



EMPLOYMENT TRIBUNALS

Claimant: Ms K Burton

Respondent: University Hospitals of Derby and Burton NHS Foundation Trust

Heard at: Nottingham

On: Monday 4, Tuesday 5, Wednesday 6 January 2021 and
Monday 8, Tuesday 9 and Wednesday 10 February 2021

Before: Employment Judge Hutchinson

Members: Ms F French
Mr J Hill

Representatives

Claimant: In person

Respondent: Mr A Sugarman of Counsel

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows: -

1. The claim of unfair dismissal fails and is dismissed.
2. The claims of disability discrimination fail and are dismissed.
3. The claim of suffering detriment for making protected disclosures fails and is dismissed.
4. The claim of breach of contract/unlawful deduction from wages fails and is dismissed.

REASONS

Background to this hearing

1. The Claimant presented her claim to the Tribunal on 13 September 2019. She had been employed by the Respondents at the Royal Derby Hospital in Derby as a Senior Therapy Radiographer. She commenced her employment on 15 July 2013.

2. Following her step father's death, the Claimant was diagnosed with depression and it will be seen from the findings of fact that there were several periods of absence from work.

3. In December 2017 the Claimant was formally diagnosed with borderline personality disorder and complex post-traumatic stress disorder and the Respondents accept that from that time they were aware that the Claimant suffered from a disability.

4. The Claimant claims that she raised issues of health and safety in the Radiotherapy Department both towards the end of 2018 and in March 2019 and says that she suffered detrimental treatment thereafter.

5. The Claimant commenced her final period of absence on 2 April 2019 and subsequently attended a welfare meeting on 11 April 2019 and a long-term absence review meeting on 16 May 2019. She says that the way that she was treated at these meetings and particularly the final meeting amounted to the last straw which caused her resignation with immediate effect on 22 May 2019. The Respondents held a meeting with the Claimant on 7 May 2019 when they tried to persuade her to withdraw her resignation and having been unable to do so accepted that resignation with effect from that date. She was paid up to that date but not for her notice pay.

6. The Claimant claims the following: -

6.1 Constructive unfair dismissal under section 94 Employment Rights Act 1996 (ERA).

6.2 Direct disability discrimination under section 13 Equality Act 2010 (EQA).

6.3 Harassment relating to disability under section 26 EQA.

6.4 Failure to make reasonable adjustments under sections 20 and 21 EQA.

6.5 Discrimination arising from disability under section 15 EQA.

6.6 Whistleblowing detriment under section 43B of the ERA.

6.7 Unlawful deduction of wages/breach of contract in respect of her final payment and a failure to pay her notice pay.

7. Originally the case was listed for 3 days commencing 4 January 2021 but on the first morning it became apparent that there would be insufficient time deal with the matter. The Tribunal spent the first day reading and then heard evidence over 4 days and the final day was for submissions and the Tribunal reaching its conclusions. In view of time constraints, I was only able to give the parties a summary of our reasons orally and agreed to provide these written reasons as soon as possible.

The issues

8. At the commencement of the hearing we agreed the issues that the Tribunal would have to determine. These were: -

8.1 Constructive unfair dismissal claim: -

8.1.1 Has the Claimant established as a matter of fact the conduct relied upon below at (a) to (h) and if so, by reason of the cumulative effect of that conduct culminating in the alleged final straw as set out at (h). Has the Respondent acted without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence? -

(a) in the period 26 June 2017 to 24 July 2017 by: -

(i) failing to provide a 3-week period during which the Claimant was working in a supernumerary position, instead requiring her to return to clinical duties as a Senior Radiographer within 3 days;

(ii) failing, almost every day, to provide sufficient colleagues to cover the Claimant so as to allow her to take breaks;

(iii) failing to provide adequate training to the Claimant after she returned from her sabbatical;

(iv) failing to provide competent colleagues, namely colleagues who had received sufficient training on the new equipment.

(b) In the period between 24 July 2017 and 19 September 2017 by her Line Manager failing to contact the Claimant until she was invited to an absence review meeting on 9 September 2017;

(c) in the period 23 March 2018 until March 2019 by: -

(i) failing to address concerns around safety and incompetent staff raised by the Claimant. The Claimant says that on several occasions she raised with her Team Leader and with Sarah Clements and Lorna McDonald about other Radiographers' fitness to practice;

(ii) failing to address the Claimants additional needs as discussed in the return to work meeting in February 2018. She complains that the issues that she raised in her stress risk assessment subsequently submitted were also not addressed.

- (d) In the period January 2019 to April 2019 by: -
- (i) Sarah Clements telling the Claimant she was causing problems by trying to address training issues and staff incompetency;
 - (ii) responding to concerns raised by staff including the Claimant through the “staff suggestions” box in an unhelpful and aggressive way when Lorna McDonald and Sue Marriott said in a staff meeting that the concerns were not welcome nor would they be addressed;
 - (iii) failing to listen to or take seriously concerns raised by the Claimant through the Respondent’s freedom to speak up guardian.
- (e) In the period after 26 March 2019 by failing to address the occupational health report dated 26 March 2019 with the Claimant later on in the week it was written or the beginning of the following week;
- (f) on or after 1 April 2019 by Lorna McDonald failing to address concerns raised by the Claimant in an e-mail to her dated 1 April 2019;
- (g) at and after the welfare meeting on 11 April 2019 by: -
- (i) focussing on the Claimant’s absence and reasons why it was not possible to implement the recommendations set out in the occupational health report;
 - (ii) Candida Capaldi telling the Claimant that because she had exceeded trigger points she would go onto the long-term absence procedure which could result in redeployment or reference to a panel for dismissal;
 - (iii) failing to implement the recommendations made by occupational health in the 26 March 2019 report;
 - (iv) sending the Claimant, a letter following the meeting which was not accurate.
- (h) At and after 16 May 2019 long term absence meeting which the Claimant avers as the “last straw” by: -
- (i) Candida Capaldi telling the Claimant that if she did not return to work she would be dismissed and if she was not well enough to return to work maybe she should consider resigning so that she was not sacked and that way would not be looked upon badly if she were to apply for a position in the future;

(ii) asking questions about the medication the Claimant was on and the management of her condition;

(iii) sending the Claimant, a letter following the meeting which was not accurate.

8.1.2 If the Respondent did commit a repudiatory breach of contract did the Claimant affirm the contract?

8.1.3 If the Respondent did commit a repudiatory breach of contract did the Claimant resign in response to the breach?

8.1.4 If the Claimant was constructively dismissed did the Respondent:-

(a) Have a potentially fair reason for dismissal;

(b) was the dismissal fair within the meaning of section 98 ERA.

