasons were her disability and/or Disclosures.

135. As is very clear from *Ibekwe*, the fact that the Respondent has failed to establish the reason for refusing to allow the Claimant to retract her resignation does not mean that the Claimant establishes that the reason was all or any of the Disclosures.
136. We have found that the Respondent, including Ms Dee, did not know the Claimant was disabled for 2010 Act purposes at the relevant times, so we do not consider that fact to be the reason.
137. We have considered whether the reason might have been the knowledge of the difficulties associated with the Claimant's mother, and the fact that the Claimant had had at least some sickness absence due to the stress surrounding her caring responsibilities for her, but in fact the Respondent had shown great care and understanding towards the Claimant in relation to that (e.g., Ms Crisp: "*your family come first*").
138. We consider it appropriate to draw an adverse inference from the Respondent's lack of documentary evidence about the recruitment freeze, and its mixed messages in the period between the Claimant's resignation and her employment terminating. In particular, we had the distinct impression that Ms Dee was not giving us the complete picture. In oral evidence she had referred to Ms Poppitt being a joint decision maker regarding the refusal to allow the Claimant to retract her resignation, but the remainder of Ms Dee's evidence indicated that Ms Poppitt was not at the critical meeting on 8 October 2021. Ms Dee indicated to us that she had learned of the recruitment freeze at that meeting, but she agreed in oral evidence that she informed the Claimant on that same day that she had begun the process of recruiting her replacement and that was one of the two reasons why the Claimant was not permitted to retract her resignation. The Tribunal did not find her evidence to be credible on this subject.
139. Because of the complete lack of documentary evidence, we do not accept that Ms Dee advocated for the retention of the Claimant in her existing role or by means of the creation of a new Education and Training Facilitator role.

140. Moreover, Ms Dee had dealt with the Third Disclosure, which (as set out below), is the only one of the three put forward by the Claimant that we regard as amounting to a protected disclosure.
141. The adverse inference we draw, based on the lack of plausible explanation for the Respondent's actions and our concerns with the position put forward by the Respondent, is that the Third Disclosure was a more than trivial influence on the Respondent's treatment of the Claimant (*Fecitt*).
142. We also consider the total absence of correspondence from Ms Dee to the Claimant in the three week period since the Claimant resigned to the date she sought to retract her resignation as significant. It supports the inference we have drawn, and supports our refusal to accept Ms Dee's contention that she advocated for the retention of the Claimant in her post or the creation of a new role for the Claimant. If Ms Dee thought so highly of the Claimant, we consider she would have contacted her at least once in that three-week period to express regret or sadness that the Claimant was leaving the organisation after 18 years' service. Ms Dee has said that the reason she did not contact the Claimant was because Ms Crisp was in regular contact with her, but Ms Dee had line managed the Claimant for a time, and had been privy to intimate details about the Claimant's life and challenges, and it strikes the Tribunal as significant that she did not reach out to her at all following her resignation. Ms Dee's silence speaks volumes as to her feelings towards the Claimant.

Law

Constructive unfair dismissal

143. The right not to be unfairly dismissed is set out in section 94 of the Employment Rights Act 1996 (the **1996 Act**). For these purposes, an employee is dismissed by their employer if:
- "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"*
- (section 95(1)(c) of the 1996 Act).
144. This treatment of the employee's resignation as "constructive dismissal" pre-dates the 1996 Act, and Lord Denning MR in the Court of Appeal decision in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 described the nature of the contractual breach which entitles the employee to accept that breach and treat the employer's conduct as dismissing them:
- "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 the employer's conduct. He is constructively dismissed."

