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EMPLOYMENT TRIBUNALS

Claimant: **Ms Andrea Wainwright**

Respondent: **Cennox Plc**

Heard at: **East London Hearing Centre**

On: **24, 25, 26, 31 March 2021, 14 and 16 April 2021**

Before: **Employment Judge Burgher**
Members: **Mrs A Berry**
Ms S Harwood

Appearances

For the Claimant: **Ms G Cullen (Counsel)**
For the Respondent: **Ms R White (Counsel)**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

1 The Claimant's claims for direct disability discrimination fail and are dismissed.

2 The Respondent discriminated against the Claimant because of something arising from her disability, namely the permanent appointment of Ms Cawthorne to the role of Head of Installations when the Claimant was on sick leave in November 2018 and misleading the Claimant about it. The Claimant's claims in this regard therefore succeed.

3 The Claimant's claims for unlawful victimisation fail and are dismissed.

4 The Claimant's claim for unfair constructive dismissal fails and is dismissed.

5 The Claimant's claim for wrongful dismissal fails and is dismissed.

6 A remedy hearing is listed for 22 June 2021 at 12pm if the matter is not otherwise resolved.

REASONS

Issues

1. At the outset of the hearing, following clarification and amendment application, the issues were confirmed as follows.

Jurisdiction

2. Whether the Claimant's claims for unlawful discrimination have been presented in time according to section 123 of the Equality Act 2010. The Claimant avers that her dismissal was discriminatory l and is accordingly in time. Further, it is the Claimant's case that the acts of discrimination and victimisation form part of a continuing act. The Respondent avers that (save to the extent the Tribunal finds any such acts formed part of a continuing act) any alleged acts of discrimination that occurred up to and including 13 June 2019 are out of time.

3. In so far as these claims have been brought out of time, is it just and equitable to extend time?

Disability

4. The Claimant had Stage 3 breast cancer and had a disability at the material time.

5. The Respondent accepts that the Claimant had a disability (cancer) at the relevant time, for the purposes of the Equality Act 2010.

6. The Respondent accepts that it knew of the Claimant's disability from August 2018.

Direct Disability Discrimination (section 13 of the Equality Act 2010)

7. Did each of the alleged acts of discrimination set out in Schedule 1 occur as alleged or at all?

8. To the extent that any of the acts set out in Schedule 1 occurred, was the Claimant treated less favourably than a non-disabled person (whose circumstances were not materially different from the Claimant) has or would have been treated in relation to those acts?

    a. The Claimant relies on a hypothetical comparator, whose circumstances were not materially different from the Claimant, namely a senior employee, with a long service history, who had a period of absence which was not due to cancer. The Respondent avers that the hypothetical comparator should further include that the absence was owing to serious illness with an unknown prognosis.

    b. Alternatively, the Claimant avers that the Tribunal can draw inferences based on the Respondent's conduct where it is explicit or based on stereo-type, and that in such circumstances a hypothetical comparator is not required.

9. Was the reason for the less favourable treatment because of the Claimant's disability?

    a. The Claimant avers that, in order to determine whether the Respondent's treatment of the Claimant was on the proscribed ground, the Tribunal can draw inferences from evidence that the Respondent's conduct was based on stereo-typical assumptions about persons with the Claimant's disability.

Discrimination arising from disability (section 15 Equality Act 2010)

10. The Claimant alleges that she was treated unfavourably due to something arising because of her disability.

11. Did the Claimant experience the treatment set out in Schedule 2?

12. If so, was such treatment unfavourable to the Claimant?

13. The Claimant claims that the "something" arising in consequence of her disability was her absence through ill-health. Did this arise in consequence of her disability?

14. If so, was the Claimant subjected to such treatment as a result of her absence through ill-health?

15. If so, was such treatment a proportionate means of achieving a legitimate aim?

Victimisation

16. Was the Claimant subjected to a detriment because she did a protected act or the Respondent believed she has done, or may do a protected act, within the meaning of section 27(2) of the Equality Act 2010? The Claimant relies on the following protected acts:

    a. The Claimant's email of 19 July 2019
    b. Her grievance of 31 July 2019
    c. Her grievance appeal letter 2 September 2019

17. Following further consideration, the Respondent accepts that all the three matters amount to protected acts.

18. The Claimant alleges that she was subjected to the following detriments:

    a. Failure to investigate her grievance in the first instance (12 August 2019);

    b. Email from Richard Grimmer, dated 2 September 2019, where he said he was 'very surprised and very disappointed that you wish to take this further.'

    c. Decision on the 6th September 2019 by senior managers, including Steve Garrod to block her access to the Respondent network and email system.

    d. Failure to investigate and deal with her grievance in an appropriate manner between 31st July 2019 and 27th September 2019;

e. Failure to investigate her appeal in a prompt and appropriate manner (between 2nd September 2019 and 27th September 2019);

f. Failure to acknowledge the Claimant's resignation when it was sent on 27 September 2019.

Unfair Dismissal

19. The Claimant claims constructive unfair dismissal.

20. The Claimant claims that the Respondent breached an express term of her contract regarding her job role and responsibilities, in demoting her to a lesser role with reduced managerial responsibility and this was a repudiatory breach of contract.

a. Did the Claimant's contract contain express terms relating to the Claimant's job role and responsibilities, and if so what were those terms?

b. Was the Claimant demoted or was her managerial responsibility reduced as alleged or at all?

c. If so, was this a breach of an express term of the Claimant's contract?

d. If so, was any such breach fundamental?

e. Did the Claimant, by continuing to remain in employment, affirm any such breach?

21. Further, the Claimant claims that the Respondent breached the implied term of mutual trust and confidence and that this was a repudiatory breach of contract. The allegations the Claimant relies on in this regard are set out in Schedule 3.

a. The Claimant avers that the most recent act causing her resignation was the delay and overall management of her grievance and appeal.

b. Had the Claimant since affirmed the contract?

c. If not, was the act by itself a repudiatory breach of contract?

d. If not, was it nevertheless part of a course of conduct which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?

e. Did the Claimant resign in response to that breach?

22. The Claimant relies on the delay and overall management of her grievance and appeal as being the 'last straw'.

a. Was there a delay and/or deficiencies in the overall management of the grievance and appeal?

b. If so, did this contribute something to the alleged breach of the implied term of trust and confidence?

23. The Respondent avers that any such delay is not capable of amounting to a 'last straw' as it was trivial and entirely innocuous and/or it had reasonable and proper cause for such delay.

Wrongful Dismissal

24. Was the Respondent in repudiatory breach of contract?

25. Is the Claimant entitled to notice pay?

Compensation

26. Is the Claimant entitled to compensation, having regard to section 124 of the Equality Act 2010 and section 120 and 123 of the Employment Rights Act 1996?

27. Has the Claimant mitigated her loss?

28. Has there been any contributory fault by the Claimant?

29. Should there be an uplift for a failure by the Respondent to follow the ACAS procedure?

30. Should there be a reduction for a failure by the Claimant to follow the ACAS procedure?

Evidence

31. The Claimant gave evidence on her own behalf.

32. The Respondent called the following witnesses:

    a. Jennifer Spencer-Lee, HR Director
    b. Richard Grimmer, Managing Director, grievance officer.
    c. Steven Garrod, Services Director, Claimant's line manager
    d. Clive Nation, Chief Executive Officer, grievance appeal officer/

33. All witnesses gave evidence under oath and were subjected to cross examination and questions from the Tribunal.

34. The Tribunal was also referred to relevant pages in the agreed bundle consisting of 1026 pages.

35. The Tribunal permitted late additional documentation, including the offer letter to Ms Cawthorne (requested by the Tribunal), the LinkedIn profile of Gracie Wade as at 8 July 2020, and two pages of manuscript notes of meetings submitted by Ms Spencer-Lee. In respect of the manuscript notes the Tribunal permitted the Claimant and Ms Spencer-Lee to be recalled to evidence and or comment on them.

Facts

36. The Tribunal has found the following facts from the evidence.

37. The Respondent company provides retail and banking solutions and specialises in the provision and maintenance of automatic teller machine ('ATM') and banking equipment, software and services to financial services and retail sectors. It has offices in the United States and Europe. Its global headquarters are in Camberley, Surrey and it has other offices in London, Billericay, Manchester and Leeds.