8.1.5 If the Claimant's dismissal was unfair would the Claimant have resigned or been dismissed in any event?

8.1.6 Did the Claimant unreasonably fail to follow the ACAS Code of Practice on disciplinary and grievance procedures by failing to lodge a grievance about the conduct upon which she now relies as constituting a repudiatory breach of contract?

Direct disability discrimination

9. Has the Claimant established any of the following as a matter of fact and if so does such conduct constitute less favourable treatment: -

(a) In the period 23 January 2018 to March 2019 whenever the Claimant asked for help or reasonable adjustments did Sarah Clements refuse them without consideration when those with physical impairments were permitted to have reasonable adjustments;

(b) in February 2019: -

(i) when the Claimant was late into work one morning due to traffic on the A38, did Sarah Clements ask her, but no one else, if she had filled in a time sheet and told the Claimant she wanted to check as you have taken a lot of time off recently;

(ii) Sarah Clements questioning the Claimant about free time she had taken to attend a therapy appointment and said to the Claimant "Lorna asked me to check it was for therapy and not another Social Services meeting" when others were not questioned about taking time off for hospital appointments.

(c) In the period 26 March 2019 to 1 April 2019 Sarah Clements failing to discuss or put in place adjustments recommended by Occupational Health;

(d) on 11 April 2019: -

(i) Sarah Clements telling the Claimant that a long rotation into data input “would not be happening”. It was “not fair on other staff”. That it was “just as stressful” and the Claimant could “just as easily make a mistake there”;

(ii) the failure to allow the Claimant to take regular breaks so that she was not treating patients without a physical or mental pause, something that was done for others with physical ailments;

(iii) Sarah Clements and Candida Capaldi questioning the Claimant about her medication and withdrawal side effects despite the fact the Claimant had already discussed it with Occupational Health.

(e) On 16 May 2019 Sarah Clements and Candida Capaldi questioning the Claimant on her medication, therapy and mental illness despite her already having discussed it with Occupational Health.

10. If so was that less favourable treatment because of the Claimant’s disability or disabilities namely anxiety and depression, borderline personality disorder and complex post-traumatic stress disorder?

Harassment related to disability

11. Has the Claimant established that the Respondent engaged in the following conduct: -

(a) On multiple dates between October 2018 and March 2019 Sarah Clements asked the Claimant after a therapy session if she was okay in front of lots of members of staff in the treatment unit and if the Claimant responded she was, Sarah Clements would ask if she was sure in front of others, Sarah Clements would say “come and see me later” and would remind the Claimant if she wanted to “talk anything over, she would be in her office”;

(b) in February 2019: -

(i) when the Claimant was late into work one morning due to traffic on the A38 Sarah Clements asking her (but no one else) if she had filled in her time sheet and told the Claimant she wanted to check “as you have taken a lot of time off recently”;

(ii) Sarah Clements questioning the Claimant about “free time” she had taken to attend a therapy appointment and said to the Claimant “Lorna asked me to check it was for therapy and not another Social Services meeting” when others were not questioned about taking time off for hospital appointments.

12. If so was such conduct related to the Claimant’s disability or disabilities?

13. If so was the conduct unwanted?

14. If so did the conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive working environment for the Claimant having regard to:-

- (a) the perception of the Claimant;
- (b) the other circumstances in the case and;
- (c) whether it is reasonable for the conduct to have had the effect alleged.

Reasonable adjustments

15. Did the Respondent operate the following provision, criterion or practice ("PCP"): -

"The requirement to work 7.5-hour days on a shift basis with no certainty regarding breaks in a stressful working environment where the Claimant was required to spend the entirety of the shift treating patients and not rotating with other staff to ensure some time out of the treatment room to do other none clinical tasks."

16. If so did the PCP put the Claimant at a substantial disadvantage because:-

- (a) A lack of certainty regarding a break caused her stress;
- (b) she found that treating patients all day was physically and mentally draining and she needed a "brain break";
- (c) a lack of adequate staffing caused her heightened anxiety and panic as there was no one to cover her to allow her a break to use the therapy techniques she was learning;
- (d) being with patients if she began to panic or worry would cause her more anxiety;

17. If so did the Respondent fail: -

- (a) To allow the Claimant to take breaks at a set time or giving the Claimant priority to take a break;
- (b) to give the Claimant an opportunity to swap out of treating on a regular basis and instead pursue none clinical tasks;
- (c) to rotate if (a) and (b) above were not possible, the Claimant into a non-clinical area such data input or medical physics;
- (d) to provide the Claimant with the opportunity to work flexibly on a temporary basis so that she did not have to return to work following a therapy appointment.

18. If so were any of the matters in the preceding paragraph reasonable adjustments the Respondent ought to have made to avoid the substantial disadvantage?

Discrimination arising from disability

19. Has the Claimant established any of the following as a matter of fact: -
- (a) On 11 April 2019 Sarah Clements and Candida Capaldi talked to the Claimant in a way that made her stress, anxiety and panic attacks worse;
 - (b) on 16 May 2019 Sarah Clements and Candida Capaldi: -
 - (i) failed to adjourn the meeting or recommend a break despite the Claimant being upset, panicked and struggling to catch her breath.
 - (ii) instead of pausing or explaining matters reasonably spoke to the Claimant abruptly with phrases like “if you don’t come back to work then you will be referred to a panel for dismissal” and “maybe you aren’t well enough to be in work right now so it might be better if you resign rather than be sacked”;
 - (iii) asked about the Claimant’s medication, why she was changing it and who advised it.

20. If so did that constitute unfavourable treatment?

21. If so was that unfavourable treatment because of something arising out of the Claimant’s disability or disabilities, namely: -

- (a) Her absence levels;
- (b) her stress and anxiety;
- (c) the fact she suffered from panic attacks.

22. If so, was the Respondent’s treatment of the Claimant a proportionate means achieving a legitimate aim or aims, namely: -

- (a) Trying to manage staff absence in order to achieve acceptable levels of attendance;
- (b) trying to support its absent employees’ return to work;
- (c) providing an efficient and cost-effective service to patients.

Whistleblowing detriments

23. Did the Claimant disclose information to the Respondents within the meaning of section 43B of the ERA as follows: -

- (a) In the period January 2019 to April 2019 did the Claimant: -
 - (i) make several complaints to Joanne Marshall and Sarah Clements regarding both her ability and the Department’s ability to provide a safe working environment for colleagues and patients;

- (ii) act as the main spokesperson for the team, taking a list of concerns to freedom to speak up guardian Allison Bell in March 2019 relating to staffing, errors, confidentiality breaches.