145. Therefore there are three elements that an employee needs to prove so as to demonstrate that they have been constructively dismissed:
- a) A fundamental breach of the contract of employment between them on the part of the employer;
 - b) A causal link between the employee's resignation and that employer breach; and
 - c) Evidence of the employee accepting that breach before any affirmation of the contract.
146. Underhill LJ giving the judgment of the Court of Appeal in *Kaur* observed that
- "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
 - (2) Has he or she affirmed the contract since that act?*
 - (3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
 - (4) If not, was it nevertheless a part (applying the approach explained in Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation...)*
 - (5) Did the employee resign in response (or partly in response) to that breach?"*

Fundamental breach

147. An employer may, in the words of Lord Denning MR in *Western Excavating*, "[show] that [they] no longer [intend] to be bound by one or more of the essential terms of the contract" through a course of conduct, which may cumulatively amount to a fundamental breach of contract. This is so even if the 'last straw' incident does not, by itself, amount to a breach of contract (*Lewis v Motorworld Garages Ltd* [1986] ICR 157), although that 'last straw' must contribute to the course of conduct relied upon. A blameless act by the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of

his or her trust and confidence in the employer (*Omilaju v Waltham Forest London Borough Council* [2005] ICR 481).

148. The test of whether the term of the contract has been breached is an objective one. There will be no breach simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held (*Omilaju*).
149. The term breached may be an express term of the contract, or an implied one. In the case of the implied term of trust and confidence:

“A finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract, and entitling the employee to resign and claim constructive dismissal” (*Morrow v Safeway Stores plc* [2002] IRLR 9).

Causal link

150. There must be a causal link between the breach by the employer and the employee’s resignation (one case example is that of the Court of Appeal decision in *Meikle v Nottinghamshire County Council* [2005] ICR 1).

Acceptance of that breach without affirming the contract

151. The issue of affirmation was discussed in the EAT case of *Leaney v Loughborough University* [2023] EAT 155, where HHJ Auerbach helpfully summarised the relevant general principles, used below.
152. Where one party is in fundamental breach of contract, the injured party may elect to accept the breach as bringing the contract to an end, or to treat the contract as continuing, requiring the party in breach to continue to perform it – that is affirmation. Where the injured party affirms, they will thereby have lost the right thereafter to treat the other party’s conduct as having brought the contract to an end - unless or until there is thereafter further relevant conduct on the part of the offending party.
153. An employee who claims unfair constructive dismissal based on a *continuing cumulative breach* is entitled to rely on the totality of the employer’s acts notwithstanding prior affirmation of the contract provided that the later act – the last straw – forms part of the series. The effect of the final act is to revive the employee’s right to terminate his or her right to terminate the employment contract based on the totality of the employer’s conduct (*Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978).
154. Affirmation may be express or implied. Affirmation can be implied if the innocent party:

- a) calls on the guilty party for further performance of the contract, since that conduct is only consistent with the continued existence of the contractual obligation; or
- b) themselves does an act which is only consistent with the continued existence of the contract.

However, if the innocent party further performs the contract to a limited extent but makes it clear that he:

- c) is reserving his rights to accept the repudiation; or
- d) is only continuing to so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation (*WE Cox Toner (International) Ltd v Crook* [1981] ICR 823).

Burden of proof in discrimination complaints

155. Section 136(2) of the 2010 Act sets out the burden of proof applicable to proceedings under that Act:

“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 the contravention occurred.”

156. In other words, an examination of whether unlawful discrimination on the ground of disability has occurred involves a two-stage enquiry:

- a) Firstly, the claimant must establish, on the balance of probabilities, facts from which the inference could properly be drawn by the tribunal that, in the absence of any other explanation, an unlawful act was committed; and then
- b) Secondly (if the claimant has made out a *prima facie* case for discrimination, as per the first stage), the burden of proof shifts to the respondent to prove, on the balance of probabilities, that the treatment in question was in no sense whatsoever on the ground of the claimant’s disability

(Igen Ltd (formerly Leeds Careers Guidance) v Wong [2005] ICR 931).

157. If the claimant does not prove on the balance of probabilities such facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination against the claimant, he or she will fail.

158. *“The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination” (Madarassy v Nomura International plc* [2007] ICR 867).