38. The Claimant commenced employment for Acketts Group Ltd ('Acketts) on 22 July 2002 as company bookkeeper. Acketts supplied ATM installation, moves and changes (IMAC) services with associated construction and security services to organisations. During her employment with Acketts the Claimant completed multiple roles and progressed the to the role of Group Commercial Director and Company Secretary in 2010. The Claimant's contract for commercial director included the following 'flexibility' clause.

3 Summary of duties

"Your duties are explained to you upon and during employment and any oral or written descriptions of your duties are intended to serve as a guide to the major areas for which you will be held accountable. Due to the evolving nature of the Employer's business, note that, your obligations or job description will inevitably vary and develop."

39. On 15 December 2016 the Claimant's role for Acketts changed and she was appointed Customer Services Director. The summary of the role is as follows:

"Maintaining the company's existing relationships with its key clients, so they will continue using the company for business. Your duties will involve both managing relationships with clients and managing operational personnel, as the current company reporting lines.
The goal is to ensure the company's retention of clientele through reliance and facilitate further growth helping to meet the company's sales targets.
To assist the Managing Director to direct and control the company's operations and give strategic guidance to its Managers to ensure that the company achieves its mission and objectives."

40. In this position, the Claimant was required to report to Hilary Fearn, the Managing Director, and deputise support to her as required. The Tribunal was not referred to any separate contract for Customer Services Director and the Claimant accepted that the 'flexibility clause' continued to apply to her.

41. The Claimant attended a 1-day CDM2015 Principal Designers and Designers course on 2 June 2017. It was not suggested that anything other than attendance on the course was required to complete it.

TUPE

42. In July 2017 the Respondent purchased Diebold International Limited ("Diebold"). Diebold, like the Respondent and Acketts undertook IMAC work. John Ennis, Richard Grimmer, Steve Garrod and Shelley Cawthorne all previously worked at Diebold prior to their transfer to the Respondent. Following transfer to the Respondent Mr Ennis became the UK Managing Director of the Respondent.

43. The Respondent then sought to acquire Acketts. Unfortunately for the Claimant Hilary Fearn did not forewarn her of the intention to sell her company to the Respondent.

The Claimant was concerned about her future work for the Respondent and the role she would undertake. She had discussions with Mr Ennis in November and December 2017 prior to the integration.

44. The Claimant appreciated that the Respondent was a much larger company than Acketts and that she would not be able to have the same senior level reporting to the Managing Director with the Respondent within the organisational structure. At the time of the transfer, Acketts employed only 24 staff from one office location whereas the Respondent, including Diebold employed nearly 250 people. Following discussions, the Claimant accepted the role of Head of Installations working for the Respondent.

45. Mr Ennis notified all staff that the Claimant would be appointed as Head of Installations in December 2017. He stated:

> "On the installations work side, Andrea is going to head up the installations group. Andrea Wainwright is from Acketts, so she going to run the installation group which is going to be quite big, very large in fact. We recon it is going to be probably over about or up to £10m a year almost. So, It's a BIG BIG group. So, Andrea will work for Steve Garrod and Andrea will pull it all together. So, we've got people like Shelley. Shelley will work in the group. People like Neil who's here and others in the group I haven't even told them yet and were going to pull it all together in a nice way. So, we are going to talk to all the people this week, but we think the installation team is so big that we need to have one group running it. You'll meet Andrea as well. She works out of Billericay but she'll be here quite a lot as well as I understand it."

46. The reference to 'Shelly' in Mr Ennis's December statement was to Shelly Cawthorne who previously undertook a senior role at Diebold. Ms Cawthorne was to remain a senior employee albeit within the Claimant's reporting line in the proposed new structure integrating the 3 companies. Save for the Claimant heading up the Installations group and it being large, big big group and working with Mr Garrod to pull it together there was little detail of how Installations would work going forwards.

47. In any event, the Claimant transferred to the Respondent as Head of Installations on 1 January 2018 reporting to Mr Garrod. Despite this agreed change it is apparent that the Claimant harboured discontent that she was no longer a director reporting to the managing director. She continued to use the title Client Services Director in her emails; raised concerns about her remuneration package; and chose to raise concerns relating to workload with directly with Managing Director, Mr Ennis.

48. The Claimant, and others, were under a great deal of pressure to seek to embed the three organisations and seeking to achieve targets. The Claimant had to manage operational, administrative changes and travel throughout the country. She liaised with sales and finance teams to try and meet stated objectives.

Regulatory compliance

49. The thrust of the Claimant's evidence on regulatory compliance including CDM 2015, was that she was the only person with sufficient knowledge and qualifications to ensure that the Respondent could comply with the regulatory and health and safety requirements to install ATM's. We do not accept her evidence in this regard. When cross examined on this she was bound to accept that the Respondent could continue

to undertake works without her specific presence and oversight. The Respondent was a much larger concern than Acketts and we accept the Respondent's evidence that they had to comply with and be audited by some of their client's regulatory requirements, and that different aspects of work required different expertise with personnel who had the appropriate skills, experience and regulatory authority to do the work. The Respondent obviously continued its operations in the absence of the Claimant and if the Claimant's position was correct the Respondent would have had to cease operations until she returned.

Organisational structure and workload

50. The Claimant provided her first iteration of an organisational flowchart on 19 January 2018, with her as the head of installations and Ms Cawthorne listed as business/program lead.

51. On 1 March 2018 Mr Garrod sent his direct reports an email with an organisational chart. He asked them for their latest organisational chart to ensure that it included staff currently out of the business, including those on long term sickness. He asked for the charts quickly as he had a meeting the following week. It is evident that the optimum organisational structure was still in a state of flux.

52. The Claimant raised concerns about her workload in June and July 2018 by email. She also met numerous times with Mr Grimmer who was the sales director at the time. On an occasion prior to August 2018 at a client site the Claimant broke down in tears and indicated to Mr Grimmer that she was struggling with her work life balance which was causing sleepless nights and stress. Generic discussions followed about how the role could be changed to address the Claimant's concerns.

53. During this time there is evidence to suggest that the Claimant was unwilling to delegate tasks and that she sought to manage everything. However, the Claimant also sought to appoint two senior members of staff, an IMAC manager and a Resource Manager, and was told by Mr Garrod to submit a business case. At this stage the appropriate and optimal organisational structure still needed to be confirmed. Approval was subsequently granted for recruitment in June 2018. However, despite sending the Claimant CV's for potential suitable applicants the recruitment consultancy had to chase the Claimant for a response on 9 August 2018.

Cancer diagnosis

54. On 17 August 2018, the Claimant was informed that she had been diagnosed with breast cancer and she was advised that chemotherapy would have to start on 24 August 2018. The Claimant emailed Mr Garrod and Ms Spencer-Lee to let them know and told them that she would attend work on 20 August 2018 to complete a handover. The Claimant attended work on 20 August 2018 to provide handover notes and was asked for the latest organisational chart. The Claimant emailed Mr Garrod an updated version of this the same day.

55. On 21 August 2018, the Claimant's sickness absence commenced. It was agreed by the CEO, Mr Clive Nation, that the Claimant would be paid 6 months at full pay as opposed to the normal 2 weeks. It was also agreed that the Claimant would be eligible for income protection through the Respondent's scheme at 50% of pay after 6 months absence.

56. The Claimant refers to a number of emails that she sent regarding work matters during her sickness absence. However, we do not find that there was any expectation by the Respondent that the Claimant should work in her absence. Having said that there was no explicit instruction given by the Respondent's senior management that the Claimant should not review her emails at all. In her email of 26 August 2018 to Mr Garrod she thanks him for support regarding sick pay and wrote that:

I've avoided all email monitoring to date, but have glanced over this morning. This has provided reassurance, as Jane has picked up and responded periodically to recipients.

57. Mr Garrod responded by saying that the Claimant was very welcome and that they would continue to support her as best as they could. There was no observation on the Claimant accessing work emails.

58. Immediately following the Claimant's absence, Ms Cawthorne stepped into the Claimant's role as Head of Installations which necessarily acting up to ensure business continuity.