24. In relation to each alleged disclosure was the disclosure a qualifying disclosure within the meaning of section 43B ERA in that the Claimant held a reasonable belief that: -

- (a) The disclosure was made in the public interest;
- (b) the information disclosed tended to show one or more of the matters set out in section 43B of the ERA.

25. Did the Respondent subject the Claimant to any of the following detriments: -

- (a) Constantly belittling the team by telling them their concerns were unhelpful;
- (b) speaking to the team in a way that amounted to bullying or was intimidating and under minding;
- (c) telling the Claimant, she was causing a problem and doing nothing about her concerns;
- (d) failing to make reasonable adjustments as set out above.

26. If so, did the Respondent subject the Claimant to a detriment or detriments on the ground that she had done a protected act contrary to section 47B(1) of the ERA?

Unlawful deduction from wages/breach of contract

27. Has the Respondent made an unlawful deduction from wages and/or breached the Claimant's contract by:-

- (a) Failing to pay her correct wages to the date of termination;
- (b) failing to pay the Claimant properly for accrued but untaken holiday at termination;
- (c) failing to pay her notice pay.

Evidence

28. The Tribunal heard evidence from the Claimant and from the following witnesses for the Respondent : -

28.1 Sarah Clements, Superintendent Radiographer and the Claimant's line manager.

28.2 Lorna McDonald, Principal Treatment Superintendent and line manager of Ms Clements.

28.3 Candida Capaldi, Senior HR Adviser.

29. There was an agreed bundle of documents which was added to during the hearing and where I refer to page numbers it is from that bundle.

30. Most of the events that the Tribunal was dealing with occurred more than two years ago and some of the matters that the occurred almost four years ago and the Tribunal acknowledged the difficulty of the witnesses in recalling precisely what happened particularly when this was not documented at the time.

31. Where there was a conflict of evidence the Tribunal preferred the evidence of the Respondent's witnesses. Their evidence was clear, credible and cogent and was consistent generally with the documents that were created at the time. They were all experienced professionals whose evidence was plausible.

32. That could not be said about the Claimant's evidence. We were satisfied that her view of events was tainted by the prism in which she had looked back on those past events. Mr Sugarman used the phrase "through black glasses" which is the opposite of "rose tinted spectacles".

33. The Claimant was clearly aggrieved by what had happened to her and she had been very ill at that time and had subsequently reinterpreted events; not seeing things as they were at the time.

34. An example of this was the difference between the account given in her resignation letter to the account that she gave in her witness statement.

35. Her resignation letter made no mention about feeling that she was very upset and that she was not offered a break. Whereas she complains about this in her witness statement.

36. Another example is that in her statement she says that Candida Capaldi told her that she would be dismissed or that she should consider resigning so she was not sacked. In her resignation letter she says something entirely different namely that if she:

"Did not return to work in the next two weeks, then the position would go before a panel and I was threatened with the possibility of dismissal".

37. Furthermore, it is the Claimant's contention that she should have been offered another role but in her resignation letter she says something completely different namely:

"You have offered me an alternative role but that is not acceptable. I want to do my role with my employer's support as is my right."

38. Another example was her contention about a conversation with Lorna McDonald in July 2017. She was adamant that she had gone home early on Monday 17 July 2017 and that when she had returned the following morning she had spoken to Lorna McDonald about the reason that she felt that she needed to leave work the previous day. She could not have had that conversation because Lorna McDonald was away in Italy on holiday during that period.

39. A final example of issues with the Claimant's memory of what happened was when the Tribunal called Candida Capaldi to give evidence. The Claimant was not at all sure that the person who was giving evidence was the person who attended those two meetings.

The facts

40. The Claimant commenced employment with the Respondent as a Therapy Radiographer on 15 July 2013. She became Senior Therapy Radiographer in April 2015. She was line managed by Sarah Clements who is a Superintendent Radiographer since the end of 2014.

41. The Claimant was absent on three separate occasions in 2014. In January 2015 her step father died after a long period of illness. Ms Burton was very close to him and took a week off work when he died and then a further three days bereavement leave a few weeks later for the funeral.

42. Ms Burton was then absent from work on four occasions within six months in 2015. She was referred to Occupational Health on 17 December 2015 (pages 122-123). The report said that Ms Burton had been prone to minor ailments and an emotional reaction to her bereavement. All ailments though appeared to be resolved.

43. After a further series of absences in 2016 Occupational Health reports were obtained on 23 March 2016 (page 139) and 21 September 2016 (page 176).

44. Her absences led to a stage 2 absence review meeting which was conducted on 14 October 2016 (page 183-184). The Claimant had been off sick on four separate occasions since March 2016 for a mixture of issues relating to stress and anxiety and gynaecological problems. None of these related to any work issues. The Claimant had already asked for and been granted a career break for her to go travelling with her partner and it was agreed that when she returned in early July 2017 she would start at the beginning of the Trust's management of health and attendance policy meaning that stage 1 triggers would be reached after 10 days absence or 4 episodes in a 12-month period. The Respondents could have suspended Ms Burton's monitoring period but they agreed not to do this and decided to give her a fresh start when she returned.

45. During this career break there had been changes in the department. This included an equipment upgrade and a resultant change in the working procedures.

46. The Claimant returned to work on 26 June 2017. It was decided that she should have a three-week supernumerary period and she received training and support on the equipment from those who were working on the new machines.

47. Staff are entitled to a 20-minute paid break in a six-hour shift but in the department, they allow staff to take a 30-minute break in addition to the 20 minute paid break. Because of the nature of the work staff cannot take their breaks at the same time. They must be taken around the service needs of the department. Staff always have their 30-minute unpaid lunchbreak and if any break gets missed it would be the discretionary 20-minute paid break. Those working on the machines would be expected to manage their day so that they could take breaks at appropriate times.

48. Ms Burton had only returned for four weeks when she commenced a sickness absence on 24 July 2017. This was due to a “depressive episode” (page 189).

49. Ms Burton was reviewed by Occupational Health on 14 August 2017 (page 200-2001). It is Recorded that, “Her symptoms were triggered by a mixture of things work and personal, but mostly work”. She was unhappy with the Department. She referred to feeling unsupported. The report did not identify her areas of concern. It was said that she was unlikely to be able to undertake her usual work at that time and it was suggested that a stress risk assessment should be performed.

50. Ms Clements contacted Ms Burton on 31 August 2017 (pages 205-206). She was sent the stress risk assessment on the same day (page 204).