159. The “‘more’ which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred” (*Deman v Equality and Human Rights Commission* [2010] EWCA Civ 1279).

Direct disability discrimination

160. Section 13(1) of the 2010 Act describes the prohibited conduct of direct discrimination as follows:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

161. In other words, two conditions must be satisfied for a direct disability discrimination complaint to be made out:

1. The employer must have treated the claimant less favourably than it treated or would treat others; and
2. The reason for that difference in treatment is a protected characteristic.

162. The assessment of whether treatment is less favourable is an objective one, i.e., whether the tribunal finds it so, not whether the claimant perceived it as such.

163. Section 13 involves the comparison of treatment afforded the claimant against a named or hypothetical comparator (“*than A treats or would treat others*”), and section 23(1) provides that:

“there must be no material difference between the circumstances relating to each case” [i.e., there must be no material difference between the circumstances of the claimant and the comparator],

and where the protected characteristic in question is disability, the “*circumstances*” that should be considered are the abilities of the claimant and the comparator (section 23(2)).

164. When answering the second question, the examination of the reason why the decision-maker acted in the way that they did, the claimant need not show that the protected characteristic was the sole reason, but it needs to have been a “*significant influence*” (Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572). It is not necessary that the decision-maker was conscious of this significant influence.
165. Lord Nicholls in *Nagarajan* observed that “*the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.*”

Failure to make reasonable adjustments

166. The duty to make reasonable adjustments is set out in section 20 of the 2010 Act, and for the purposes of this case the relevant part of that duty is as follows:

“where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a matter in comparison with persons who are not disabled, [A is] to take such steps as it is reasonable to have to take to avoid the disadvantage”.

167. However, as per paragraph 20(1) of Schedule 8 of the 2010 Act:

“A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know... (b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage...”

168. Elias P in the EAT decision of *Project Management Institute v Latif* [2007] IRLR 579 confirmed that the claimant must not only establish that the duty has arisen, but also that it has been breached. A “*real prospect*” of an adjustment removing a disabled employee's disadvantage would be sufficient to make the adjustment a reasonable one, which is not to say that a prospect less than a *real prospect* would not be sufficient (*Foster v Leeds Teaching Hospital NHS Trust* UKEAT/0552/10).

169. This effectively involves four questions:

1. Did the respondent know (in fact, or by reason of knowledge being imputed to them because they could reasonably be expected to know) that the claimant was disabled at the relevant time?
2. If yes, did the respondent apply a provision, criterion or practice (the **PCP**)?
3. If yes, did that PCP cause the claimant (a disabled person) a substantial disadvantage?
4. If yes, was there a step that could reasonably have been taken that had a real prospect of removing the disadvantage (or some prospect less than a real prospect of the adjustment removing the disadvantage)?

170. The determination of whether the disadvantage is substantial (defined in section 212(1) of the 2010 Act as something that is “*more than minor or trivial*”) is made by way of comparison with “*persons who are not disabled*”. In other words, the application of the PCP must cause greater disadvantage to disabled people than to non-disabled people. This necessarily means that the PCP applies, or is capable of applying, to non-disabled people as well as to disabled ones.

171. There must be some causative nexus between the claimant’s disability/ies and the substantial disadvantage (*Thompson v Vale of Glamorgan Council* EAT 0065/20).

172. Once the claimant has proven a *prima facie* case that the duty arose (i.e., steps 1 to 4 above), the burden then shifts to the respondent to show that the adjustment was not a reasonable one for it to make. There is no requirement for the claimant

to have identified with precision what adjustment it was reasonable for the respondent to make, but there must be some indication as to what adjustments it is alleged that the respondent should have been made:

“Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.”

