Case No. 2303577/2022

EMPLOYMENT TRIBUNALS

Claimant: **Ms Joan Hogben**

Respondent: **Kent Community Health NHS Foundation Trust**

HELD AT: Ashford (By Video Link) **ON:** 02, 03, 04 & 05 July 2024
Deliberations 9 July 2024

BEFORE: **Employment Judge R S Drake (via VR)**
Ms E Wiles
Mrs S Goldthorpe

REPRESENTATION:

Claimant: Ms Naomi Gyane (of Counsel)
Respondent: Ms Hollie Patterson (of Counsel)

RESERVED JUDGMENT

1. The Tribunal finds that the Claimant has not made out her claims as well founded and therefore dismisses her complaints of: -

   1.1 Constructive Unfair Dismissal under Sections 95(1)(c) and 98 of the Employment Rights Act 1996 ("ERA"); – and –

   1.2 Discrimination arising from disability under Section 15 of the Equality Act 2010 ("EqA"); - and -

   1.3 Harassment as defined by Section 26 EqA related to disability - and -

   1.4 Victimisation as defined by Section 13 EqA; - and -

   1.5 Failure to make reasonable adjustments under Sections 20-22 EqA

2. There are no other Orders made save that: -

   2.1 Because the decision has been reserved, we recognise the parties will; value production of full reasons in writing under Rule 62 of Schedule 1 to the Employment Tribunals (Constitution & Rules) Regulations 2013 ("the Rules");

   2.2 The Respondent's application to hold the hearing in private (limited to the period of Ms Dawn Gaiger being cross examined) was declined.

REASONS

Introduction

a) We refer to the parties and witnesses by initials (for ease of reference) and to documents in the mostly agreed evidence bundle as page numbers (P1 to P497 etc). We heard oral testimony and read written statements given over 3 days by and from the following:-

   i) The Claimant –"**C**"
   ii) Mr Andrew Hogben ("**AH**") – C's husband;
   iii) Mrs Anine Dawson ("**AD**") – former Senior Nurse Practitioner employee of **R** (retired January 2021) and friend of C;
   iv) Mr Terence Moorcroft ("**TM**") – former SNP employee of **R** (left January 2020) and friend of **C**;
   v) Ms Gemma Marshall ("**GM**") – One of R's HR managers;
   vi) Ms Dawn Gaiger ("**DG**") – Staff Governor of the **R** Trust and **C**'s line manager as Operational Lead of (inter alia) **R**'s 2 Minor Injuries Units ("MIUs"), and Outpatient Units at Gravesend and Swale;

   We also received a signed witness statement from –

   vii) Ms Jessica Wilson ("**JW**") – an Admin Supervisor for **DG**

b) The hearing has been conducted on the basis that there would be regular breaks when requested by **C** or her Counsel. Furthermore, we ensured that questions were to be asked at appropriate pace with passages of documents referred to being read by **C** as an arrangement which she agreed, to enable her full participation in the light of her disability (anxiety and depression) the current state of which was not in issue. The Tribunal is satisfied that **C** has been able to process and understand what was being said in the course of this hearing and has been able to formulate her responses and to mount appropriate challenges to R's witness evidence with the assistance of learned Counsel Ms Gyane. Further it should be noted that as a further adjustment to procedure, the Tribunal endeavoured to hear C's cross examination to conclusion on the second day, so as to avoid her being embargoed overnight if she started testimony on the first day.

c) The Tribunal is aware, in particular, of common disadvantages and impairments suffered by those with anxiety (inter alia), including in guidance in the Equal Treatment Benchbook. We made our findings as to credibility and inconsistencies in **C**'s evidence mindful of the need to take appropriate care when reaching conclusions so as to take into account any impairment suffered by **C**.

d) We noted that EJ England issued CMOs at a PHR on 17 August 2023 which included a List of Issues identifying very specific allegations of particulars relied upon by **C**. Because of their detail and significance (since they are informed by the statutory structure/form of the claims and common law interpretation of them) we annex them to this Judgment; We also cross refer our findings of fact thereto in order to demonstrate our attention to them. This List, and reference to specific para numbers therein, serve usefully as a template for our decision making process in guiding us to conclusions/findings as they not only identify the questions we needed to ask of the evidence but also the precise particulars which C seeks to rely upon to found her claims.

e) The Tribunal records its thanks to both Counsel and their respective instructing Solicitors for their detailed case preparation and both skilful and civilised presentation of respective cases.

f) After oral evidence which lasted 3 days, we read detailed and helpful final Submissions and heard succinct oral argument speaking to them from Counsel on the fourth day and deliberated on the fifth so as to promulgate a reserved decision. We refer to these where necessary below.

The Claims

3. The Claimant made the following complaints and the issues/particulars are identified as per EJ England's CMOs:

3.1 - Constructive unfair dismissal (relying on S.95(1)(c) ERA 1996) – (Issues 2.1 to 2.4);

3.2 - Discrimination arising from disability (S15 EqA) (Issues 5.1 to 5.6);

3.3 - Harassment related to disability (S26 EqA) (Issues 6.1 to 6.5);

3.4 - Victimisation (S27 EqA) (Issues 7.1 to 7.5); and

3.5 - Failure to make reasonable adjustments (SS20 & 21 EqA) (issues 8.1 to 8.7).

4 The remaining issues identified by EJ England relate:-

4.1 To determining disability, though we noted that though R originally disputed the assertion that anxiety and depression were disabilities specifically in this

case, they conceded this in the hearing, but they still disputed awareness that these impairments amounted to disability at the relevant times; - and

4.2 To remedy which is not relevant here for the reasons set out below and because we have so far dealt only with liability;

4.3 Limitation.

5 We recognised that in respect of the constructive unfair dismissal claim the burden of proof rests wholly with **C** and that in respect of each of the claims under EqA, a prima facie case had to be made out by **C,** and that if such were established, then the burden of proving some other (lawful) reason for whatever **R** did rested with **R.** In this respect, we were guided by the CA decisions in **Igen v Wong [2005] IRLR 258** and again in **Madarassy v Nomura [2007] IRLR 246**

The Issues (as identified by EJ England and particularised by C)

These are identified in the Annex attached to this Judgment and we refer hereafter in our Findings of Fact and our Conclusions to each of the identified issues relevant to such findings.