51. Lorna McDonald also contacted Ms Burton on 1 August 2017 as to how she was (page 190).

52. The Claimant completed her stress risk assessment on 6 September 2017 (pages 208-219). She did express a concerns about work pressures, an inability to take breaks, a lack of cover, a feeling of not being listened to, new systems and processes being put in place, as well as the need to look after her mother after her step father had died.

53. There was a long-term review meeting on 19 September 2017 and the Claimant continued to be off sick. She was told that there would be a further referral to Occupational Health in view of the contents of her sick assessment and they discussed the Occupational Health report from 14 August 2017. Ms Burton was still awaiting further recommendations from her psychological assessment which had taken place on 13 September 2017 and it was agreed that on receipt of the psychological assessment she would be referred back to Occupational Health with all the necessary information. They discussed briefly the causes of her absence and the issues that she was having at work and reassurance was given that the training and workload pressures had now subsided. It was acknowledged that before her absence there had been unprecedented referrals which had been difficult for the whole department. A letter was sent to her after the meeting confirming its contents on 22 September 2017 (pages 222 – 223).

54. They agreed that Ms Clements would call Ms Burton on a weekly basis and in October this was changed to fortnightly.

55. There was a further call on 3 November 2017, an exchange of texts on 9 November 2017 and Ms Burton called Ms Clements on 14 November 2017 and 28 November 2017. The notes of these conversations and exchanges and her sick note are at pages 229 – 233.

56. On 14 December 2017 Ms Burton attended Occupational Health. The report is at page 239-240. It confirms that Ms Burton had been hospitalised in September following a mental breakdown and that she had been diagnosed with borderline personality disorder, post-traumatic stress disorder, depression and anxiety. The respondents accept that from this time they were aware that the claimant suffered from a disability. The Claimant was not fit to return to work.

57. Ms Clements met with the Claimant on 23 January 2018 for a long-term

review meeting. At the meeting they discussed the use of a traffic light system and reduced hours. The traffic light system allowed Ms Burton to use different colours to indicate the type of day she was having. This option was left with the Claimant to think about but the Respondent never heard back from her. The onus was on her to tell Ms Clements or someone else how she was coping. Ms Clements reassured Ms Burton not to worry about her absences. A letter was sent confirming the outcome of the meeting on 13 February 2018 (pages 248-250).

58. Ms Burton returned to work on 27 February 2018 and shortly after Ms Clements agreed that she would have reduced hours of work.

59. On 3 April 2018 Ms Burton completed her stress risk assessment (pages 252-263). It is very positive saying that she had no problems with her shifts because “work has been very flexible with working times and patterns”.

60. She went on to say that she had been allowed to readjust to the working environment and that she had been encouraged to be involved. She also said that during her phased return the support that she had been offered “has been brilliant”. She said:

“I feel any concerns have been taken seriously and addressed and I have been able to work at a pace I am comfortable with.”

61. When she had returned to work she had started off on 50% of her hours and these had been increased gradually. Ms Burton was to decide which days and hours she felt able to work and she was supernumerary during this period. If she needed to go home she could do so.

62. By the end of the phased return Ms Burton realised that she could not work full time and decided to work 3 days a week i.e. 22.5 hours.

63. Ms Burton continued to have frequent, short term absences. These absences between May 2018 and December 2018 are documented at pages 264-282. These were on,

4 May 2018

29 June 2018

6 – 20 August 2018

9 October 2018

19 October 2018

30 November – 4 December 2018

64. We are satisfied that Ms Burton had regular contact with Ms Clements but did not raise any concerns to Ms Clements or indeed anyone else about patient safety or any other concerns during this period.

65. Between September 2018 and March 2019, the Department did have an influx of unprecedented referrals (pages 300 T-U). It was an extremely busy period for the whole department and staff were working long hours and felt under pressure. The staff survey that we have seen ultimately shows these pressures. As a result of these concerns an action plan had been put in place from the focus groups that were held in the Department.

66. On 14 January 2019 Ms Clements conducted a return to work interview (page 285) following a further one-day absence on 11 January 2019. Although the triggers for stage 2 of the management of health and attendance policy had

been met no further action was taken at that stage. This was because it was recognised that the treatment that Ms Burton was having was difficult and was causing her increased anxiety which was manifesting itself in physical symptoms.

67. Ms Burton was absent again or part of her shift on 21 January 2019 and again on 22 January 2019. There was a further return to work interview on 29 January 2019 (page 288). Ms Clements remained supportive to Ms Burton. She was then absent again on 8 February 2019.

68. These absences had triggered the short-term absence policy and there was a referral to Occupational Health made on 11 February 2019. The referral is at pages 293 – 7.

69. In February 2019 Ms Burton was late to work due to traffic on the A38. Ms Clements approached Ms Burton and asked whether she had filled in the appropriate “time owed in lieu” sheet to reflect the fact that she had been late. This was an entirely appropriate procedure and she wanted to ensure that her being late due to traffic did not count against her as it was outside her control. It was not inappropriate for her to ask Ms Burton about the reason for her being late as her team leader.

70. The following week Ms Burton had time off to attend a therapy appointment which was allowed under the Department’s policy. She was paid to attend these. Ms Burton arrived for work later that morning and Ms Clements asked her where she had been as she wanted to check that Ms Burton was okay and needed to distinguish between whether the absence was due to a therapy session or a Social Services meeting which would not have been paid. There was nothing unreasonable in this. Ms Clements was her team leader and entitled to know where Ms Burton had been. Ms Burton did not complain at the time and we are satisfied that Ms Clements was entirely professional and courteous in her action.

71. Ms Burton says that she flagged up concerns in March 2019 with the freedom to speak up guardian. These concerns are raised entirely confidentially and we are satisfied that until the Claimant resigned when she told the Respondents, Ms Clements and Ms McDonald were not aware of those concerns.

72. On 1 April 2019 Ms McDonald received an e-mail from Ms Burton saying that she did not feel able to come into work and that she thought this might be the case for some time because she felt that the environment in the department at work was hindering her recovery and she felt highly stressed at work (page 315).

73. It was at this time that Ms McDonald became aware of concerns that some members of staff had raised about the management of the department through the freedom to speak up guardian. The concerns had been raised confidentially.

74. As a response to the concerns Ms McDonald with others arranged several focus groups within the department. These were held in April and May 2019 and a radiotherapy staff engagement action plan was prepared (page 300N-Q).