59. During September and October 2018, the Respondent undertook a review of the Installations division with the assistance of a trusted consultant Linda Nowak. The aim of the review was to identify a structure to provide control, accountability and support for the improved delivery of the business and provide a scalable organisation for growing business and opportunities in 2019. Whilst Ms Cawthorne provided the input Mr Grimmer, Managing Director from September 2018 and Mr Garrod, Service Director set the parameters for the review. We find this review of the structure would have happened even if the Claimant had not been absent on sick leave.

60. What is noteworthy however is that the review did not identify the need for two Heads of Installation. No written business case was provided to the Tribunal supporting the idea for two Heads of Installation during this review which is surprising in view of the fact that the Claimant had to provide a business case to seek to recruit two senior employees.

Appointment of Ms Cawthorne to Head of Installations

61. In late October 2018 Ms Cawthorne informed Mr Garrod that she had been offered a senior position with one of the Respondent's competitors and was intending to leave. Mr Garrod considered this would have been a huge blow to the Respondent as Ms Cawthorne was a very valuable member of staff. The Respondent was also in difficulty given the absence of the Claimant due to ill-health. Whilst Mr Spencer-Lee was of the view that Ms Cawthorne should be offered a temporary role of Head of Installations until the Claimant's return Mr Garrod was of the view that Ms Cawthorne could in fact be given a permanent Head of Installations role as there would be enough work for two heads of installation once the Claimant returned to work. Ms Spencer-Lee accepted Mr Garrod's reasons despite there being no written analysis of what the two roles would be or what the business case for the two roles was. Consequently, by letter dated 5 November 2018 Ms Cawthorne was sent a letter confirming her new job title as head of installation services with effect from 1 November 2018.

62. On 2 November 2018 the Claimant met Mr Garrod and Ms Spencer-Lee and gave them an update in relation to her medical treatment. The Claimant stated that she had a last dose of chemotherapy and was starting to feel a bit better and the growth appeared to have shrunk. It was suggested that surgery was likely to be early to mid-March 2019 and it was agreed to meet again on 30 November 2018.

63. On 7 November 2018 Mr Garrod sent an email to all members of the installation team setting out the iMac/installation team structure. The email was not copied to the Claimant, nor was the Claimant directly informed of the contents. The email stated:

"Dear All,

As most of you are aware, over the recent weeks we have been reviewing the IMAC service delivery and how best to structure this for the future. You will also be aware that we have recently had to make some difficult decisions within the IMAC team as part of this review. However, we can now move forward with a new structure that will ensure we are able to meet the challenges ahead. The structure is below and we have tried to ensure that responsibilities are clearly defined and that there is management focus in the right areas. The intention is that we have the right number of people, with the right skills at the right time. This should mean that the workload is spread more evenly, that there are opportunities to develop your skills and that we meet our commitments to our customers whilst at the same time growing the business."

64. This email attached an organisational structure with Ms Cawthorne as head of installations and provided a separate bullet point stating that Ms Cawthorne will lead and have overall responsibility for the team. The email and attached organizational structure does not reference the Claimant at all. It does not state that it will be subject to change when the Claimant returns from sick leave or indicate that there could be two heads of installation once the Claimant returns to work. The failure to refer to the Claimant at all is conspicuous and would have been so to the members of staff who had previously reported to the Claimant.

65. On 23 November 2018, the Claimant discovered a post on LinkedIn inviting viewers to "Congratulate Shelley for starting a new position as Head of Installations at Cennox". There was nothing in the post that suggested that this was a caretaker role or temporary position, nor that she was acting-up. The Claimant was understandably concerned by this and queried this in an email with Ms Spencer- Lee by email sent on 26 November 2018 stating

"Hi Jenny,

I know we are catching up Friday. but I was a little thrown by something last week and I wonder if you could please clarify for me.

In Dec last year, on all hands call... John Ennis announced to the Group I would be "Head of installations" for Cennox (and for which I notified all staff & clients).

Whilst I note there has been some juggling required since my Cancer diagnosis, last week I viewed a Linkedln update advising Shelley has a new role "Head of Installations".

Can I please clarify what is happening behind the scenes and what impact this will likely have on myself upon my return?

Thank you in advance
Andrea"

66. Ms Spencer-Lee responded to the Claimant's email on 27 November 2018 with what she stated was a carefully drafted response. The email stated:

"Hi Andrea,
This absolutely is not expected to affect your role, which is still here for you when you're well enough to come back! Shelley is leading the whole installations team for now to keep everything running and we're making some changes to the Installers that we can discuss on Friday.

…
Thanks

Jenny"

67. We find this email to be a misleading response to the Claimant's enquiry. On the information provided to Ms Spencer-Lee at the time there would be a change to the Claimant's role going forward in that duties would be assigned elsewhere, albeit it was unknown what those duties would be. Further reference to Ms Cawthorne leading the whole installations team "*for now to keep everything running*" gives the impression that Ms Cawthorne is undertaking the Claimant's role temporarily.

68. Matters were discussed further at a meeting on 30 November 2018. The Claimant Mr Garrod and Ms Spencer-Lee were in attendance. There is dispute as to whether this meeting was by telephone or in person. We find this was more likely than not to be by telephone following the Respondents' witnesses evidence. We find that the reference to meet f-2-f in the manuscript notes is a reference to the hope that the Claimant could meet face-to-face in future to say hello to Paul and Dave (the new recruits) and discuss the changes. During this telephone meeting Mr Garrod stated that Ms Cawthorne had not taken the Claimant's role. He stated that more work is coming the Respondent's way and things have changed. He stated it is a different place and the Claimant would be integrated back into work when she is ready.

69. Neither Mr Garrod or Ms Spencer-Lee informed the Claimant of their general thinking or the fact that Ms Cawthorne had already been appointed on a permanent basis. The notes of the meeting indicate that there was a plan to meet on 9 January 2019 at a Costa Coffee in Chelmsford.

70. We accept that by this stage Mr Garrod was of the view that there could be two Heads of Installation, albeit he had not fully thought it through. The Respondent was recently successful in securing Sainsbury Group as a client and staff, including the Claimant were informed of this positive development by email on 28 November 2018. The significance of big ticket clients like the Sainsbury Group was that turnover would increase as ATM installation works could result in £20,000 per contract as they involved potentially rebuilding and redesigning the location. This is contrasted with standard ATM installations, which was bulk work in small shops where the contract could be only £300. Strategically Mr Garrod believed there could be a role for a

person to head the bulk work and a separate role to head the high value big ticket clients. It was hoped that specific focus and resource could be paid to develop the business and seek to secure large clients such as Royal Bank of Scotland, Tesco, Amazon and Inpost.

71. The meeting on 9 January 2019 did not take place but regular discussions and email communication relating to the Claimant's health, and income protection claim continued.

12 March 2019 email

72. On 12 March 2019 the Claimant emailed Ms Spencer-Lee asking for the confirmation of the following

    1) My position within the company has not changed and ultimately my return to work plan is staged to reasonably assist in returning to this role?

    2) As discussed with Steve yesterday, I am not currently noted within the organisational chart and as he noted, we need to establish where I fit in upon my return. To clarify, is this assuming I will temporarily undertake a varying role whilst l am in a phased plan?

73. Ms Spencer-Lee responded by email stating:

> "I'm pleased to hear the operation went pretty well and you're in recovery. Steve and I have spoken a few times about how we best support your return to work. You are still the Head of Installations and this hasn't changed, although obviously we have needed to cover all the work in your absence to keep the business going….
>
> When we understand everything you're likely to be able to do and the hours that are appropriate, we'll look to adjust the structure to show where you will fit, temporarily and longer term. Sorry I can't be much clearer than that right now, the answer really is "it depends". We are all really looking forward to having you back and I think you'll like the new team, including Paul Bush and Danny Kane, who you already know."

74. We find that this email was misleading as the Claimant was not 'the' head of installations and the thinking had changed. Ms Cawthorne had been appointed to a permanent position as Head of Installations and it was clear that it was intended that there would be more than one head of installations on the Claimant's return and as such the Claimant's role would change.

75. Later on 12 March 2019, Mr Garrod emailed the Claimant an updated version of the organizational chart that had been distributed to the other members of Installations back on 7 November 2018. The names of the IMAC engineers were included on this but the names of two members of staff at the Acketts Warehouse were deleted. The Claimant would have observed from this chart that she was not included on it.