Submissions on credibility

6 For **R** Ms Patterson argued as follows inter alia (which we paraphrase and list non-exhaustively) :-

6.1 None of **C**'s witnesses were able to give direct evidence of the matters in dispute as they weren't present when they happened; Further TM had been in past antagonistic dispute with **DG**, so his testimony was questionable as to lack of bias;

6.2 **C**'s information communicated to **R**'s Employee Relations ("ER") team (evidenced in PP110 and 207) was inaccurate or misleading, calling into question her consistency;

6.3 **C** was inaccurate when providing information to the ER team when saying she had not spoken to **DG** since going off sick which conflicts with her own call log (P491);

6.4 **C** accepted in cross examination that the message sent to her by **DG** 10 March 2022 (P462) should be seen as supportive and not insensitive or unhelpful as she had hitherto asserted;

6.5 At P237, **C** asserts that her role as a consequence of **DG**'s "non-adherence to Absence Policy has been made untenable"; Counsel argues this is an unsupportable assertion since she had only been absent for 8 weeks and

there had been only one missed meeting, that the Policy relied upon does not mandatorily require that there be face to face meetings, and her assertion of fear for personal safety (P207) is completely unsupported by evidence and is only an assertion of her subjective perception;

7 For **C,** Ms Gyane argued as follows inter alia (which again we paraphrase and list non-exhaustively):-

7.1 **C**'s testimony was given honestly, clearly, and was credible;

7.2 She argues that **C** gave succinct, considered, and measured responses in cross examination demonstrating her truthfulness as a witness;

7.3 In contrast, **C** asserts that **R**'s evidence was contrived, contradictory and untruthful; She asserts inconsistency by **DG** in her account of her knowledge or lack of it as to **C**'s depression;

7.4 **DG**'s testimony was criticised for alleged general inconsistency with documentary evidence of such frequency as to impeach her credibility totally; It was also criticised for alleged untruthfulness as to whether she had said that every time she was off sick or on leave she noted **C** was also absent and that she had issues with **C**'s performance not supported by documentary evidence.

Findings of Facts

8 We found all the witnesses to be as sincere and candid as they tried to be. We do not find anyone was not telling the truth, because instead we make findings based on our assessment of their testimonies on balance of probabilities. Thus, we simply prefer the testimony of one witness over another where conflicts of evidence were apparent, and we explain why.

8.1 Of the Submission referred to above and set out in writing (as to credibility) we prefer the testimony of **DG** where it conflicts with **C**. Where **DG** gave oral testimony appearing to conflict with documentary evidence, such conflicts we did not judge to be material and we recognise she was giving evidence about events which took place amidst a range of many other conflicting demands in a very busy and energy consuming work environment at a time when the effects of the later stages of COVID Pandemic lockdown were adding to the pressures upon her. Nonetheless we judged that she gave her testimony cogently.

8.2 **DG** has now still and has had many demands on her time and energies, whereas **C** since she left **R** and taken up another job (notably at higher pay and of kind more aligned to her work background/experience) has had much time to prepare for her case to be heard and to concentrate attention solely upon it.

8.3 Furthermore, we note that the instances relied upon as indicators of **DG**'s unreliability are not as material in our findings as **C** might suppose.

9 Therefore, with regard to the issues to be determined, the Tribunal unanimously made the following specific findings of fact relevant to its conclusions and which we cross refer to the numbered paragraphs describing the issues and their particulars in EJ England's Issue PHR List:-

General Chronology

9.1 **R** is an eponymous Foundation Trust Community Health Services provider in Kent which employed **C** since 19 December 2003. She last held the post of Clinical Team Leader ("CTL") – a post graded as what is termed Band 7 – she was based at R's Minor Injury Unit ("MIU") at Swale where 40% of her work was clinical and the balance was administrative leadership of and support for the Unit; She decided to look for another job on or by 27 March 2022, resigned on 9 June 2022 and, though she says in effect as pleaded in this case that she was entitled to do so without giving notice, she unilaterally opted to work her notice, which would have expired contractually on 31 August 2022, and also agreed at her request to the foreshortening of it to 4 August 2022; Her most recent Contract of Employment is dated 02 June 2017 (PP99-109) confirming her notice obligations which significantly she continued to fulfil;

9.2 **C's** terms were augmented by reference in her Contract to the "NHS Terms and Conditions of Service Handbook" – The Contract provides (P104 para 15) that the employment is "subject to the Trust's Disciplinary Rules and Procedure" and further offers (P104 para 16) the guidance, but does not impose an obligation, to use the "Trust's Grievance Procedure" if a grievance is to be raised; On her evidence she did not do so until 27 March 2023 (PP206-207)

9.3 **R** operates a "Managing Sickness Absence Policy" (PP127-147) which **C** alleged they breached (though we find it is non-contractual) and upon which alleged breach she relies as evidence of fundamental breach of contract; We note and find that it is not formally incorporated in **C**'s Contract of Employment and is couched in terms of being for the purpose of fulfilling **R**'s Strategy and not as imposing mutual obligations per se on the parties as employer and employee; The only reference to anything akin to obligation appears at P134 (para 4.1) which provides - "For all periods of absence, upon a colleague's return to work, the line manager must hold a return to work meeting"; This presupposes/implies/requires, and depends entirely on, co-operation of the employee; We come to this later in our findings;

9.4 **C** has suffered from anxiety and depression; Both sides accept now that these amount to disability, but **R** did not do so at the relevant times of events complained of - no evidence had at that time been adduced as to the effect of **C**'s impairments, or of their seriousness, nor their actual or expected duration; Also, she was absent from work in August 2020 for a certificated

period due to having suffered a cardiac episode (or "MI") which caused continuing coronary artery disease and related stress;

9.4.1 An Occupational Health ("OH") examination/consultation was commissioned by **C's** line manager **DG**, A report was produced dated 9 September 2020 (PP111-113) which advised C was "not yet fit to return to work and that rehabilitation … " … was necessary before return;

9.4.2 A second OH review report was then produced on 9 October 2020 (PP114-116) which states that a further sick note justified C's continuing absence from work until 2 November 2020 (a further 4 weeks) and also advising R to undertake a "stress risk assessment";

9.4.3 Lastly, this second report recommends phased return to work; During this period of time there was a message exchange between C and DG (PP117-118) in which the latter asked C if she can undertake work from home – C takes exception to this arguing it was stress-imposing, but we find she did not complain about this at the time and this enquiry was something a reasonable line manager might reasonably ask so as to support an employee by learning what OH might advise her she could do or could not do; We note in particular that C stated that OH had told her that her anxiety was "not work related" but "related to the diagnosis and (heart) treatment"– (P118);