75. Ms Burton attended at least the first focus group. We are satisfied that concerns raised by staff were dealt with by Sue Marriott and Ms McDonald in a professional way. Ms Marriott is the Principle Pre-Treatment Superintendent and Radiotherapy Service Manager. We are not satisfied that there is any evidence

other than Ms Burton's say so that they behaved unhelpfully or aggressively.

76. An action plan was drawn up which came through the focus group discussions and staff then had the opportunity to state whether they felt the action plan addressed their concerns.

77. Ms Burton was reviewed by Occupational Health on 26 March 2019. The meeting was with Debbie Allen and is at pages 306-309. Dr Allen is a Chartered Clinical Psychologist in Occupational Health. Ms Clements was advised that Ms Burton was well enough to be in work and it was suggested that she should be removed from direct patient care and given time to check over her work. Dr Allen suggested two areas would remove her from direct patient care which were radiotherapy, physics-dosimetry and data input in radiotherapy. It was recommended that any adjustment should then be reviewed after six months.

78. On 1 April 2019 Ms Burton told Lorna McDonald that she did not feel able to come into work that day and that she would not be in for a few weeks (page 315). She did not contact her line manager as she should have done. Ms Clements wrote to Ms Burton on 4 April 2019 (page 317) and invited her to attend a meeting on 11 April 2019 to discuss the Occupational Health report.

79. The meeting on 11 April 2019 was a welfare meeting and Ms Clements was accompanied by Candida Capaldi, Senior HR Adviser. Ms Burton had a colleague with her Ms Koi.

80. Ms Clements explained at the start of the meeting that this was a welfare meeting as her absence was under four weeks. She was told that if her absence became greater than four weeks then it would be managed under the management of health and attendance policy and formal absence review meetings would be needed.

81. We are satisfied that Candida Capaldi who was a senior and experienced HR Manager did not say Ms Burton had already surpassed triggers and that she would move into a long-term absence procedure which could result in her being redeployed or "referred to a panel for dismissal". We were satisfied that there was no threat to dismiss her. It was entirely appropriate and professional for Ms Clements to point out where she was in the absence management process.

82. They went on then to discuss a number of matters, in particular: -

82.1 The possibility of condensing her hours into longer days. All parties recognised that longer days could be harder and more tiring than a normal day and Ms Burton had her own reservations about that suggestion.

82.2 They discussed the possibility of a non-patient facing role. Ms Burton said at the meeting that she was not interested as she wanted to do what she was trained to do. She said that she loved her job.

82.3 They discussed the medical physics role. There was no such role for Ms Burton to fill.

82.4 The data input role was discussed but it was highlighted that this was a stressful area often more so than the clinical role that Ms Burton already held.

82.5 Both Ms Clements and Ms Capaldi did not think this would be

suitable because Ms Burton was worried about making mistakes. Furthermore, if a six-month placement was made in this role it would not allow for rotational staff to spend periods of training time there. Other staff would not be able to meet their competencies and it would mean taking a member of staff away from a patient facing clinical area which could impact service delivery and patient outcome.

83. We are satisfied that the meeting was focussed on Ms Burton's welfare and wellbeing and Ms Clements and Ms Capaldi did not "question" the Claimant about her medication. They did discuss how she was managing with the reduction in her medication that she had told them about and this was appropriate. On many previous occasions Ms Burton had been the one to volunteer details about her medication and the side effects of it. This is highlighted in the return to work meetings an example of which is on 26 March 2019 (page 305). We are satisfied that Ms Burton did not raise any issue about having panic attacks otherwise this would have been recorded in the letter that Ms Clements sent after the meeting.

84. A letter was sent to Ms Burton after the meeting (pages 318-321) which we are satisfied is an accurate account of the meeting. The letter noted that they had discussed her absence level and confirmed that if the absence continued that this would be managed within the Trust long-term absence procedure. While the options that would be looked at then would be redeployment, if that was not feasible continued absence could trigger referral to a formal absence management panel the consideration of dismissal due to ill-health.

85. After she received the letter Ms Burton wrote on 23 April (page 322b) to say that she did not feel the letter was entirely accurate of events. She acknowledged:

"Perhaps it is the way I have interpreted it but the letter reads as though I said I don't want to be non patient facing. I don't believe this reflects the conversation we had... I do believe I made it clear that I would feel more comfortable being non patient facing at the moment and we discussed some of these roles that were suggested by Occupational Health."

86. It can be seen from the e-mail exchange between Sarah Clements and Candida Capaldi thereafter (page 322a) that it was not how they recalled the meeting. Their recollection was that Ms Burton had specifically said that she did not want non-patient facing work.

87. Ms Burton was due to return to work on 26 April 2019 but she did not do so and a further fitnote was sent which continued to 24 May 2019 (page 323). This meant that Ms Burton had been off for longer than 4 weeks and would need to have a review meeting in line with the health and attendance policy and Ms Clements wrote to Ms Burton on 7 May inviting her to that meeting (page 331-332).

88. The meeting on 16 May 2019 was again conducted by Ms Clements with Ms Capaldi. Ms Burton was this time accompanied by Dave Pulborough, work colleague and trade union representative.

89. At this meeting they discussed a four-week placement in data input as suggested by Mr Pulborough and they also discussed Ms Burton returning to work on 28 May 2019. Ms Clements agreed that four weeks would have been workable and felt that it would have given Ms Burton confidence to get her back

into the workplace which was a good idea.

90. They recommended that Ms Burton discuss this with Occupational Health when she next saw Debbie Allen and that she did not need to give them an answer at that time.

91. Ms Burton said that she felt discussions over the risk assessment were going around in circles and that she felt that she did not want to return to work as she felt as though nothing would change.

92. Ms Capaldi raised the possibility of temporary redeployment including outside the department but Ms Burton said that she was not sure that she wanted to do this.

93. Matters were left in Ms Burton's hands about what to do about the suggested four-week temporary placement, a shorter day and other adjustments. The shorter working day would mean that she was working 9:00 am to 3:00 pm to avoid the stress of the rush hour traffic.

94. The meeting lasted about an hour and it is agreed by all parties that Ms Burton did become distressed. She was crying. Regrettably no breaks were taken during the meeting. It is fair to say that Ms Clements perhaps should have made the suggestion but it is also fair to say that Ms Burton and her representative did not ask for a break at any time. We have no doubt that if she had asked for a break it would have been granted. It is not something that the Claimant complained about in her resignation letter.