29 April 2019 meeting

76. A meeting took place with the Claimant, Mr Garrod and Ms Spencer-Lee on 29 April 2019 at a country club. We accept Ms Spencer–Lee's manuscript notes of the meeting as what she recorded at this meeting. Whilst we are critical of the failure to previously disclose these notes we do not accept that they were fabricated during

evidence. At this meeting it was agreed that the Claimant's working hours prior to ill health was excessive and that there was a need to ensure that this does not happen on her return. The Claimant indicated that she felt that work could grow in retail for diversification. In the meantime, ad hoc work would need to be identified for her to return and a suggestion that the Claimant took 2-week annual leave. It was suggested to tell only a limited number of people when she returns to work and not clients straight away.

77. On 2 May 2019 Ms Spencer-Lee wrote to the Claimant's specialist Dr Mukesh requesting a report regarding the Claimant's return to work. The letter stated:

> 1) When is Andrea likely to be well enough to return to her full role? Andrea is employed as Head of installations, which is a senior management role and includes:
>
> - Responsibility for commercial and finance management to optimise profitability.
> - Engagement with customers and internal staff regarding future and ongoing projects.
> - Staff management and dealing with escalated employee relations issues.
> . Travelling to sites and other Cennox offices.
> - Driving continuous improvement.
>
> 2) We intend to build Andrea's hours up to full time (45 hours) over a 6-week period with regular reviews to adjust the support. is this a realistic target?
>
> 3) What are the short and long term impacts of Andrea's illness on her ability to carry out her role?
>
> 4) Are there any further short or long term adjustments you can recommend to support Andrea's return to work and while at work?

78. Dr Mukesh responded on 3 May 2019 stating that it was anticipated that the Claimant would be able to return to work towards the end of July 2019, that a 6 week return to work would be suitable, subject to regular review and that she would recover well form her ongoing treatment and should not be left with any long-term impact which could influence her role. A short-term adjustment of doing some working hours at home was suggested.

79. On 28 May 2019 Ms Spencer-Lee confirmed a meeting with the Claimant to catch up on how she was doing, review the advice from her specialist and plan for her to return to work which sounded likely in July. The Claimant responded querying whether there was a planned agenda or whether she would like one to be drafted. Ms Spencer-Lee responded that no detailed agenda was needed.

20 June 2019 meeting

80. The meeting was arranged for 20 June 2019. In attendance with the Claimant was Mr Garrod and Ms Spencer-Lee. In view of the previous correspondence the Claimant reasonably expected this to be a return to work meeting. However, during the meeting it was explained by Mr Garrod that the head of installations role would be split into two and it needed to be agreed how to split it. The Claimant suggested splitting with customers/VIPs/large projects. A phased 6 weeks return to work plan for the Claimant to work on an IMS project was agreed at this meeting.

81. The Claimant denies that there was any suggestion that the head of installations role would be split into two. We do not accept her evidence in this regard. Whilst we accept that the Claimant may have misconstrued what was being said at the meeting because she reasonably considered this to be a return to work meeting. The Claimant maintains that there was a discussion relating to a split in workload not the actual role and refers to her email on 28 June 2019 to Mr Garrod and Ms Spencer-Lee setting out what she considers to be for the purposes of clarity her points of the meeting:

> 1) AW has confirmed she is looking to return to existing role, although role title to be clarified. Currently retained job title as Client Services Director/ Head of installations. SC revised role post secondment also to be clarified.
>
> 2) SG keen to ensure work load is split, to ensure adequate work levels. SG to put forward suggested changes.
>
> 3) SG to issue AW with updated organisational chart, to establish divisional structure changes and proposed changes following SC's secondment and proposed work split.

82. The references to divisional structure change and proposed changes 'following Ms Cawthorne's secondment' and proposed work split is consistent with the fact that the structure was to change going forward.

83. We have considered the Claimant's evidence but we accept that Mr Garrod and Ms Spencer-Lee did specifically state that the head of installations role would be split into two. Ms Spencer-Lee's late disclosed manuscript notes of the 20 June 2019 meeting mention splitting the Head of Installations role in two and her email of 2 July 2019 (effectively writing up her manuscript notes) states:

> We spoke about the growth of the Head of installations role and Steve is proposing to split the role in two, creating two new job descriptions summarising different responsibilities for Andrea and Shelley Cawthorne. Andrea's role will continue to be at the same grade, pay and terms and conditions. Andrea made suggestions that the role could be split by customers/VIP clients or large projects.

New structure

84. On 19 July 2019 Mr Garrod emailed the Claimant proposed job descriptions of the split in roles for Head of Installations and organisation charts. The structure proposed two Heads of Installation, one for Key Accounts that was nominally allocated to the Claimant (following her expressed interest at the meeting) and the for IMAC services that was nominally allocated to the Ms Cawthorne (following her expressed interest). The Claimant was very unhappy with this and responded with an email on the same date stating that she felt she had been demoted and disadvantaged due to her cancer diagnosis. The Claimant did not agree with having two Head of Installation roles and requested that she return to all her previous responsibilities with a view to reviewing her own workload.

85. On 20 July 2019 the Claimant provided her feedback on the proposed structure maintaining that it was wrong, non-compliant with CDM Regulations and was a demotion for her. She raised concern that it would separate her from direct management of the division.

86. Mr Garrod responded by email dated 23 July 2019 to the Claimant's specific concerns. He wrote:

"You're aware that there has been a significant amount of change since Cennox and Acketts came together in November 2017 and this has continued with the business diversifying into other areas e.g. Locker installations, large scale programme management, etc. with the consequence that the breadth and scope of works has increased ranging from very simple through to highly complex prime contractor. As you highlighted, both before you became unwell (e.g. email to myself on 07 June 2018 @ 23:03 "my workload is excessive and work is on a rapid increase") and in subsequent conversations during our catch—ups during your recovery, the workload was already unsustainable causing you to work extremely long hours and impacting on your work/life balance. Taking this into consideration and following a review of IMAC business in the Autumn of last year by myself and Linda Nowak to identify opportunities to improve/streamline the team -— which you would have been actively involved in if you had been at work but due to the seriousness of your illness I felt it inappropriate/insensitive to discuss this with you in any depth - there was a restructure of the team members. Some staff left, Paul Bush was recruited to manage the small projects teams and Daniel Kane to manage the Installers. It became obvious during this review that the workload would be enough for two senior managers and there was never any intention to diminish your role but rather to ensure that the role was manageable. Secondly, to ensure that we develop the IMAC business in the areas/opportunities needed i.e. those providing us with the greatest revenue/margin, whilst providing the focus demanded by these types of customers, splitting the Head of Installations role in two seems like a sensible way to maintain your role, whilst ensuring that the benefit of your experience/skills is maximized and ensure the workload is manageable. The only question that remained and was discussed with you and Shelley recently, was where to make the split.

The role is the same title, it's made up from your existing responsibilities, has the same reporting line, is on the same pay and at the same grade so I don't feel there is any loss of status. The main difference is that the responsibilities are now divided between yourself and Shelley so as to ensure that there is the right balance between customer/internal focus. Shelley has demonstrated over the past year that she is very capable of continuing to perform at this level in partnership with yourself and we hope that you will work well together for the benefit of the current/future business."

87. In respect of the demarcation of the role Mr Garrod stated:

"PMs other than the NBS team are generally dealing with ad-hoc short notice works and/or short-term projects, rather than the longer term works. The former type of works create a significant workload (As an example lnPost want to deploy 1000 lockers next year) that would stop you focusing on the role l have stated above i.e. We want build on larger type of work and increase the team delivering it and we see your skillset as key in achieving this."

88. We find that the reasoning and explanation for the split in roles was genuine and justified for the management of the business. Specifically, we do not find that it was as sham reorganisation related to the Claimant's disability absence or her disability and we find had the Claimant not been previously absent due to her disability the reorganisation and direction of the business would have been discussed and she would have been consulted on in at an earlier time.

89. On 25 July 2019 the Claimant had a telephone conversation with Ms Spencer-Lee regarding the reorganisation. The Claimant believed that two Heads of Installations

positions would not work. She stated that she did not think the role of Head of Installations could be split as it would make her and Ms Cawthorne compete against each other and someone needed to have ultimate control.