(Latif)

173. The assessment as to whether the adjustment (or “step”) is reasonable is an objective one (*Smith v Churchills Stairlifts plc* [2006] ICR 524). A significant consideration will be the effectiveness of the proposed step (whether it would, or might, be effective in removing or reducing the disadvantage), but the relevant considerations in a given case will depend on its particular circumstances (paragraph 6.23 of the Code), and may include the cost of the step, its impact on other members of the respondent’s workforce, as well as the size, resources and nature of the employer’s organisation.

Protected disclosure detriments

174. Section 47B(1) of the 1996 Act provides:

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

175. The term “protected disclosure” is set out in section 43A:

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

176. The basis on which a disclosure will be a “protected disclosure” is described in section 43B as follows:

“(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

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

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

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

...

(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).”

177. A “qualifying disclosure” made to the discloser’s employer is a “protected disclosure” pursuant to section 43C.
178. In other words, for a person to demonstrate that they have made a protected disclosure they need to show the following:
- a) That they have made a “**qualifying disclosure**” by:
 - (i) disclosing information;
 - (ii) in the reasonable belief that the disclosure was in the public interest;
 - (iii) in the reasonable belief that the information disclosed tended to show one or more of the “**relevant failures**” in section 43B(1)(a) to (f); and
 - b) That their qualifying disclosure was made in accordance with one of the six specified methods of disclosure, which includes disclosure to their employer.
179. Disclosing information involves conveying facts, not simply allegations (*Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325 and *Kilraine v London Borough of Wandsworth* [2018] ICR 1850).
180. The language “*in the reasonable belief of the worker*” involves applying an objective standard to the personal circumstances of the discloser (and this was considered by the EAT in the case of *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4, which concluded that those with professional or ‘insider’ knowledge will be held to a different standard than laypersons in respect of what it is ‘reasonable’ for them to believe). This “*reasonable belief of the worker*” language applies to both whether the disclosure is in the public interest and whether the disclosure tends to show one or more relevant failure. There are both subjective and objective elements to this test.
- a) The subjective element is that *the worker must believe* that the disclosure is in the public interest and that the information disclosed tends to show one of the relevant failures; and
 - b) The objective element is that that belief must be reasonable (*Phoenix House Ltd v Stockman* [2017] ICR 84).

181. The protection afforded workers by section 47B is from detriment by his employer done *on the ground that* the worker has made a protected disclosure, so a claimant pursuing a claim under section 47B must show:
- a) That they made a protected disclosure;
 - b) That they suffered some identifiable detriment;
 - c) That detriment was at the hands of their employer; and
 - d) There was a causal connection between the act or failure and the protected disclosure – that the detriment was on the ground of their protected disclosure.
182. Whether something amounts to a “*detriment*” is to be assessed from the point of view of the worker (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337).
183. Being subjected to a “*detriment*” does not mean anything more than “*putting at a disadvantage*”. A detriment “*exists if a reasonable worker would or might take the view that the [act] was in all the circumstances to his detriment*” (*Ministry of Defence v Jeremiah* [1980] ICR 13).
184. It is not a “but for” test, but rather whether the detriment is “*on the ground*” of the protected disclosure is to be understood as meaning that the protected disclosure “*materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*” (*Fecitt v NHS Manchester* [2012] ICR 372).
185. This requires an examination of the mental processes (conscious or unconscious) of the decision-maker – what caused or influenced them to act (or fail to act) as they did (*London Borough of Harrow v Knight* EAT/0790/01).

Burden of proof in protected disclosure detriment complaints

186. Section 48 of the 1996 Act provides:
- “(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B...”
- “(2) On a complaint under subsection... (1A)... it is for the employer to show the ground on which any act, or deliberate failure to act, was done.”
187. Section 48(2) does not mean that the burden of disproving the necessary causative link between the protected disclosure and the detriment shifts to the employer – rather, it means that while the burden of proving that connection rests with the employee, the employer is expected to identify and evidence the ground or grounds on which it acted or failed to act so as to result in the detriment shown by the claimant. The claimant does not ‘win’ by default if the employer fails to establish a reason for its actions – there remains an evidential burden on the claimant (*Ibekwe v Sussex Partnership NHS Foundation Trust* UKEAT/0072/14/MC).