95. Ms Capaldi did explain to Ms Burton that as she had had extensive periods of absence and if she was unable to return to work there would be a case review. We are satisfied that Ms Capaldi would not and did not say that if Ms Burton did not return to work she would be dismissed. We are satisfied that she did not say that if Ms Burton was not well enough to return to work she should consider resigning so that she was not sacked. We are satisfied that an experienced professional such as Ms Capaldi would not have said anything of that sort.

96. They did suggest that Ms Burton should take as much time off as she needed to get herself well and to come back to work when she felt ready. They talked about another sabbatical type opportunity similar to what had happened before. They wanted to retain the services of Ms Burton who was regarded as a very good member of staff.

97. We are satisfied that Ms Burton was not asked about medication or the management of her condition at the meeting.

98. Ms Burton was not told that the adjustments which had been referred to in the earlier occupational health report were not going to be put in place. We were satisfied that Ms Clements and Ms Capaldi wanted to do everything they could to ensure that Ms Burton could return to work and they were discussing moving her to a non patient facing role.

99. Ms Clements did explain to her that the role in medical physics was not available because it was in a different department managed by other people and a completely different skill set. But they were very interested in considering the data input role and they would look further into this if she said that she was interested and if occupational health thought it was appropriate.

100. With Ms Burton's knowledge further discussions took place between Mr Pulborough, Ms McDonald and Ms Clements to facilitate the temporary redeployment as discussed. This was agreed prior to the letter going out to Ms Burton and so was added as a post meeting note.

101. The outcome of the meeting is set out in the letter at pages 334-336. We are satisfied it accurately reflects the discussions in the meeting.

102. We are satisfied that that letter crossed in the post with the Claimant's resignation letter which was dated 22 May 2019 and is at pages 337-338.

103. The letter states as follows:

"Following on from a meeting with Sarah Clements and HR representative Candida Capaldi on Thursday 16 May 2019, I am writing to inform you of my intention to resign from my post as Senior Therapy Radiographer at Royal Derby Hospital with immediate effect."

104. At page 338 she describes the reasons for her resignation. She says:

"I now have no confidence in my employer's ability to look after my health and welfare at work. I am done fighting. I can no longer allow you to have such a huge impact on my health. The mutual trust and confidence I had in my employer to support and look after me, listen to my concerns and respond to my requests have been well and truly broken.

For this reason I am resigning with immediate effect for the following reasons: -

- I feel bullied, intimidated and harassed at work
- I feel unsupported in my role
- I believe work is having a negative impact on my health, wellbeing and welfare
- I do not believe you have listened to me and acknowledged the reasonable adjustments I have requested regarding my disability
- You have failed in your duty to support me during my absence and consider my mental state
- You have failed to acknowledge my grievance and whistleblowing concerns about employee and patient safety"

105. The letter was sent to Lorna McDonald. It was sent by e-mail and both Ms Clements and Ms McDonald were "stunned" by it. They had not been aware of any such intention by the Claimant.

106. Ms McDonald and Ms Clements both held Ms Burton in high regard and did not want her to leave.

107. In her letter Ms Burton had complained that the meeting on 16 May 2019 had been carried out in an intimidating way but she had not expressed her reasoning for this.

108. Ms McDonald sent a copy of the letter to Sue Marriott and spoke to Human Resources and they agreed to invite Ms Burton to a meeting to discuss the concerns that she had raised. On 29 May 2019 Ms McDonald wrote to

Ms Burton acknowledging her intention to resign and inviting her to attend a meeting on 7 June 2019.

109. Ms Burton attended that meeting which was attended by Ms McDonald, Claire Bedford from HR and a colleague of Ms Burton, Lydia Kedziorek. During the meeting they discussed various adjustments and options that the Trust had and could offer such as a possible three-month temporary redeployment into data input.

110. Ms Burton was asked if she would change her mind and take up the temporary redeployment. At the end of the meeting though Ms Burton decided that this was “too little, too late” and that her resignation with immediate effect still stood.

111. They then completed the termination form and calculated the annual leave and overtime that she had outstanding. We are satisfied that she was not told that she would be paid her notice pay. It was clear that her intention was to terminate her employment with immediate effect.

112. Ms McDonald completed a termination form indicating a leaving date of 22 May 2019 as per Ms Burton’s resignation letter (page 535-540). Subsequently she changed this to 7 June 2019 as this was the date of the last meeting and the time that Ms Burton could reconsider her resignation.

113. Subsequently the Claimant said she was expecting to receive eight weeks’ notice pay and Ms McDonald e-mailed Ms Burton on 19 June 2019 to advise her that a new termination date of 7 June 2019 would be submitted. Ms McDonald thanked Ms Burton for all her hard work in the department and at the Trust over the last six years and wished her all the best for the future.

114. On 21 June 2019 Ms McDonald wrote to Ms Burton (page 375-377). The letter confirms that they had discussed Ms Burton’s concerns around the management of her sickness absence and patient safety.

115. We are satisfied that Ms McDonald had not agreed at the meeting that the Claimant would receive her notice pay. No such agreement was reached at the time. Ms Burton resigned with immediate effect as set out in her letter and did not work or offer to work her notice period. She was not therefore entitled to any notice pay.

The law

Constructive unfair dismissal

116. The claim of unfair dismissal is made under section 94 ERA. Section 95 deals with the circumstances in which an employee is dismissed and provides:

“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2):-

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

117. The burden is upon the Claimant to establish that the Respondents have committed a fundamental breach of contract, that she resigned in response to that breach and that she did not affirm any breach by delay or otherwise.

118. Mr Sugarman referred us to the following cases: -

- **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221
- **Marshall Specialist Vehicles Limited v Osbourne** [2003] IRLR 672
- **Tullett Prebon Plc and Others v BCG Broker LLP** [2011] EWCA civ 131
- **British Aircraft Corporation v Austin** [1978] IRLR 332
- **Walker v Josiah Wedgwood and Sons Limited** [1978] ICR 744
- **Norwest Holst Group Administration Limited v Harrison** [1984] IRLR 419
- **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA civ 978
- **Omilaju v Waltham Forest London BC** [2005] 1 All ER 75

Direct disability discrimination

119. Section 13 EQA provides as follows:

“(1) 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.”