90. Ms Spencer-Lee disagreed with this and explained that the split in responsibilities of the Head of Installations role was a good solution for a role which had rapidly grown. She stated that there was a risk that with only one person undertaking the role that it would be unsustainable. Ms Spencer-Lee emphasised that there was always a role for the Claimant. It was apparent to Ms Spencer-Lee that the Claimant was concerned that she would no longer have control of strategic operations, which she may have done at Acketts. However, the Respondent was a much bigger team and the roles were inevitably different.

91. Unfortunately, the Claimant believed herself to be the authority on installations and compliance, and questioned whether Mr Garrod knew enough about the role. The Claimant was upset that her role had been changed. However, her title, terms and conditions and remuneration package were unaltered. The changes that were proposed were a reassignment of some her of responsibilities to Ms Cawthorne. During the conversation the Claimant indicated that she would raise a grievance.

92. We find that the Claimant would have been content with such reassignment of duties if Ms Cawthorne was not also named as a Head of Installations, or if the Claimant herself was titled 'Director of Installations' being the sole lead of the team. However, we find that in view of the evident previous work pressures, the Nowak led review the previous year and the drive to increase revenue through big ticket clients, the structure the Claimant worked on before her sickness absence would inevitably have changed. The Respondent was seeking to consult with the Claimant about required changes but the Claimant had a closed mind to any suggestion that she would no longer be sole Head of Installations.

93. The Claimant emailed Mr Garrod on 26 July 2019 stating that she did not agree to the proposed changes as they disadvantage her greatly. Mr Garrod responded to the Claimant later that day with an email that stated

> "I appreciate that you are finding the proposed changes upsetting but I would like to reiterate that this is not intended and that these changes are partly due to feedback from yourself about the workload and work/life balance. When this is taken into account, along with the scope of services now in the IMAC team and the forecasted works, splitting the responsibilities does make sense and is something that would have been needed regardless of your absence. An example where we have successfully done this is in Cennox Europe where we have joint MDs. This by no means diminishes your role and if anything makes it more critical as it is intended to fully utilise your skills and experience on the 'Key Accounts' and provide the drive and focus in this area.
>
> However, as we have previously discussed, as Divisional Director, I am splitting the department, but happy to discuss jointly with yourself and Shelley how we tune my proposal i.e. Where the pre-construction team sit. As previously advised, this change does not affect your terms and conditions, so formal consultation is not required, though I'm keen to take your views on board."

94. Mr Garrod was open to further discussion on where responsibilities should fall and changed reporting lines to accommodate some of the Claimant's observations.

However, we find that the Claimant was not prepared to entertain the prospect of there being two Heads of Installation.

95. The Claimant returned to work following long term absence on 29 July 2019 and it was planned that she work under the agreed 6-week phased return to work plan on the IMS project.

Written grievance

96. On 31 July 2019 the Claimant submitted a written grievance. The grievance was 11 pages long but the first 5 pages were background of the Claimant's view of her responsibilities and her performance in the role. The grievance set out her experience and qualifications from Acketts and her seeming frustration that she was not appointed a director when transferred to the Respondent. However, the thrust of her grievance that she had been lied to by Mr Garrod and Ms Spencer-Lee regarding her role and that she was being blocked from returning to her role due to her cancer diagnosis.

97. A grievance meeting was held on 8 August 2019, conducted by Managing Director Richard Grimmer. At the hearing, the Claimant brought a bundle of over 100 pages for Mr Grimmer to consider. Much of the information was from when the Claimant was employed at Acketts and Mr Grimmer did not deem it relevant to their discussion of the matters he needed to decide.

98. During the grievance meeting the Claimant reiterated frustrations about her role being reduced on transfer to the Respondent from Acketts and that she was no longer a director acting as Managing Director for the much larger merged organisation. Mr Grimmer sought to explain to the Claimant that since he had come into the role, he had implemented many changes into the business. He sought to deal with the grievance in a meditative way and suggested that the Claimant continue to provide Mr Garrod with input on how the role structure should work to ensure success.

99. Mr Grimmer did not uphold the Claimant's grievance and wrote a short outcome letter on 12 August 2019. Mr Grimmer did not address the Claimant's concerns that she had been lied to in his grievance outcome letter. There was a genuine reorganisation and the earlier permanent appointment of Ms Cawthorne did not change that. The Claimant was invited to speak to Mr Garrod to clarify her role going forward. The Claimant was informed of her right to appeal within 7 days.

Meeting with Mr Garrod

100. During August 2019, Mr Garrod had weekly calls with the Claimant regarding her return to work plan and workload. The Claimant was indicating that she wanted to return to the full workload of the Head of Installations role immediately and seemed unwilling to build up gradually, contrary to what had previously been agreed and as had been advised by Dr Mukesh.

101. On 18 August 2019, the Claimant requested the grievance appeal deadline to be extended to 19 September 2019 to allow time for discussion with Mr Garrod and follow up meetings with yourself and some tolerance for 'any negotiations' required. The appeal deadline date was subsequently extended to 2 September 2020.

102. On 21 August 2019, the Claimant met with Mr Garrod. The Claimant had compiled a lot of information for the meeting, which included the organisation chart structure she had previously been working on. She pointed out there could only be one Head of the division taking responsibility of the overall division and subsequent regulations. The Claimant maintained that the Respondent could not have two Heads of Installations because the management of CDM2015 could not be split or separated.

103. The Claimant did not suggest removing Ms Cawthorne's reporting lines and accepted that Ms Cawthorne be allowed to retain management responsibility in the proposed group structure. The Claimant's aim was to retain division control, and she suggested as a compromise that she could be called 'Installations Director'.

104. Mr Garrod took a copy of the organisation chart that the Claimant had drafted and said he would see what compromises were available. Mr Garrod stated that he would revert within a week but he did not do so. Following chasing up by the Claimant on 30 August 2019 Mr Garrod, spoke to the Claimant and asked her whether she had accepted the changes. The Claimant responded that she understood that they were seeking a workable middle ground. However, Mr Garrod said that he had not changed his mind about his proposal. The Claimant said that his proposal was not acceptable and was not workable. There was an impasse and which Mr Garrod indicated would need to be resolved by the Claimant's open grievance.

105. The Claimant approached Ms Cawthorne who informed her that she had been appointed as permanent head of installations in November 2018. This was the first time the Claimant was aware that Ms Cawthorne had been appointed on a permanent basis. However, the reorganisation was not a sham. The Claimant was informed in November 2018 meeting that more work was coming the Respondent's way and things have changed, it was a different place and the Claimant would be integrated back into work when she is ready. Similar sentiments were expressed in March 2019 communication. Ms Cawthorne been appointed on temporary, acting up basis until the Claimant returned, we find that there would still have been a business need for two Heads of Installation and as such Ms Cawthorne would have been appointed into a permanent role following consultation.

106. Whilst the Claimant was concerned by this she did not resign. She stated that her working life was not just about her, it provided financial security for her daughter's future care support and her mortgage renewal was due to end in February 2020 after a five-year fixed term. The Claimant stated that she longed for normality and her job was also something she longed for having spent a year in relative isolation.

107. Consequently, on 2 September 2019, the Claimant submitted a grievance appeal on the grounds that her grievance was not heard fairly, no proper investigation was carried out and that her grievance was misunderstood. The Claimant maintained that she had been discriminated against and she requested financial accounts for 2018 and 2019 to progress her grievance.

108. Mr Grimmer responded by email to the Claimant saying:

"I have read your response and I am very surprised and very disappointed that you want to take this further as we have always been clear with the strategy and always supportive of

you throughout your employment at Cennox post the Acketts acquisition. The next stage and last stage will be to raise this up to Clive Nation and as such I will speak to Jenny who will advise of next steps. "

109. We find that using wording 'very disappointed' was not appropriate in the context of a grievance appeal. However, this was indicative of Mr Grimmer's surprise that the grievance had not been resolved in the meditative way he had hoped. We do not find that it amounted to an obstruction to appeal and the Claimant was informed that Clive Nation would consider matters next.

110. On 5 September 2019, Ms Spencer-Lee contacted the Claimant and shared a list of the matters that required further investigation. The same day, Ms Spencer-Lee discussed the Claimant's concerns regarding Perry Alexander, Group Finance Controller, conducting the investigations because his partner worked in the Installations department. Ms Spencer Lee suggested one of the UK&I Directors be used as an alternative, but the Claimant was not happy because they reported to Mr Grimmer.