9.4.4 A third OH report was produced on examination by phone on 9 December 2020 (PP119-121**);** It advised that C was medically fit to start work on a phased return already planned, and that work would be therapeutic;

9.4.5 We do not see any sign of **C** being compelled to return to work more than the by now accepted four days per week, but rather that OH note that return is indeed her wish - (P120) "Joan would like to continue her four days a week"; Further, the report records "She is medically fit to return to her current role with support";

9.4.6 **C** had an appraisal by **DG** 04 March 2021 which records that over the previous 12 months according to C my "support from my Line Manager and Head of Service was excellent under the circumstances – it was demonstrated (that) staff are important" which we find accurately portrays **C**'s attitude to and close cordial relationship with **DG** at that time and in particular its mutuality; It also records she was able to phase return to work satisfactorily despite 4 months of sickness absence; We note everything recording this appraisal evidences **C**'s state of mind and shows she was happy in her role and with relationships at work;

9.4.7 **C** appears to have been concerned (but has not specifically pleaded in aid) that **DG** was looking for a way of getting rid of her

relying on evidence that **DG** was concerned to note during her absence that many emails sent to her had not been answered and some had thus bounced back to senders; On the evidence we cannot conclude that **DG** did actually want to get rid of **C**;

Chronology specific to the claims themselves

9.5 Following the demise of a close family friend in January 2022, **C** was signed off sick on successive dates from 17 November 2021 (PP112 for 2 weeks), from 11 February 2022 (P157 for 2 weeks), from 25 February 2022 (P166 for 2 weeks) - all on the basis of "anxiety and depression"; She remained off work until 25 April 2022 (her absence being extended to four weeks following the conversation which in her kind constituted fundamental breach though we did not agree), but in the meantime she applied successfully for a new post at Faversham Medical Practice the offer of which (P287), after interview on 20 April 2023, she accepted orally on 29 April 2023;

9.6 We note that efforts to maintain telephone contact for welfare purposes between **DG** and her office and **C** during January 2022 were sometimes frustrated by **C** not always being available to fulfil planned calls, nor returning calls (P123), and in some cases were specifically cancelled by C;

9.7 C's main complaints (which often overlap between heads of claim) in chronological order are -

- (**Issues 2.1.1.1 & 5.1.1**) - her assertion there were failures to hold Absence Review Meetings ("ARMs") on 8 and 18 March 2023;

- (**Issues 2.1.1.2 & 5.1.2 & 7.2.2 & 9.1.1**) – she asserts lack of support during her 2022 absence period;

- (**Issues 2.1.1.8 & 6.1.1 & 7.2.2**) - she asserts that she was accused on 18 March 2022 (P197) of accessing for her own purposes the NHS Spine Portal (a data storage system holding confidential information);

- (**Issues 2.1.1.3 & 5.1.3**) - that in a phone conversation on 22 March 2022 **DG** commented on whether her role was viable implying that she was being warned it was under threat;

- (**Issues 2.1.1.6 & 7.1.1**) - these allegations are augmented by further allegations that **C** called **R**'s ER team seeking advice on 17 March 2022 and later on 22 March 2022 she contacted them again, but eventually in the face of what she regarded as lack of meaningful response she had to resort to making a formal grievance to ER by email dated 27 March 2022 (PP206-207);

- (**Issue 2.1.1.4**) – her assertion that sometime around 26 March 2022 **R**'s staff referred to her by an offensive name on a staff whiteboard;

- (**Issue 5.1.4**) – her assertion that **DG** cancelled a meeting scheduled for 30 March 2022 – she implies, but doesn't expressly plead that **DG** did nothing about this matter;

- (**Issues 2.1.1.9 & 6.1.2 & 7.2.3 & 8.2.1 & 8.2.2**) – her assertion that around the beginning of May 2022 "unnecessary burden of work" was placed by **DG** upon her following return to work by requiring her to complete 24 appraisals in 2 weeks and requiring her to attend both MIU sites physically;

- (**Issues 2.1.1.10 & 6.1.3 & 7.2.4**) – her assertion that at the beginning of May 2022 **DG** raised her concerns about **C**'s performance and threatened to put **C** on a Performance Improvement Plan ("PIP") and indeed would have placed her on such plan had she not resigned;

9.8 We find as follows:-

9.8.1 **C** accepted in cross examination when faced with the evidence of P172 that the ARM scheduled for 8 March 2023 was cancelled at her request;

9.8.2 **C** was informed by text message at 15:09 on 17 March 2022 (P411) that the meeting scheduled for the next day was cancelled and gave no reason; However, a meeting message (P200) later that day explained that the reason was because an OH report which was expected had not arrived in time; **DG** explained to us that it had to be fully considered before the meeting was due to start and it was thought preferable to proceed only when it had been considered; In cross examination **C** conceded this point and that at the time she had not queried the cancellation; We find that such cancellations were for good cause and cannot be regarded as unfavourable treatment;

9.8.3 We find persuasive Ms Patterson's submissions about the alleged failures to provide support to **C** and we adopt and find as facts the catalogue of events to which she refers in para 82 of her Submission, the list of dates of **DG**'s and **R**'s staff actions to maintain contact and offer support based on the content of the documents referred to;

9.8.4 We also note that in cross examination **C** accepted that she could have followed up calls and attempts to contact her but did not do so, and that **R'**s staff sometimes faced demands on their time which made maintaining regularity of welfare calls difficult; of particular significance is **C**'s own phone log (P491) which catalogues many (at least 10) calls between **C** and either **DG** or **JW** on behalf of **DG**;

9.8.5 We find that all this evidence shows that there was no absence of effort to provide support by maintaining contact, offering informal

absence meetings, allowing phased return to work, granting further leave, and in fact holding a Return to Work Meeting ("RTW") on 25 April 2022 evidenced by an email confirming the record of the discussion (P274-275) that day;

9.8.6 **C** had been offered and taken up opportunities for OH examinations and provision of advisory reports, she had had a stress risk assessment undertaken for her benefit, and had been offered initial and further counselling when requested; These do not bespeak lack of support but quite the contrary;

9.8.7 We find that **C** was not accused of accessing the NHS Spine Portal (P197) but simply asked to account for why she had been recorded as doing so – "please can you tell me why the spine was accessed by you on the date attached?" Our interpretation of these words is that no turpid motive was imputed/implied nor could reasonably be inferred in this simple request and it is notable that when a complete and full response was given by **C** (P278) it was accepted by R (P278) and C did not raise the issue again other than within the course of this hearing, so the matter died there so far as the parties were concerned;