120. The Claimant therefore has to establish: -

120.1 That she has suffered less favourable treatment than others.

120.2 That it was because of her protected characteristic namely her disability.

121. Mr Sugarman referred us to the following cases: -

- **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337
- **CLFIS (UK) Limited v Reynolds** [2015] EWCA civ 439
- **Harrow London Borough v Knight** [2003] IRLR 140
- **Glasgow City Council v Zafar** [1998] 2 All ER 953
- **Watts v High Quality Lifestyles** [2006] IRLR 850
- **Aitken v Commissioner of Police for the Metropolis** [2011] EWCA civ 582

122. The burden of proof provisions which are relevant to these considerations are set out in section 136 EQA which provides:

“(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the Court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision. In respect of this Mr Sugarman referred us to: -

- **Igen Limited v Wong** [2005] EWCA civ 142
- **Madarassy v Nomura International Plc** [2007] EWCA civ 33
- **Hewage v Grampian Health Board** [2012]

- **Martin v Devonshire Solicitors** [2011] ICR 352
- **Bahl v The Law Society** [2003] IRLR 640

Harassment related to disability

123. 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 purpose or effect of: -
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B...
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account: -
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.”

Reasonable adjustments

124. The duty to make reasonable adjustments is contained in section 20 EQA which states as follows:

- “(2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

125. Mr Sugarman referred us to: -

- **Environment Agency v Rowen** [2008] IRLR 20
- **Royal Bank of Scotland v Ashton** UK EAT/0542/09
- **HM Prison Service v Johnson** [2007] IRLR 951
- **Lincolnshire Police v Weaver** [2008] All ER (D) 291
- **Matuszowicz v Kingston-Upon-Hull City Council** [2009] EWCA civ 22

Discrimination arising from disability

126. 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, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

Whistleblowing

127. The claim that the Claimant has suffered detriment as a result of making protected disclosure involves the Claimant in establishing that she made a disclosure which qualified for protection. Section 43B ERA provides:

“(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:-

- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered.”

128. For the qualifying disclosure to be protected it must be made by the worker in a manner that accords with sections 43C-H ERA.

129. Mr Sugarman referred us to: -

- **Kilraine v London Borough of Wandsworth**
- **Babula v Waltham Forest College** [2007] IRLR 346
- **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4
- **Phoenix House Limited v Stockman and Another** [2017] ICR 84
- **Kraus v Penna Plc** [2004] IRLR 260
- **Chesterton Global Limited and Another v Nurmohamed** [2018] ICR 731
- **Fecitt v NHS Manchester** [2012] ICR 372
- **Bolton School v Evans** [2006] EWCA civ 1653

Our conclusions

Constructive unfair dismissal claim

130. We are satisfied that the conduct of the Respondents over the period relied on by the Claimant namely 26 June 2017 until 16 May 2019 did not amount to conduct which was calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between the Claimant and the employers which was alleged to have occurred on 16 May 2019 did not justify the

Claimant's resignation. We were satisfied that the Respondents had overall behaved in a reasonable manner towards the Claimant.

131. The Respondent, we are satisfied had supported her throughout this period despite her absence record. The reason for Ms Burton's absences were not in the main related to any work issues but were to do with problems outside work.

132. The period 26 June 2017 to 24 July 2017 was two years before her resignation. At that time the Claimant was rotated in a supernumerary position and we are satisfied that she was not rotated normally until 17 July 2017. She was not required to return to her clinical duties as a Senior Radiographer within 3 days as she alleged.

133. The Respondents did not fail to provide sufficient colleagues to cover the Claimant to allow her to take breaks. We are not satisfied the Claimant as she alleges went without breaks "almost every day". The Claimant was never expected to go without a break. We are satisfied that breaks could not always be taken at set times and it was part of Ms Burton's job to organise the work in such a way as she was able to take a break.

134. We are satisfied that although the Claimant said in her risk assessment at the time that this had happened on several occasions, that was simply the reality of the staffing provision at that time. Ms Burton did not complain about it and it had no bearing on her decision to resign.

135. We are satisfied that when the Claimant returned to work she was provided with adequate training. As we have found she was placed in a supernumerary position and adequate training was provided.

136. The Claimant has made a vague allegation that her colleagues were not competent. There is no evidence to support such a contention and she did not complain about it at the time or even raise the issue in her resignation letter.

137. During the period 24 July 2017 to 19 September 2017 there was no failure by Ms Clements to contact the Claimant. She was not as she described abandoned.

138. The Tribunal has seen a record of various conversations that took place between Ms Burton and Ms Clements.

139. During the period 23 January 2018 until March 2019 there was no failure by the Respondents to address her concerns around safety and incompetent staff. We are satisfied that no concerns were raised until the discussions with the freedom to speak up guardian and then Ms McDonald took those concerns seriously and took action that was appropriate in respect of those.

140. At that time there was no failure to address the Claimant's additional needs as discussed in the return to work meeting on 27 February 2018.

141. The evidence shows that there were detailed discussions about adjustments at that time and as at 17 February 2018 the Claimant was well enough to return to work. After she returned to work she completed a stress risk assessment which confirmed that she had no problems at all. She was “very happy” and that the support that she had been offered was “brilliant”.

142. During the period January 2019 until April 2019 Sarah Clements did not tell Ms Burton that she was causing problems by trying to address training issues and staff incompetency. There is nothing to support the Claimant’s contentions in respect of this.

143. There is no evidence to support her contention that staff concerns were responded to in an unhelpful and aggressive way by McDonald and Ms Marriott at the meeting on 13 March 2019. Ms Burton was not even at this meeting. We do not even know where the information came from.

144. We have heard evidence from Ms McDonald and seen the notes of the meeting. Neither supports Ms Burton’s contentions.

145. We are satisfied that when concerns were raised through the freedom to speak up guardian Ms McDonald and Ms Clements did not know who was raising those concerns but in any event, took them seriously. An action plan was formulated and updated and focus groups were held to look into those concerns.

146. There was no failure to address the Occupational Health report dated 26 March 2019. We are satisfied that when Ms Clements received the report she contacted Ms Burton in a reasonable period, writing to her on 4 April 2019 asking her to meet up to discuss the contents of it. That was not an unreasonable delay.

147. We are also satisfied that Ms McDonald did not fail to address Ms Burton’s concerns raised in her e-mail on 1 April 2019. Ms McDonald is not the manager/was not the manager of Ms Burton and it was appropriate for her to entrust Ms Clements with the management of Ms Burton as she pointed out in her e-mail the following day.

148. The welfare meeting on 11 April 2019 was conducted properly and reasonably. Ms Burton had a terrible absence record but was told that she had not exceeded the trigger points but if her absence continued and she did exceed that trigger point there would be a long-term absence review.

149. At the meeting they discussed adjustments including flexibility to attend appointments, time off after appointments, flexibility in terms of choice of working days, condensed hours and extended days.

150. They also discussed six months in none patient facing roles but at that time there was no role available in medical physics/dosimetry/planning. Even if it was it would require significant training and would not be sensible as a short-term adjustment.