111. On 6 September 2019, the Claimant was signed off work for 6 weeks for stress.

112. On 9 September 2019 Ms Spencer-Lee wrote to the Claimant to suggest that the investigation continue, a provisional date of 4 October 2019, when the Chief Executive Mr Nation was due back from business in America was proposed as the date for the appeal hearing so the matter would be progressed.

Restricting emails

113. On 9 September 2019 the Respondent's Finance Director told Ms Spencer-Lee that he was aware that the Claimant had been contacted by one of the Respondent's customers, Mobius, regarding potentially recruiting her. He was concerned about the Claimant having access to sensitive information and it was decided to limit the Claimant's access to her emails while she was signed off work. The following contemporaneous email reflects the Respondents reasons for this:

"Hi Steve,

Dave McCulloch has just been in to see me about concerns with Andrea having access to sensitive Cennox information, in light of her admission to you and Richard that she has been interviewed by Mobias, who are currently in conversation with Cennox about future work. You already raised similar concerns last week and this morning.

Given this and the concerns we discussed about Andrea continuing to get involved in work during her previous sickness absence, adding to her stress, putting a pause on her Cennox account is starting to look like a good idea. It's a shame, as I'm sure Andrea will try to use this against us, but given the concerns about Mobias and her previous form continuing to access work emails when she was off sick, I'm not sure we have much choice. We are not often in is situation, but I believe we would be doing this without hesitation for anyone else off with stress and continuing to get involved in work. Are you happy for IT to put a pause on her account?"

114. The Claimant discovered she was locked out of her email on 11 September and called Ms Spencer-Lee. Ms Spencer-Lee offered to help if she needed any

documents. The Claimant replied to say that it caused her a disadvantage because her grievance documents were on there. Ms Spencer-Lee responded on 11 September 2019 that IT have confirmed she could still access her historic email and laptop, but if she needed anything else to let us know and we would ask IT to send it to her.

115. On 13 September 2019 Ms Spencer-Lee wrote to the Claimant stating that Mr Nation was not comfortable with releasing sensitive accounts in their raw form and would like her to identify the specific information required.

116. Mr Perry Alexander, supported by Ms Sophie Hamlin, HR Advisor, started the appeal investigation process and initially wanted to meet with the Claimant but she refused to meet him until he had reviewed all of the documents that she intended to submit.

117. On 18 September 2019 as part of the grievance investigation Mr Alexander interviewed both Ms Spencer-Lee and Mr Garrod. Unfortunately, Mr Alexander became ill and had to be admitted into hospital on 20 September 2019. This caused difficulty because the Claimant had indicated that she did not want anyone who reported to Mr Grimmer and given that he was the Managing Director of the UK & Ireland division this limited the Respondent's options for an alternative investigator. Mr Nation therefore decided that Mr Alexander should continue when he had recovered and returned to work. It was not anticipated that he would be away from work for a long time but this meant that there would have to be a delay to the interview meeting with the Claimant.

118. On 25 September 2019, Ms Spencer-Lee wrote to the Claimant to inform her of Mr Alexander's illness and that he would not be able to conduct his interview with her, she asked if the Claimant would agree to delay the interview by a week. The Claimant responded the same day to say that she was not willing to agree to any further delays as she needed to consider her health and well-being.

119. On 26 September 2019 Ms Spencer-Lee replied to the Claimant and outlined the difficulties involved in sourcing another investigator and that Mr Alexander was not expected to be off for an extended period.

120. On 27 September 2019, the Claimant sent Ms Spencer-Lee an email to say that was she resigning with immediate effect as she considered that her grievance had not been taken seriously and that she had been mistreated by the Respondent. She wrote:

> "I am very unhappy about the way I have been treated and set out some of the more serious matters.
>
> During my sickness absence in November 2018 I learned that Shelley Cawthorne had been given my job, I queried this but I was assured this would not affect my role.
>
> In June 2019 it became clear that a restructure had taken place and that Shelley was doing my job. The Company said it would need to see where I would fit in.
>
> I was assured that my role was unchanged but when I returned to work I did not return to my existing role. I was demoted and several key responsibilities were taken away from me. I

was offered a role that was a demotion and regulatory non-compliant.

I lodged a detailed formal grievance (11 pages) on 31 July. The outcome letter (1.5 pages) failed to adequately deal with my grievance complaints.

I reasonably asked for documents that l was entitled to and believed would support my grievance appeal. These were not sent.

I lodged a grievance appeal on 2 September which should have been dealt with promptly under the Grievance Procedure.

In response to my grievance appeal the Company locked me out of my company account.

The Company has mistreated me because of the complaints I made, the Company has not dealt with my grievance appeal adequately since 2 September and does not intend to do so.

My mistreatment stems from my cancer diagnosis and because I complained about disability discrimination.

Your email (below) stating that the grievance appeal meeting will need to be delayed further is the final straw and I write to say that I resign with immediate effect and treating myself as constructively dismissed."

121. The Respondent continued with the investigation and grievance appeal as it was anticipated that Mr Alexander would be well enough to return to work the following week. On 27 September 2019, HR Advisor, Ms Hamlin wrote to the Claimant inviting her to her grievance investigation meeting on 3 October 2019. However, the Claimant did not agree to the meeting and referred to her resignation email.

122. On 30 September 2019, Mr Alexander returned to work and continued with the investigation.

123. On 30 September 2019, Ms Spencer-Lee wrote to the Claimant and accepted her resignation with effect from 27 September 2019. The Claimant was invited to continue with the grievance appeal and attend the meeting with Mr Alexander on 3 October 2019.

124. The Claimant did not make contact and the meeting on 2 October 2019 was cancelled. The Claimant's written statement used for this investigation and she was contacted again on 4 October 2019 inviting her to attend her appeal hearing on 24 October 2019.

125. On 17 October 2019, the Claimant was sent a copy of Mr Alexander's investigation report.

126. On 24 October 2019, Mr Nation held the grievance appeal hearing. The Claimant did not attend. At this hearing, Mr Nation considered the grievance and on 30 October 2019 he wrote a letter indicating that the Claimant's appeal had not been upheld.

Law

Direct discrimination

127. Section 13 Equality Act 2010 (EqA) sets out the provisions for direct discrimination. It states*:*

'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.'

128. As far as comparators are concerned the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, HL it was held that the appropriate comparator must be in the same or not materially different circumstances but for the protected characteristic.

Discrimination arising from disability

129. Section 15 EqA provides for discrimination arising from disability. It states:

Discrimination arising from disability

(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

130. The Tribunal was referred to the guidance in Pnasier v NHS England [2015] IRLR 170 where it was held that the Tribunal must identify whether there is unfavourable treatment, if so what was the reason for it. In this context motives are irrelevant. Whether the reason or cause is something arising from disability is an objective question of fact.

Victimisation

131. Section 27 EqA defines victimisation

'(1)A person (A) victimises another person (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.

(2)Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.'

132. In the House of Lords case of Nagarajan v London Regional Transport [1999] ICR 877 it was held that victimisation is established if the protected act had a significant influence on the outcome. In the House of Lords case of Chief Constable of West Yorkshire v. Khan [2001] ICR 1065 it was held that the Tribunal must look "operative" or "effective" cause for the treatment. In summary the focus is on the reason why the alleged discriminator acted as they did.

Burden of proof

133. The burden of proof provisions are found at section 136 EqA. This states:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

134. The burden is on the Claimant to prove, on a balance of probabilities, to establish a prima facie case of discrimination. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ 33, at paragraph 56. The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of

discrimination), confirmed that a Claimant must establish more than a difference in status (e.g. disability) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

135. Even if the Tribunal believes that the Respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that the treatment was due to the Claimant's disability.

EqA - Time Limits

136. Section 123 EqA states:

(1)[Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
1 (a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

137. The Tribunal's discretion to extend time is wide but emphasises that, as Auld LJ observed in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 at [25]:

"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of the discretion is the exception rather than the rule".

138. We also considered Sedley LJ's remarks in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 at [31] and [32] that there is "*no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised*" and that whether to grant an extension "*is not a question of either policy or law*" but

"*of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it*".