188. However, “*In the absence of a satisfactory explanation from the employer... tribunals may, but are not required to, draw an adverse inference*”, but any “*inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found*” (*International Petroleum Ltd v Osipov* UKEAT/0058/17).

Application to the claims here

Constructive unfair dismissal

189. The case of *Kaur* indicates that the following questions are usually appropriate for a tribunal to ask and answer in relation to a complaint of constructive unfair dismissal:
- a) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - b) Has he or she affirmed the contract since that act?
 - c) If not, was that act (or omission) by itself a repudiatory breach of contract?
 - d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?
 - e) Did the employee resign in response (or partly in response) to that breach?
190. Taking each in turn:
- a) What was the most recent act (or omission) on the part of the Respondent which the Claimant says caused, or triggered, her resignation?
 - (i) The Claimant identifies the Darth Vadar Incident as the “last straw”.
 - b) Has the Claimant affirmed the contract since that act?
 - (i) The Claimant clearly did affirm the contract by calling on the Respondent for further performance of it, when she sought to retract her resignation. She made that request without reserving her rights (even though she later made allegations of discrimination and protected disclosure detriment).
 - c) If not, was that act (or omission) by itself a repudiatory breach of contract?
 - (i) This need not be answered given the above, but in any event we find that the Darth Vadar Incident was not a repudiatory, or even a less-than-repudiatory, breach of the Claimant’s contract of employment. The Claimant might have been upset about it at the time, but we have found that that was not the reason she resigned, and her action in speaking to Ms Harber – the person she held responsible for the Darth Vadar Incident – on 30 September 2021 and confiding in Ms

Harber that she hadn't wanted to resign, shows that Ms Harber's actions had not caused any deep or lasting upset.

- d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?
 - (i) No. Of the breaches the Claimant alleged, we found only that three of the Claimant's duties were removed temporarily during the Covid-19 pandemic. Those were not, in our view, sufficient to amount to a repudiatory breach of the *Malik* term of trust and confidence.
- e) Did the employee resign in response (or partly in response) to that breach?
 - (i) Again, this need not be answered in light of the above, but in any event we have found that the Claimant resigned by reason of the acute stress on her due to caring responsibilities for her mother, and the fact that she did not feel able to learn a new process which the Respondent had introduced.

191. The Claimant's constructive unfair dismissal claim fails.

Direct disability discrimination

192. The Claimant has articulated her position on this allegation poorly, and though we recognise that she is a litigant-in-person, it is not easy to understand the argument she is running in relation to this complaint (which contrasts starkly with, for instance, the protected disclosure detriment complaint). We consider this significant in indicating her own level of belief in this allegation.
193. This is, in part, because of her oral evidence that one of the people involved in deciding not to permit her to retract her resignation, Ms Dee, had "*not considered*" whether the Claimant was disabled. The Claimant has offered no evidence that any of the other decision-makers – being Ms Beaumont, Mr Broderick, Ms Green and potentially Ms Poppitt (according to Ms Dee's evidence) – were aware of her disability at the time of their joint decision to refuse to permit her to rescind her resignation.
194. Moreover, the Claimant has not drawn her hypothetical comparator, or when referring to those individuals who (she learned from her subject access request) were permitted to withdraw their resignations, explained why those individuals are comparators satisfying section 23(1) (i.e., that there are no material differences between their circumstances and hers besides her disability).
195. Furthermore, the Claimant has pointed to the bare facts of a difference in treatment, without showing us the "more" that could shift the burden of proof to the Respondent (*Madarassy*).
196. The Claimant's complaint of direct disability discrimination is not made out.