9.8.8 With regard to the welfare call conversation between **C** and **DG** on 22 March 2023, we note a clear conflict of evidence as to what was said; **DG** says that her superior Victoria Cover "had flagged to me that Joan had concerns about the support she had been provided" in respect of welfare calls during her period of absence and did not feel comfortable raising these concerns with me. I raised this with Joan during the meeting and explained that I was disappointed to hear this given the length and perceived strength of our working relationship". **C** argues that **DG** was saying she was disappointed about the <u>fact</u> that C had raised these concerns to ER and that this coloured/poisoned the relationship;

9.8.9 Conversely, **DG** says that she was expressing disappointment not at the <u>fact</u> that concern had been raised with ER as such, but the fact it had not been raised first <u>with her</u> specifically – we perceive a misunderstanding between the two, but prefer the explanation of **DG** as it is more likely on a balance of probability that that is what she said in the light of what was a well-evidenced long standing cordial relationship between them;

9.8.10 Additionally, in this conversation **C** asserts that she was told specifically that her post was not viable and this caused her great anxiety; **DG** says (para 14 of her statement) that **C** enquired about "how the MIUs were doing and she felt she needed to be candid in her response about the pressure on the team". **DG** was unequivocal during cross examination when she repeatedly categorically denied saying that **C**'s role was unviable or implying it was at risk; We find **C** was mistaken at a time when she was

anxious and depressed, and that **DG**'s clear unequivocal recollection is to be preferred;

9.8.11 **C** took exception to and prays in aid a discovery she made on 26 March 2022 (P206 refers) of the misspelling of her name, in what she regarded as an offensive manner, on a staff whiteboard when she came in from absence to collect some books; We can sympathise with her concern, but we find it is clear on the evidence that **DG** was not herself responsible for this and that she reacted immediately and vigorously, as the tone and contact of her message 30 March 2022 (PP424) to staff bespeaks i.e. making it clear such behaviour is "very unkind and inappropriate and not expected to reoccur in the future", asking for the person responsible to come forward; It is apparent **C** took the view that little more was done about this, but we find that without a clear lead, there was little else **DG** could do; Subsequently on 5 April 2022, **C** emailed **DG** to say she was heartened by **DG**'s reaction to this event (P237) and thus we conclude she accepted that what DG had done was as much as she could do;

9.8.12 **C** was also offered an informal ARM for 30 March 2023 but this offer was not taken up because **C** was again signed off sick from 23 March 2023 (P203); This opportunity could not be advanced by **R** in the circumstances which were not their fault; All this demonstrates support by **R** for **C** even if she does not perceive it through the prism of her anxiety and depression which we accept may have clouded her perception; In particular, we note that of the meeting scheduled for 30 March 2022, though **C** says she was not told of its cancellation, this assertion flies in the face of the evidence (PP469 and 232) showing that she was, the latter in writing from **DG** herself; **DG** arranged for **C** to be advised of its cancellation of the ARM meeting and to be told the reasons, by a welfare call from **JW** to **C** on 31 March 2022; **C** was further supported upon requesting on 14 April 2022 and being granted annual leave to be taken from 2 May 2022, and by agreement being reached to engage in **C**'s phased return to work with full support and co-operation of **DG** and her team; This does not evidence lack of contact nor support but quite the opposite

9.8.13 On 27 March 2022, **C** wrote a detailed message to ER (PP206-207) amounting to the raising of a grievance, which she followed up by several requests for outcomes to happen; Yet we can find on the evidence that **DG** was still trying to maintain contact by scheduling the proposed 30 March 2022 ARM.

9.8.14 When condensed to its essentials, the grievance is only two things i.e. (1) about **C** feeling unsupported, and (2) also being aggrieved about the whiteboard name incident – but we find on the basis of the above findings that both of these were already

being dealt with and addressed by **DG** by the time the grievance was expressed to ER, which in effect makes the grievance an ex post facto rationalisation in **C**'s mind of matters which were already being or had been remedied;

9.8.15 Furthermore, we accept **DG'**s testimony that the first she knew of the raised grievances or of **C**'s email expressing them was when she saw PP206-207 in the course of document disclosure in these proceedings; Thus. we cannot find that anything she did was motivated or caused by the raising of a grievance in formal terms;

9.8.16 On her return to work on 25 April 2022 (not early May as alleged by **C**) **C** faced a standing obligation (not in fact imposed by **DG** but by organisational requirements) to have completed 24 staff appraisals for the year ended 31 March 2022 by 30 April 2022; This was a big expectation, but one which would be important to the staff concerned as pay increases if any were dependent on appraisals inter alia; We accept that in discussion with her superiors, **DG** managed at her behest to gain an extension of time for **C** to 21 May 2022 (P271 refers); **DG** advised **C** of this extension by email 26 April 2022 (PP280-281) and received a response (PP285) saying **C** was happy with this extension; Thus we conclude **C** was not required to complete the appraisals by 30 April as she alleges, but instead expressed satisfaction with the extension of time actually afforded to her; We further conclude that this was yet another example of the support **DG** was providing to **C;**

9.8.17 When **C** returned to work 25 April 2022, (PP274-175 refer) she and **DG** discussed in a combined Sickness Absence Review ("SAR") and Return to Work Meeting ("RTW") **DG**'s growing reasons for concern about **C**'s performance which **DG** had discovered during **C**'s absence; It had already been agreed that she would begin a phased return over several weeks, so she would not be plunged into full work mode immediately; A stress risk assessment was commissioned, and pay was protected during the phased period; **C** was permitted to work from home;

9.8.18 At this meeting, a draft Performance Improvement Plan ("PIP") was discussed, but **DG** agreed not to implement it until expiry of the phased return period a few weeks later; **C** asserts she was threatened with it, and we recognise that due to her mental state she was pessimistic about it; However, we find that the tone and content of the meeting notes (PP274-275) and the PIP itself (357-362) do not bespeak threat nor unreasonableness in explaining what sort of performance improvement was desired by **DG**; **DG**'s meeting record and of the PIP itself were subjects upon which her testimony was unequivocally firm under cross examination despite skilled and exacting probing by Counsel; We do not

accept **C** is right in characterising the discussion about the subject as a threat which in our estimation is an exaggeration;