151. The six-month role in data input was also not viable because it would prevent other rotational staff gaining the necessary skills. As they discussed the position might not have been suitable for Ms Burton because of her concerns about making mistakes. Most important of all, the Claimant was not interested in any none patient facing role and wanted to return to her old job.

152. It can be seen therefore that there was no unwillingness to discuss the possibility of implementation of the recommendations made by Occupational Health.

153. She was not told that going into long term absence procedure would result in redeployment or reference to a panel for dismissal.

154. Ms Clements did not fail to consider the recommendations.

155. Ms Clements did not send an inaccurate letter after the meeting.

156. The meeting on 16 May 2019 is described by the Claimant as “the last straw”.

157. We are satisfied that Candida Capaldi did not tell the Claimant that if she did not return to work she would be dismissed or that if she was not well enough to return to work she should consider resigning.

158. Whilst the Claimant was asked about why she had stopped taking her medication this was a perfectly reasonable question to ask and she was told that she did not have to answer it if she did not want to.

159. The letter that was sent after the meeting was accurate and reflected what they had discussed and in any event crossed with the Claimant’s resignation letter.

160. It can be seen from our conclusion that we are satisfied that the Respondents did not commit a repudiatory breach of contract at any stage and the Claimant was not constructively dismissed.

Direct disability discrimination

161. We are satisfied that there is no evidence to support a case that Ms Burton was treated less favourably than someone in comparable circumstances because of her disability.

162. We are satisfied that she has not established any less favourable treatment and certainly there is no evidence that any treatment was on the grounds of her disability.

163. It is simply not fair for her to say that whenever she asked for help or reasonable adjustments it was refused by Ms Clements. It can be seen from our findings of fact that many adjustments were made but some were simply not possible.

164. It is the Claimant's contention that some were not made because of her mental disability and would have been made if she had had a physical disability. There is no evidence to support such a contention. As we have said many adjustments were made and we are satisfied that the Respondents did all they could to accommodate the Claimant in the hope that she would be able to return to work.

165. It is not fair for Ms Burton to say that Sarah Clements refused reasonable adjustment without consideration and would have treated someone with physical impairments much better.

166. When the Claimant was late coming into work because of traffic on the A38 in February 2019 she was not told by Ms Clements that she was checking up on the Claimant because she had had a lot of time off recently.

167. Sarah Clements also did not question Ms Burton about free time in respect of her appointments. The allegation is untrue.

168. None of the conduct at the meetings on 11 April 2019 or 16 May 2019 demonstrates in any way that the Claimant was being treated less favourably than someone in a comparable position nor was it because the Claimant suffered from the disability that she did.

Harassment

169. As can be seen from our findings of fact it will not be a surprise for us to conclude that Sarah Clements did not engage in unwanted conduct towards Ms Burton. Nor did the conduct have the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

170. Ms Clements asking Ms Burton if she was okay following her therapy sessions does not in any way amount to harassment. She did not shout across the office and did not discuss private issues concerning Ms Burton openly in the office.

171. There is no evidence that Ms Burton found the enquiry degrading or embarrassing as she suggests. It was genuinely made and Ms Burton did not complain about it at the time or even mention it in her resignation letter.

172. Similarly, the allegations in February 2019 about her lateness also did not amount to harassment. Ms Clements was simply concerned about the fact that her lateness might be countered against her in the management of her absence. It was all perfectly reasonable and was not complained about at the time or even mentioned in her resignation letter.

Reasonable adjustments

173. In this case the PCP relied upon is the requirement to work 7.5-hour days on a shift basis with no certainty regarding breaks in a stressful working environment where the Claimant was required to spend the entirety of the shift

treating patients and not rotating with other staff to ensure some time out of the treatment room to do other none clinical tasks.

174. We are satisfied that Ms Burton was not required to spend the entirety of her shift treating patients, that she was not prevented from rotating with other staff and that she did undertake none clinical tasks.

175. Whilst there may have been shortages of staff it did not mean that the Claimant was not able to take her breaks. She like other staff had to be flexible about when they could take breaks. It would have been preferable for the Claimant to be able to take breaks at a set time but we are satisfied that did not put her at a particular disadvantage.

176. The Claimant did have a bad absence record which did mean that the Respondents needed to make reasonable adjustments and we are satisfied that they did. They did not progress to the formal stages of the absence management policy on more than one occasion when they could have done so. They did allow the Claimant to have extra support and allow her to work flexibly on a temporary basis. They also considered other roles at the meetings in April and May 2019. We are satisfied that at the meeting in April 2019 the Claimant made it clear that she was not interested in non-client facing roles at that time and that the Respondents were considering the possibility of her undertaking the data input role at the time that she resigned. She resigned before they could take any steps in respect of that.

Discrimination arising from disability

177. We are satisfied that in their discussions with Ms Burton on 11 April 2019 Sarah Clements and Candida Capaldi did not talk to her in a way that made her suffer stress, anxiety and panic attack. The meeting lasted only about an hour and Ms Burton was represented by an experienced union representative at the meeting. She did not ask for a break even though we are satisfied that she was upset at the meeting. If she had asked for a break then she would have been given a break.

178. She was not spoken to abruptly or told to consider resigning or that she was likely to be dismissed. Whilst she was asked about her medication there was nothing unreasonable in doing so.

Whistleblowing

179. We are not satisfied that Ms Burton made any complaints to Joanne Marshall and Sarah Clements about her ability and the Department's ability to provide a safe working environment for colleagues and patients. There is no evidence in support of her contention that she did. In any event no information was provided even based on her own claim.

180. Regarding her concerns taken to Allison Bell the issues under the heading "manager" are not matters which could in her reasonable belief be either in the public interest or tended to show that health and safety was being endangered.

181. Similarly, we are satisfied that the Claimant did not have a reasonable belief that shorter appointment slots/longer shifts endangered the safety of patients. That is because there was no basis for any such belief.

182. In any event the concerns that she says that she raised were raised anonymously and we are satisfied that neither Sarah Clements or Ms McDonald knew that she had raised them.

183. In any event as we have found in our findings of fact she did not suffer any detriments.

Unlawful deductions/breach of contract

184. We are satisfied that Ms Burton resigned on 22 May 2019 as she described in her letter “with immediate effect”. We are also satisfied that there was no promise thereafter to pay her notice pay. She was in fact paid up until 7 June 2019 because the Respondents had hoped to persuade Ms Burton to stay. They failed to do so and the Claimant is not entitled to any further payment.

Employment Judge Hutchinson

Date 5 March 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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