Failure to make reasonable adjustments

197. The Respondent's lack of knowledge of the Claimant's disability is fatal to this claim, as the duty to make reasonable adjustments does not arise without it.
198. In any event, we have considered the detail of this complaint.
199. The Claimant has identified the PCP as the Respondent's Leavers' Policy. That description from the Claimant is not very clear, but in describing how that policy put her at a substantial disadvantage, that clarity emerges. The Claimant said that the Leavers' Policy put her at a substantial disadvantage in that it took her longer to reach the decision to ask for her resignation to be retracted than a person who did not suffer anxiety and low mood.
200. However, the Asserted Reasonable Adjustment - that the Respondent should have considered her request to retract her resignation at a later stage of her notice period – was in fact what the Respondent did. The Claimant's own evidence acknowledges this, because she said "*I don't know why [Ms Dee] refused [to allow the retraction]... I didn't know what the reason was*". Even if the reason was unclear, the Claimant recognised that whether to permit her to withdraw her resignation had in fact been considered.

Protected disclosure detriments

(I) Was the First Disclosure a protected disclosure?

201. Did the First Disclosure disclose information?
- a) Yes, the First Disclosure described practices of Donor Carers and how those practices posed Covid-19 risk. (The Respondent does not appear to dispute that this disclosed information.)
202. Did the Claimant believe that the First Disclosure was made in the public interest?
- a) Yes, it was clear that the Claimant was "speaking up" out of concern that Covid-19 could be being spread by the practices then being followed by the Respondent.
203. If so, was the Claimant's belief reasonable?
- a) Yes.
204. Did she believe that it tended to show that the health or safety of any individual has been, is being or is likely to be endangered?
- a) Yes.
205. If so, was the Claimant's belief reasonable?
- a) Yes.

206. If so, was that qualifying disclosure made to the Claimant's employer (i.e., the Respondent)?
- a) No. The Respondent, as an NHS organisation, had many different ways that staff could raise concerns, to different levels of the organisation. Ms Dee's evidence that Yammer is a chat forum not routinely monitored by the Respondent management team was highly persuasive. The fact that members of the management team did, on occasion, view Yammer posts was not sufficient to enable the Claimant to understand that she was reporting her concerns with the First Disclosure to the Respondent. The First Disclosure was not a protected disclosure for that reason – the Claimant did not report her concerns to the Respondent by making a Yammer post.

(II) Was the Second Disclosure a protected disclosure?

207. Did the Second Disclosure disclose information?
- a) The Claimant in the Second Disclosure made reference to "*all the shortcuts taking place*", and indicated she would elaborate on what that meant on Monday. The Second Disclosure did not identify what those shortcuts were. It did not disclose "*information*", as the Claimant appeared to acknowledge when giving her oral evidence. (When Ms Crawshay-Williams said, in cross-examination, "*you don't give any information explaining what the concern is, you say you'll give the detail on Monday*", the Claimant replied "*Yes, I given a broad outline of what the concern is, but I want to raise it on Monday*".) As per the cases of *Geduld* and *Kilraine*, the Second Disclosure cannot be a qualifying disclosure, as it did not disclose facts.
208. Did the Claimant believe that the Second Disclosure was made in the public interest?
- a) The Claimant appeared to be eluding to shortcuts in the Respondent's training of its Donor Carers, which would be a matter of public concern.
209. If so, was the Claimant's belief reasonable?
- a) Yes.
210. Did she believe that it tended to show that the health or safety of any individual has been, is being or is likely to be endangered?
- a) The answer to this is not clear, because we have no idea what the concerns the Claimant did or would have raised on Monday were.
211. If so, was the Claimant's belief reasonable?
- a) Again, the Claimant has not demonstrated that.
212. If so, was that qualifying disclosure made to the Claimant's employer (i.e., the Respondent)?

- a) This communication was to her line manager, so yes, it was made to the Respondent.

213. The Second Disclosure was not a protected disclosure.

(III) Was the Third Disclosure a protected disclosure?