9.8.19 Rather, we conclude on considering the PIP content that it is a not unorthodox record of a standardised approach to dealing with perceived performance issues by employers in the NHS; We also note it is only in draft, that it contains uncontroversial subject matter, is not unrealistic in its expectations, indeed in cross examination DG accepted that C was already meeting some of its requirements; It contains very many notes of guidance as to **R**'s expectations of an employee; We do not accept that it is anything other than a reasonable expression of what **R** expected of **C**, and that it should not be viewed as unreasonable nor in a sinister light as appears to be **C**'s subjective impression;

9.8.20 **C** also appears to take exception to what she perceived as the acceptance at the end of the phased return period that she was already some way towards meeting the improvement requirements but that the PIP was still going to be implemented despite such improvements; It was not, as it was overtaken by her resignation, and we disagree with her if she seeks to argue that this means the PIP should not have been implemented at all, because we conclude that if a PIP has been discussed, but though there has been some improvement there is still more to expect, then implementing the PIP would not be unreasonable;

9.8.21 On 10 May 2022**, DG** met with **C** to discuss her proposed phased return to work**, DG** says (para 39 of her statement) and we accept that she told **C t**hat she need not work physically at two sites but could communicate with her staff there via Teams video calls – this is borne out by her email to **C** dated the same day (P299); We conclude that there was no requirement imposed to work physically at two sites, but indeed quite the opposite and that the absence of such a requirement during a phased return is another example of **R**'s support for **C**;

9.8.22 On the same date, further discussion was postponed to a meeting scheduled for 18 May 2022 but that meeting was cancelled at **C**'s behest, not **DG**; Eventually the discussion about arrangements on **C**'s return to work continued and the subject of the PIP was discussed, **DG** acknowledging that **C** was already following return demonstrating improvement in most areas covered in the PIP;

9.8.23 Eventually, much of the subsequent relationship between **C** and **DG** was overtaken by the latter having to accept **C**'s resignation, but her continued support for **C** is evidenced by her accepting and agreeing the foreshortening of **C**'s notice period;

9.8.24 **C** argues that all of the particulars of the causes of her complaint were because of her disability; We can find no causal link between any of them and her disability; The acts or omissions complained of were caused by her absence which was the direct cause even though her absence may have been attributable to the conditions which amounted to disability to the extent that her absence was something arising in consequence of disability;

9.8.25 However, we cannot find on the evidence anything which appears remotely to show **DG** and any of her colleagues had in mind treatment of **C** which was objectively unfavourable; Rather we find that everything they did (though perhaps sometimes clumsily and not always effectively) or did not do was intended to support **C** and not to undermine her; We recognise that **C** had a different but subjective point of view which was not objectively supportable; We cannot find that what **DG** and her colleagues did or did not do was objectively unfavourable;

9.8.26 We also conclude that the things **DG** did were for the legitimate purpose of managing **C** as well and as sympathetically as she could even though **C** did not perceive things that way;

9.8.27 Further, we conclude that what **DG** did, though **C** argues that in some cases was unwanted by **C,** we find she did not say so to **DG,** and the grievances she raised with ER were not left unactioned as such, and none of the particulars of her complaints were related to disability as such but to her absence; Though this helps her S15 claim, it materially adversely affects her SS26 and 27 claims;

9.8.28 Though in her particulars and as recorded by EJ England in his List of issues, **C** argues that **R** did not follow its own Sickness Absence Policy, she did not produce any clear evidence of a practice of non-adherence to it; Counsel even submits that **GM** said in evidence that managers have a discretion in respect of how they managed sickness absence; The only criticism aimed at **R** was that **DG** did not meet C face to face during her sickness absence, but this ignores the evidence of the phone log and **DG**'s evidence from which we accept that efforts were continually being made to make and maintain contact with **C**, albeit not of the exact face to face type which **C** would have liked; Simply not being satisfied by other than face to face contact does not amount to no contact and nor is it evidence of a practice of non-adherence to a non-mandatory Policy;

10. On the basis of the facts as found, we preferred the submissions of Ms Patterson, notwithstanding the quality and craft of those of Ms Gyane.

Constructive Dismissal – Statute and Case Law

11. We set out passages from statute and case law relevant to the issues in this case leaving out extracts which are not.

Section 95(1) of the **Employment Rights Act 1996** ("ERA") provides that: -

"For the purposes of this part of this Act, an employee is dismissed by his employer …. only if
(a) the contract under which she is employed is terminated by the employer (whether with or without notice) … (*our emphasis – this is not argued in this case)*
(b) …
(c) The employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct …" (*again, our emphasis*)

12. Section 95 (or its predecessor in identical statutory enactment – Section 57 EPCA 1978) is elaborated and explained by the legally well-known decision of the Court of Appeal, Lord Denning MR presiding, in **Western Excavating (ECC) v Sharp [1978] ICR 221**. In that case Lord Denning said and held as follows:

"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/herself as discharged from any further performance. If he/she does so, then he/she terminates the contract by reason of the employer's conduct and he/she is constructively dismissed" *(our emphases)*

This case is also authority for the proposition that the breach must be the DIRECT and PRINCIPAL cause of the resignation, AND resignation must be timely i.e. prompt in relation to the timing of the event complained of.

13. By reason of our findings above, we are not setting out the full content of **Section 98** ERA since it is unnecessary to do so unless dismissal were or had been proved.

14. The main guidance is set out in the Court of Appeal decision of **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978** at para 55 which advises the posing of 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 resignation?

(2) Has (s)he 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 of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a remain repudiatory breach of the implied term of trust and confidence?

(5) Did the employee resign in response to that breach?"

15. We refer below to the EAT's decision in **Omilaju v Waltham Forest [2005] CA ICR 481**, (which is cited with approval in **Kaur,**) in which Underhill J presiding said:-

"In short, I believe that the Judge was right to find as he did that what occurred in this case was the following through in perfectly proper fashion on the face of the papers of a disciplinary process such a process properly followed, or its outcome cannot constitute a repudiatory breach of contract or contribute to a series of acts which cumulatively constitute such a breach. The employee may believe the outcome to be wrong, but the test is objective, and a fair disciplinary process cannot viewed objectively destroy or seriously damaged the relationship of trust and confidence between employer and employee" (*my emphases again*)

I regard this approach as appropriate when looking at the less confrontational process inherent in a Grievance Procedure and so we take this passage as analogous guidance when examining conduct of such procedure.