139. The Tribunal had regard to the balance of prejudice between the parties when considering whether it is just and equitable to extend time and the factors in the case of British Coal Corp v Keeble [1997] IRLR 336 where Mrs Justice Smith held:

"*The EAT also advised that the Industrial Tribunal should adopt as a check list the factors mentioned in Section 33 of the Limitation Act 1980. That section provides a broad discretion for the Court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action. The decision of the EAT was not appealed; nor has it been suggested to us that the guidance given in respect of the consideration of the factors mentioned in Section 33 was erroneous.*"

140. It is accepted by both parties that the claim has been brought in time as the act relied on is the Claimant's dismissal. The Claimant's case is that it is a discriminatory dismissal and therefore section 123(a) of the Equality Act 2010 applies. Section 123(3)(a) Equality Act provides that conduct extending over a period is to be treated as done at the end of the period and as such the allegations of discrimination and victimisation are within time.

Unfair constructive dismissal

141. Section 95 (1)(c) Employment Rights Act 1996 states:

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

142. In the Court of Appeal case of Western Excavating (EEC) LTD v Sharp [1978] IRLR 27. Lord Denning MR set out the principles at paragraphs 15 and 21.

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length

of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

143. Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 where per Underhill LJ at paragraph 55.

'it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

(If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?'

144. In Omilaju v Waltham Forest London Borough Council 2005 IRLR 35 it was held :

'19. ... The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms

the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.'

145. Ms Cullen referred to the EAT case of Williams v Alderman Davies Church in Wales Primacy School [2020] IRLR 589, it was held that an ET had erred in concluding that because it found that an employer's conduct which had tipped the employee into resigning could not contribute to a breach of the implied duty of trust and confidence, the constructive dismissal claim must fail. If there was prior conduct that amounted to a breach, that had not been affirmed, and which materially contributed to the decision to resign, the claim of constructive dismissal will succeed.

146. In the very recent case of De Lacey v Wechelsen t/a/ The Andrew Hill Hair Salon [2021] UKEAT/0038/20/VP(V), Judge Cavanagh held that in considering whether a constructive dismissal is discriminatory a Tribunal should consider whether there are relevant matters of discrimination and 'whether they sufficiently influenced the constructive dismissal to mean that the constructive dismissal itself amounted to… discrimination.' It was held that the fact that the last straw was not discriminatory did not mean that the constructive dismissal was not discriminatory.

147. Ms Cullen also referred to the case of Rawlinson v Brightside Group Ltd [2018] IRLR 180, the EAT held that the implied term of trust and confidence must import an obligation not to deliberately mislead. At para 33:

'*To the extent that the Claimant contends that the implied term imports an obligation upon the employer to act in good faith and not mislead, that seems to me to be uncontroversial in so far as it relates to a continuing employment relationship (see Mahmud v BCCI [1997] ICR 606)'*

Conclusions

148. In view of our findings of fact, set out above, and applying the relevant law our conclusions on the schedules of issues are as follows:

Direct disability discrimination

149. We do not conclude that there was less favourable treatment because of the Claimant's cancer diagnosis.

150. There was no evidential basis for the Claimant's submission that the Respondent had was a negative stereotypical assumption towards cancer sufferers. Ms Cullen submissions in this regard refer to the Claimant's absence and the length of absence is more apt for section 15 EqA claim not a section 13 direct discrimination complaint.

151. In respect of the appropriate comparator we conclude this would be a long serving senior employee on long term sickness absence in a company that was undergoing organisational change and development following the merger of three companies. We do not consider that the element of unknown prognosis takes matters further in this regard as this could have applied to a non- disabled senior employee on long term absence.

152. We do not consider that Ms Cawthorne is an appropriate comparator as her relevant circumstances involved having no departmental management continuity at all if she left at the same time during the Claimant's absence.

153. Whilst we do not consider that there was less favourable treatment we do conclude that in certain respects the Claimant was treated unfavourably because of something arising in consequence her disability, namely her absence due to having cancer treatment. We deal with these matters in respect of schedule 2 below.

154. In any event our conclusions on the specific allegations of direct discrimination under schedule 1 are as follows.

Schedule 1 – Direct Discrimination (section 13 of the Equality Act 2010)

a. *The Respondent appointed a junior colleague, namely Shelley Cawthorne, to the Claimant's role of Head of Installations as a permanent position, whilst the Claimant was on sick leave, in or around November 2018.*

b. *On the 7th November 2018, Steve Garrod emailed members of the Claimant's team but did not include the Claimant on the email, to inform them of a revised structure. Steve Garrod did not include the Claimant on the structure or the accompanying note;*

c. *Removed the Claimant from the organisational structure (November 2018);*

155. Ms Cawthorne was not strictly a junior employee, albeit she reported to the Claimant in the pre-sickness absence structure. Ms Cawthorne was not appointed as Head of Installations role because of the Claimant's disability. She was appointed to this role because she had an offer from a competitor of the Respondent in circumstances where the Claimant was not in situ and the Respondent would have had operational difficulty continuing without Ms Cawthorne's continued employment.

156. The email to the team was sent reflecting the organisational structure in the Claimant's absence. It was not sent because of the Claimant's disability but because the Claimant was not at work.

157. Therefore, the Claimant's disability was not the reason for Ms Cawthorne's appointment or the notification of this in an email.

d. *The Respondent, acting through Jennifer Spencer-Lee and/or Steve Garrod, misled the Claimant on the 27 November 2018 about whether Shelley Cawthorne had been appointed permanently to the Claimant's role and/or whether the Claimant's role remained open to her on her return from sick leave when it was said 'This absolutely is not expected to affect your role which is still here for you when you're well enough to come back; Shelley is leading the whole Installations team for now to keep everything running…';*

e. *The Respondent acting through Jennifer Spencer-Lee misled the Claimant on 12th March 2019 about her role, namely that 'you are still Head of Installations and that hasn't changed.'*

158. In relation to the Claimant being misled at and the in relation to 27 November 2018 and 12 March these are not matters because of the Claimant's disability. There were clumsy attempts to seek to protect the Claimant from unnecessary worry whilst was absent from work receiving treatment. However, in the meeting on 30 November 2018 Mr Garrod indicated that more work was coming the Respondent's way and things have changed. He stated the Respondent was a different place and the Claimant would be integrated back into work when she is ready. This trailed the fact that there would be change.

…

i. Failure to deal with the Claimant's grievance promptly and/or adequately in August 2019 until the date of the Claimant's constructive dismissal on 27th September 2019;

159. We do not conclude that the Claimant's grievance was not dealt with appropriately. We provide fuller conclusions in this paragraphs 178 – 180 below. In any event we do not conclude that the Claimant was less favourably treated because of her disability in this regard.

j. On the 6 September 2019, the Claimant was locked out of her work emails and access to the Respondent's network.

160. We have found that the Respondent had genuine concerns about the Claimant being able to access sensitive information whilst being approached by a competitor whilst on stress related absence. These are different factual circumstances to Ms Cawthorne as at this time the Respondent was not in the vulnerable operational position and nor was Ms Cawthorne on a 6 week sickness absence due to stress when approached. Finally, the Claimant's disability, of cancer, was not relevant to this as her absence at this stage was stress related.

161. In summary, the Claimant has not established that the acts complained of were less favourable treatment because of her cancer. Her section 13 EqA direct discrimination complaints therefore fail and are dismissed.

Section 15 EqA - Discrimination arising from disability

162. Our conclusions on the specific allegations of discrimination arising from disability under schedule 2 are as follows:

Schedule 2: Discrimination arising from a disability (section 15 of the Equality Act 2010)

a. The Claimant appointed a junior colleague, namely Shelley Cawthorne, to the Claimant's role of Head of Installations as a permanent position, whilst the Claimant was on sick leave on or around November 2018;

b. On the 7th November 2018, Steve Garrod emailed members of the Claimant's team but did not include the Claimant on the email, to inform them of a revised structure. Steve Garrod did not include the Claimant on the structure or the accompanying note;

c. Removed the Claimant from the organisation structure on or around November

2018;

163. The Tribunal have no difficulty in concluding that the Claimant was treated unfavourably by having Ms Cawthorne appointed to the role of head of installations and this being communicated during the Claimant's sickness absence. The Claimant was absent due to sickness arising from her disability. We find that if the Claimant had not been absent and had Ms Cawthorne been approached by a competitor it is possible that Ms Cawthorne may have left without being appointed to the role. However, it is more likely given her seniority and long-standing working relationship with Mr Garrod and Mr Grimmer that this would have precipitated the reorganisation to address the workload difficulties and business development plans with a view to retaining her in a new structure.