214. Did the Third Disclosure disclose information?

- a) The Respondent has said that this disclosure cannot amount to the disclosure of information, given that the Claimant has framed it as a question. However, it is clear to the Tribunal that the Claimant was raising concerns about a gap in the information gathered by the draft DSC. She was seeking to express that gap by reference to a question, perhaps so as to do so in a 'softer' way than to obliquely say 'there's a gap that's been missed'. This does not mean that her email has not disclosed information. Once the context and detail of the correspondence is understood – as it was ultimately by Ms Harber – it is saying that there is a gap in the information we are obtaining from donors when compared with the information that should be gathered from them. This is information.

215. Did the Claimant believe that the Third Disclosure was made in the public interest?

- a) Yes, it clearly was made in the interest of all recipients and potential recipients of donated blood to whom the draft DSC would be applied.

216. If so, was the Claimant's belief reasonable?

- a) Yes.

217. Did she believe that it tended to show that the health or safety of any individual has been, is being or is likely to be endangered?

- a) Yes.

218. If so, was the Claimant's belief reasonable?

- a) Yes, and Ms Harber agreed with her by pursuing it, and the Respondent agreed with her by implementing the change. Moreover, the reasonableness of that belief is supported by the fact that others had also raised it.

219. If so, was that qualifying disclosure made to the Claimant's employer (i.e., the Respondent)?

- a) Yes.

220. The Third Disclosure was a protected disclosure.

(IV) Did the Respondent do all or any of the Protected Disclosure Complaints on the ground that the Claimant made one or more of the Disclosures?

Refusing to allow the Claimant to retract her resignation

221. As set out at length in relation to the Sixth Disputed Fact above, we find that the Respondent refused the Claimant's request to rescind her resignation on the ground of the Third Disclosure, so this complaint succeeds.

Disregarding or failing to acknowledge the Claimant's 18 June 2020 email

222. We do not consider that the Respondent disregarded or failed to acknowledge the Claimant's email of 18 June 2020 suggesting that certain training could move to be pre-recorded videos (see the Third Disputed Fact above). This allegation fails as a matter of fact.

The Darth Vader Incident

223. As for the Darth Vader Incident, while we do not regard it as having sufficient effect on the Claimant to amount to a fundamental breach of contract, we do consider that this was a detriment. This is to be assessed from the Claimant's point of view (*Shamoon*), but is also subject to a objective reasonableness assessment – would or might a reasonable worker take the view that the characterisation of the Claimant as Darth Vader was, in all the circumstances, to her detriment? The Tribunal finds that the Claimant did perceive her characterisation as having a Darth Vader personality type to be a detriment, and it was reasonable for her do so. Ms Dee's attempt to argue that being characterised as a Darth Vader personality type had some positive attributes was not successful in persuading us that this was not a detriment - Darth Vader is a legendary villain of the Star Wars series, and being aligned with his personality is insulting.

224. Nor was this simply 'the output of the test which the whole team agreed to take', because it was not the Claimant's answers that gave the Darth Vader result, but rather Ms Harber's answers, standing in the shoes of the Claimant. It therefore reflected Ms Harber's perception of the Claimant's personality, and was shared in a group environment. It is little wonder that the Claimant was upset by it.

225. The Claimant's unchallenged evidence was that Ms Harber's pursuit of the gap in the draft DSC identified by the Claimant in the Third Disclosure had resulted in Ms Harber being "*told that she was a bad representative of the NCQT*". We find this more than sufficient to satisfy the requirement that the detriment was "*on the ground*" of the Claimant having made the protected Third Disclosure.

Conclusions

226. For all of the above reasons, the Claimant's complaint that she was subjected to a detriment by the Respondent on the ground that the Claimant has made a

protected disclosure succeeds on two counts: in relation to the Respondent's failure to allow her to retract her resignation and in relation the Darth Vadar Incident.

227. The Claimant's remaining complaints are not made out and are dismissed.

Employment Judge Ramsden

Date **27 March 2024**

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 April 2024

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