Discrimination – Statute and case law

16. Section 15 EqA provides as follows:-

"(1) A person (A) discriminates against a disabled person (B) if

- *(a) A treats B unfavourably because of something arising in consequence of B's disability – (my emphasis of three elements) - and*

- *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim … "*

17. Section 26 EqA provides as follows:-

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

(a) A engages in unwanted conduct related to a relevant protected characteristic - and

(b) the conduct has the purposes or effect of
   a. violating B's dignity or
   b. creating an intimidating hostile degrading humiliating or offensive environment for be

(4) in deciding whether conduct has the effect referred to in subsection (1)(b) each of the following must be taken into account –

(a) the perception of B
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect"

We recognise that this expresses in 4(a) an initial subjective test and then in 4(c) application of an objective test – the tests to be applied conjunctively in that order.

18. Section 27 EqA provides as follows:-

"*(1) a person (A) victimises another (B) if A subjects B to a detriment because*
(a) B does a protected act, or
(b) A believes that B has done or may do a protected act …"

It is common ground in this case that the raining of a grievance on 27 March 2023 was a "protected act"

20. Section 21 EqA provides as follows:-

"(1) A failure to comply with (any of the three S20) requirements is a failure to comply with a duty to make reasonable adjustments … "

19. With regard to the Section 15 claim, the Tribunal has considered **Robinson v DWP [2020] EWCA Civ 839,** in para 55 of which Bean LJ quotes with approval the finding of Underhill LJ in the CA in the case of **Dunn v SSJ [2018**] which itself also approved findings of Simler P in the EAT in the same case. The subject under discussion was remittal of the case to a new Tribunal but Underhill LJ's issues at para 54-55 in **Robinson** are of general importance to interpretation of Section 15. We see we are to "ascertain whether the treatment was unfavourable and was because of the protected characteristic and as such this requires a tribunal to look at the thought process is of the decision makers concerned …" We have done this and make findings above paras 9.8.1 to 9.8.5 inclusive and 9.8.7 to 9.8.9 inclusive.

20. We also take guidance from the CA in **Swansea University v Williams [2015] IRLR 885** that S15 requires proof of "unfavourable treatment" because of something arising in consequence of disability and that in particular the term "unfavourable treatment" is different from the test in S13 i.e. "detriment"; We find persuasive the submissions of Ms Patterson to the effect that … "It means placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person but the threshold is relatively low. It is necessary first to identify the relevant treatment that is said to be unfavourable. A broad view is to be taken when determining what is 'unfavourable' and the treatment at issue is to be measured against an objective sense of that which is **adverse as compared with that which is beneficial**. Persons may be said to have been treated unfavourably if they

are not in as good a position as others generally would be. However, treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous…"

21. The CA in **iForce v Wood UKEAT/0167/18/DA** held that the concept of "arising in consequence of a disability" is very broad and provided that there is a causal connection, there may be several links between the "something" and the underlying disability. However it is clear from statute and case law that in determining whether unfavourable treatment has occurred "arising from" or "in consequence" of an employee's disability, it is necessary to investigate first whether the employer treated the employee unfavourably "because of" an identified "something", and second whether it did that something arising "in consequence of the employees disability"; this is a 2 stage causal test

22. In respect of the SS20-21 claim, we accept that it is trite law according to the decision in **Aderemi v London & SE Railway Ltd [2013] ICR 591** that "substantial" when referring to disadvantage means more than trivial. Before we can consider whether a proposed adjustment becomes necessary, the question for us is whether the disadvantage caused by the PCP constitutes a substantial disadvantage. We refer to our findings at paras 9.8.21, 9.8.22, and 9.8.29 above.

23. Also we note the CA's decision on **Smith v Churchill Stairlifts [2006] ICR 524** that the test of reasonableness of adjustments in the context of S20 is an objective test and is ultimately to be determined by our view of what is reasonable which is what matters. We recognise that what is reasonable is always a matter for our judgement and is not predetermined by any concession made by a party based on subjectivity.

24. We note the EAT's finding in **Burke v College of Law [2011] All ER 33**8 in which it found that sufficient adjustments had been made for a person (in that case) with MS to take a particular test as it related to capability or "competence standard". In that case it held that the necessity to take the test to which the claimant had objected was competence standard related and thus the duty to make reasonable adjustment did not arise, but that if ot did, the adjustments it offered being of themselves reasonable were reasonable for the purposes of Section 20.

25. In **Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation, when it deals with reasonable adjustments, is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. We derive from this the principle that the focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an*

assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing." Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect. However, what these cases show is not that only the adjustments suggested by **C** can amount to reasonable if those offered by **R** can also in terms of potential outcomes be reasonable. Nothing in the final analysis thus points to substantiality of disadvantage in terms of outcomes.

Conclusions – By refence to the Issues - EJ England's para numbers.

A – Constructive Unfair Dismissal

26. (Issue 2.1.1) Leaving aside harassment and victimisation which we deal with specifically below but bearing in mind we find C was not harassed nor victimised as defined by SS26-27 EqA, we conclude that none of the specific allegations in 2.1.1 occurred save for –

26.1 2.1.1.1 (failure to hold absence review meetings) which is adequately qualified by our finding that the meetings didn't occur except for good reason; - and –

26.2 2.1.1.4 (the whiteboard incident) which did happen but was followed up immediately by **DG**;

27. (Issue 2.1.2) We do not find that **C** has established that there was breach of the duty as to trust and confidence by **R**, or that **R** acted in a way calculated to or likely to destroy or seriously damage trust and confidence; moreover we find what R did do or what it did not do were for reasonable and proper cause.

28. (Issues 2.1.3 to 2.1.5 inc) **C** has not established that the Absence Policy was contractual and thus cannot establish breach thereof nor rely on it as a basis for resignation; C has not established breach let alone fundamental breach of contract.

29. (Issues 2.1.6 and 2.1.7 inc) Because **C r**esigned very soon after securing alternative employment, it is reasonable to conclude in the circumstances of this particular case and in the light of the findings above that she resigned not in response to any perceived breach but in response to the fact she had found another job; In any event by returning to work and continuing to fulfil her duties in circumstances in which she says she was entitled not to have to give notice, we find that she affirmed her contract of employment which thus obviates and negates a constructive dismissal claim; It follows that in respect of her other claims the particulars upon which she relies which are dependent upon establishing constructive unfair dismissal also fail in respect of those claims.

30. Accordingly the unfair dismissal claim fails as constructive dismissal is not established and the employment was not terminated for the purposes of S95 ERA by R.

B - Complaint under S15 EqA

31 (Issues 5.1 to 5.1.3 inc) Though we can conclude that whatever happened was because of her sickness absence, having found that the matters complained of have not been established by **C**, we conclude that she was not treated unfavourably in respect of them.

32. (Issues 5.6 and then 5.4 and 5.5) We conclude that **DG** was aware of **C'**s depression and ought to be aware that it could amount to disability and that she was aware at the time when the matters complained of occurred notwithstanding the fact that it is only in the course of these proceedings that **R** has conceded disability as such; however we accept that **DG** was only aware of **C'**s condition and not presented with evidence by **C** supporting all the other elements of the S6 EqA definition of disability; In any event, by reason of our findings of fact above we conclude that whatever **DG** on behalf of **R** did do was an appropriate and reasonably necessary way to achieve the aims of managing the MIUs effectively, which was a legitimate aim. However we recognise that this particular finding is largely redundant in light of our findings that **C** was not treated unfavourably.

33. Accordingly, the Section 15 claim is not made out and fails, but in any event, **R** has the defence provided for under Section 15(1)(b)

C - Complaint under S26 EqA

34. (Issue 6.1) We have concluded that none of the particulars of complaint raised by **C** occurred or that if they did they occurred in the way she asserts; She was not accused of accessing her own medical records, she was not imposed with unnecessary burdens of work in the way she alleges, and she was not threatened as such with a PIP,

35. (Issue 6.2) We accept that had the matters complained of occurred they were conduct which was unwanted by **C** but recognise that this is a subjective point of view and is moderated by the statutory addition of a test of objectivity.

36. (Issue 6.3) We are not satisfied that **C** has established that whatever she complained of related to her disability and therefore this aspect of her claim fails on this ground in any event.

37. (Issues 6.4 and 6.5) We find that whatever **DG** and **R** did was not for the purpose of violating **C**'s dignity nor creating an intimidating, hostile, degrading, humiliating, or offensive environment for her (the effect); Even though we have taken account of her perception, in the other circumstances of the case as found we can conclude it is not reasonable for **C** to take the view that the conduct complained of had such effect.

D - Complaint under S27 EqA

38. (Issue 7.1) We accept that it is clear and proved that **C** raised concerns with ER on 27 March 2022. This was clearly and it is common ground accepted that it was a protected act for the purposes of S27.

39. (Issue 7.2) Although raising issues of **C**'s performance and proposing to implement a PIP as opposed to threatening the same, we have found that all of the allegations upon which this head of claim is founded did not happen or did not happen in the way in which **C** asserts.

40. (Issue 7.3 to 7.5 inc) that's about finding at paragraph 36 we cannot conclude that **C** was subjected to detriment or that it was because of or whatever **DG** did was not because of a protected act. Accordingly this complaint also fails.

E – Complaint under SS20-21 EqA

41. (Issue 8.1) We conclude that the **DG** was aware of **C**'s mental condition at all relevant times, but she did not have evidence of the other elements of the S6 EqA definition of disability, and she did not know until these proceedings that C's condition is a disability which does satisfy the section 6 definition.

42. (Issues 8.2 and 8.3) the PCPs relied upon by **C** have not been established and therefore it cannot be said that any aspect of them put **C** at a substantial disadvantage; in any event with regard to the appraisals we have found that time was extended for their completion and no travel was required, the we can accept that a more stringent time limit had been imposed and travel had been required it is possible that **C** would be more likely to be sick because of her mental condition if such a PCP had been in practise; however we find that it was not.

43. (Issues 8.4 and 8.5) in the light of the above findings the question of whether **R** knew or could reasonably have been expected to know that **C** was likely to be placed at disadvantage becomes redundant; in any event we have found that these steps which **C** suggested be taken to avoid any disadvantage had indeed been taken by **DG** on behalf of **R**, thus showing that they were reasonable steps but that they had acted reasonably and that they had not failed to take those steps even though there was no obligation upon them under section 20 to do so.

44. Accordingly this claim also fails.

Limitation – Issue 1

45. Counsel both confirmed that though limitation is a jurisdiction issue and is usually dealt with as a preliminary matter, because the evidence relative to limitation is so intertwined with the evidence in the substantive pleaded issues of the case, limitation as an issue to be determined could best fall to be dealt with at the same time

or just after the substantive issues, so that the risk of testing evidence at full hearing would not be prejudiced by hearing part of it at a prior PHR.

46. The SS20-21 EqA complaints are by their nature ongoing right upto the last day worked which was 7 August 2022. We noted that some of the other specific particulars of complaint pre-date 5 May 2022 and therefore conclude that even taking account of the Early Conciliation process, the claims relating to such events were presented to the Tribunal 11 October 2022. Thus such complaints are potentially out of time.

47. We did not receive evidence as to it not being reasonably practicable for C to raise her claim of unfair dismissal within 3 months of 5 May 2022, and nor did we receive evidence that she presented her claim within a reasonable further period of time after expiry of the time limit for doing so. In relation to the EqA claims we did not receive evidence that such claims were presented within such further period of time after expiry of the primary time limit as we could find just and equitable. However, we can readily see that all the allegations form part of a continuum extending over a period of time (with connecting features linking them as described by Mummery LJ in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA**) running from February 2023 right through to **C's** last day of working 7 August 2022.

48. Thus we do not regard the claims as out of time and consider that in any event C is entitled under both respective statutory provisions to extension if they were out of time.

49. The claims do not fail on the basis of limitation but on their own merits or otherwise.

ANNEX

The Issues as identified by EJ England – PHR 17 August 2023
Including particulars pleaded by the Claimant

1. ***Time limits***

    1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 05/05/22 may not have been brought in time.

    1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

        1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
        1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 it was accepted by Counsel for R that limitation issues depended on the same evidence as the primary claim issues and this would necessitate not treating limitation as a preliminary issue.

2. ***Unfair dismissal***

2.1 Was the Claimant dismissed?

2.1.1 Did the Respondent do the following things:

2.1.1.1 Failure to hold absence review meetings on 8th and 18th March 2022;

2.1.1.2 Failure to provide support to the Claimant in an effort to return her to work;

2.1.1.3 Ms Dawn Gaiger on 22 March 2022 in a telephone call commenting on whether the Claimant's role was viable due to her absences;

2.1.1.4 At some point before 26 March 2022 referring to the Claimant as "Joan Hogbog" on a Notice Board;

2.1.1.5 Cancelling an absence meeting on 30th March 2022 without notifying the Claimant;

2.1.1.6 Employee Relations failing to take appropriate action to progress the Claimant's complaint made on 27 March 2022, such steps should have included commencing an investigation and communicating with the Claimant;

2.1.1.7 Around the start of May 2022, the Claimant being advised by Ms Dawn Gaiger that the Claimant had "upset" her manager (Ms Gaiger) due to raising the issue with Employee Relations;

2.1.1.8 Around the start of May 2022, Ms Gaiger accusing the Claimant of accessing her own medical records on the NHS Spine Portal;

2.1.1.9 Around the start of May 2022, unnecessary burden of work being placed on the Claimant following her return from sick leave by requiring the Claimant to complete 24 appraisals in 2 weeks and requiring to go physically to both MIU sites on each shift;

2.1.1.10 Around the start of May 2022, Ms Gaiger raising issues of the Claimant's poor performance and

threatening to put her on a PIP and/or placing her on a PIP;

2.1.1.11 The acts of victimisation that pre-date the resignation on 09/06/22 as set out below;

2.1.1.12 The acts of harassment that pre-date resignation on 09/06/22 as set out below.

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 Alternatively or in addition, was there a term that required the Respondent to comply with its sickness absence policy?

2.1.4 If so, did the actions above breach this term?

2.1.5 If so, was this a fundamental breach of contract?

2.1.6 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

2.1.7 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract? The Respondent relies upon 'SOSR', specifically the breakdown in working relationships between the Claimant and Respondent.

2.3 Was it a potentially fair reason?

2.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

3. ***Remedy for unfair dismissal***

NB – Not considered in the light of the Judgment

4. ***Disability***

4.1 The Claimant relies on a disability of coronary artery disease, anxiety and depression (cumulatively and separately). The Respondent accepts that the Claimant was disabled by virtue of coronary artery disease and anxiety and accepts knowledge. The Respondent disputes whether the Claimant was disabled by virtue of depression and knowledge.

4.2 Did the Claimant have a disability by reason of depression as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.2.1 Did s/he have a physical or mental impairment: depression?
4.2.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
4.2.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
4.2.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
4.2.5 Were the effects of the impairment long-term? The Tribunal will decide:
4.2.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
4.2.5.2 if not, were they likely to recur?

5. ***Discrimination arising from disability***

5.1 Did the Respondent treat the Claimant unfavourably by:

5.1.1 Failing to hold absence review meetings on 8th and 18th March 2022 due to her period of absence;
5.1.2 Failure to provide support to the Claimant in an effort to return her to work;
5.1.3 Ms Dawn Gaiger on 22 March 2022 in a telephone call Commenting on whether the Claimant's role was viable due to her absences;
5.1.4 Cancelling an absence meeting on 30th March 2022 without notifying the Claimant due to her absence;
5.1.5 Constructively dismissing the Claimant? The issues above regarding whether the Claimant was dismissed will need to be determined.

5.2 Did the following things arise in consequence of the Claimant's disability:

5.2.1 the Claimant's sickness absence between 11 February 2022 and 24 April 2022?

5.3 Was the unfavourable treatment because of any of those things?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were maintaining a fully functioning and effective workforce, although they may amend this in the amended ET3.

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the Claimant and the Respondent be balanced?

5.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability of depression? From what date?

6. ***Harassment related to disability***

6.1 Did the Respondent do the following things:

6.1.1 Around the start of May 2022, Ms Gaiger accusing the Claimant of accessing her own medical records on the NHS Spine Portal;
6.1.2 Around the start of May 2022, unnecessary burden of work being placed on the Claimant following her return from sick leave by requiring the Claimant to complete 24 appraisals in 2 weeks and requiring to go physically to both MIU sites on each shift;
6.1.3 Around the start of May 2022, Ms Gaiger raising issues of the Claimant's poor performance and threatening to put her on a PIP and/or placing her on a PIP;
6.1.4 Constructively dismissing the Claimant? The issues above regarding whether the Claimant was dismissed will need to be determined.

6.2 If so, was that unwanted conduct?

6.3 Did it relate to disability?

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

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

7. ***Victimisation***

7.1 Did the Claimant do a protected act as follows:

7.1.1 Raised concerns with Employee Relations on 27 March 2022?

7.2 Did the Respondent do the following things:

7.2.1 Around the start of May 2022, the Claimant being advised by Ms Dawn Gaiger that the Claimant had "upset" her manager (Ms Gaiger) due to raising the issue with Employee Relations
7.2.2 Around the start of May 2022, Ms Gaiger accusing the Claimant of accessing her own medical records on the NHS Spine Portal;
7.2.3 Around the start of May 2022, unnecessary burden of work being placed on the Claimant following her return from sick leave by requiring the Claimant to complete 24 appraisals in 2 weeks and requiring to go physically to both MIU sites on each shift;
7.2.4 Around the start of May 2022, Ms Gaiger raising issues of the Claimant's poor performance and threatening to put her on a PIP and/or placing her on a PIP;
7.2.5 Constructively dismissing the Claimant? The issues above regarding whether the Claimant was dismissed will need to be determined.

7.3 By doing so, did it subject the Claimant to detriment?

7.4 If so, was it because the Claimant did a protected act?

7.5 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

8. ***Reasonable Adjustments***

8.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability of depression? From what date?

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

8.2.1 A requirement to complete 24 appraisals in 2 weeks;
8.2.2 A requirement to attend each MIU site physically; and
8.2.3 A practice of not following the Respondent's sickness absence policy.

8.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:
8.3.1 The appraisals and travel required an excessive amount of work/energy that caused her undue stress and exacerbated her disability.
8.3.2 The Claimant was more likely to be sick due to her disability and therefore rely on the protections and structure of the policy, which was denied to her by the PCP.

8.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

8.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

8.5.1 The opportunity of a phased return;

8.5.2 Support in her return to work by regular meetings;

8.5.3 An allowance of greater time to complete the required appraisals;

8.5.4 An allowance not to travel for a period during a phased return;

8.5.5 Adherence to the sickness absence policy.

8.6 Was it reasonable for the Respondent to have to take those steps and when?

8.7 Did the Respondent fail to take those steps?

9. ***Remedy for discrimination or victimisation***
NB – Not considered in light of the Judgment

Employment Judge R S Drake
Signed 16 July 2024

Sent to the parties on
Date: 17 July 2024

Note
Reasons for the judgment have not been given orally at the hearing; Therefore, written reasons have been provided. . No written request need be presented by either party hereafter.

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