164. The unfavourable treatment in this respect is therefore appointing Ms Cawthorne to a role affecting the Claimant without any input from the Claimant at all. This arose from the Claimant's disability related absence.

165. We then considered whether the Respondent had justified this. We do not consider that the Respondent was justified for the Respondent in appointing Ms Cawthorne to a permanent role at this stage. There were less discriminatory ways of achieving the aims of business stability such as which is being done such as acts appointing Ms Cawthorne as the 'acting head' or a 'temporary head' subject to the Claimant returning to work. The Claimant has therefore established that the Respondent discriminated against her by treating her unfavourably for a reason arising from her disability in relation to schedule 2 allegations a – c.

d. The Respondent, acting through Jennifer Spencer-Lee and/or Steve Garrod, misled the Claimant on the 27th November 2018 about whether Shelley Cawthorne had been appointed permanently to the Claimant's role and/or whether the Claimant's role remained open to her on her return from sick leave when it was said 'This absolutely is not expected to affect your role which is still here for you when you're well enough to come back; Shelley is leading the whole Installations team for now to keep everything running…';

e. The Respondent acting through Jennifer Spencer-Lee misled the Claimant on 12th March 2019 about her role, namely that 'you are still Head of Installations and that hasn't changed.'

166. In relation to Schedule 2 points d and e the Tribunal find that the Claimant was treated unfavourably. The Claimant was misled and was given an indication that Ms Cawthorne was acting temporarily in an acting up role on 27 November 2018, 30 November 2018 and 12 March 2019. The reasonable interpretation from those emails and the meeting is that Ms Cawthorne is acting up in the place of the Claimant until her return. The reality was Ms Cawthorne had been appointed on a permanent basis and, at least by late November 2018, the Respondent was clear that there would have to be a change to the structure going forward. The Respondent did not notify the Claimant about this change because of a clumsy and misguided view that it did not want to upset the Claimant further during her treatment period due to absence. Whilst this may have been well intended by the Respondent we have concluded it was unfavourable treatment because of the Claimant's cancer

treatment. The Claimant was not given the full picture.

167. We do not conclude that this was justified. There was a less discriminatory way of proceeding. The Claimant could have been informed the general thinking of the Respondent regarding proposed changes on the Claimant's return and it was open to the Respondent to have informed the Claimant about sensitive situation it faced in order secure the continued employment of Ms Cawthorne at the relevant time. The Claimant was informed of changed circumstances at the meeting on 30 November 2018 but and she was left under the misapprehension that Ms Cawthorne was working on a temporary basis on the structure which would continue on her return.

168. The Claimant has therefore established that the Respondent discriminated against her by treating her unfavourably for a reason arising from her disability in relation to schedule 2 allegations d - e.

f. Changed the Claimant's role and duties through June and July 2019 without any or any adequate consultation with the Claimant;

169. The Tribunal do not accept the Claimant's contention that there was a sham reorganisation from June to July 2019 without proper consultation.

170. We conclude that there was clear business reasoning, explanation and justification for the changing structure that inevitably had to wait until the Claimant returned to work. If the Claimant had not been absent we find that the discussion regarding reorganising would have taken place in any event. The workload was excessive, the Claimant had previously mentioned this as a serious underlying concern; the workload had to be an appropriately addressed and this was one of the matters that led to the reorganisation. Further, the business objectives to secure big-ticket work was also a genuine reorganisation consideration. The Respondent sought to consult with the Claimant in respect of these matters when she returned to work. It did not do so before she returned to work and as a result at there was no change prior. The corollary is that we conclude that on the Claimant's return consultation was with a view to changing the role that Ms Cawthorne had been undertaking in the Claimant's absence. It would not be the same going forwards. Therefore, we do not consider that the Claimant was treated unfavourably in relation a matter arising from her disability in relation to the proposed changes being discussed. These were matters that the Respondent was properly able to consult on.

171. Whilst the Claimant was reasonably suspicious of the Respondent's motives in view of the fact that Ms Cawthorne was an in situ there was a genuine requirement to reorganise and the Claimant was aware that the situation had changed by what was she was told in the meeting on 30 November 2019 and emails and organisation structure in March 2019.

g. On 2nd July 2019, Steve Garrod sought to prevent the Claimant from communicating with members of her Team without his prior authorisation;

172. We do not consider this to be unfavourable treatment arising from the Claimant's disability. The context was the Claimant was on a phased return to work. It was agreed, in line with medical advice, at the 20 June 2019 meeting that the Claimant

would be returning to work on a six-week phased process dealing with IMS. The Claimant's email to staff on 2 July 2019 was stepping outside the confines of the agree phased return to work plan and Mr Garrod's email in response was not email was not unreasonable in seeking to refocusing the Claimant on what had been agreed.

h. Failed to allow the Claimant to return to her role and job title of Head of Installations when she returned to work on 29th July 2019;

173. The point here was the Respondent sought to reorganise and the Claimant would have been able to return to a role of Head of Installations - Key accounts. There was discussion as to whether the role and the structure the Claimant had worked on previously was appropriate going forward.

174. On 29 July 2019 the Claimant commenced a phased return to work, there was discussion and consultation regarding the of Head of Installations. The Claimant disagreed but she did not have any contractual entitlement to remain the sole Head of Installations and she had no contractual entitlement to prevent the Respondent seeking to consult with her on reorganising the structure in line with business objectives. The Claimant clearly disagreed with the direction of travel but she failed to appreciate and accept that the Respondent and was able to make decisions that it believed appropriate, if there was a reasonable consultation period and process.

175. There was no unfavourable treatment arising from the Claimant's disability in this regard.

i. On or around 26th July 2019, demoted the Claimant to an inferior role with fewer managerial responsibilities;

176. We do not conclude that the Claimant was demoted to an inferior role with fewer response responsibilities. The allegation relates to the business reorganisation that the Claimant did not want to engage with. There was discussion regarding the relevant responsibilities. It was clear that the Claimant did not want to return to a role with excessive workload and she accepted that some of her tasks should be reassigned. Indeed, she offered to allow Ms Cawthorne to keep the reporting lines and managerial responsibility proposed if she could be titled an Installations Director. The Claimant clearly wanted a higher title and she was continuing to use the Client Service Director when she was not. The Tribunal conclude that the Claimant been offered Installations Director, or higher title, she would not have resigned. The Claimant was focused on the title not the detail of the changes suggested.

j. On 6 September 2019, the Claimant was locked out of her work emails and access to the Respondent's network;

177. At this stage the Claimant was on sickness absence due to stress. There were discussions about her interactions with a competitor. A genuine balancing exercise ensued that was noted in the contemporaneous email by Ms Spencer-Lee about the potential ramifications of removing the Claimant's email access. We do not conclude that this was related to the Claimant's disability at all.

k. Failure to deal with the Claimant's grievance promptly and/or adequately in August 2019 until the date of the Claimant's constructive dismissal on 27th

September 2019;

178. We have had regard to the chronology of events. On 31 May 2019 the Claimant submitted a grievance. A grievance meeting was held on 8 August 2019 by Mr Grimmer and the outcome was provided by 12 August 2019. Whilst Mr Grimmer did not address the issue of the Claimant being lied to, he adopted a meditative approach to the grievance seeking achieve a way forward for the Claimant. The effect of any misleading by this stage was immaterial. Whether or not Ms Cawthorne was appointed permanently in November 2018 did not impact on the reasoning for the current reorganisation which would have occurred if the appointment for cover was temporary. The Claimant was given a right of appeal. The Claimant sought an extension of time for the appeal, discussed matters further with Mr Garrod and then submitted a grievance appeal on 2 September 2019 when her 'negotiations' to seek a higher title proved unfruitful.

179. The appeal process was dealt with appropriately given that the identification of an appropriate investigator was in issue and once appointed, Mr Alexander suffered a subsequent illness where he was hospitalised.

180. We do not conclude that there was unreasonable delay or inadequacies in the handling of the Claimant's grievance and appeal in these circumstances. Further, we do not conclude that the way the grievance and/or appeal was heard was unfavourable treatment arising from her disability.

181. In summary, we conclude that the Claimant Ms Cawthorne's permanent appointment in November 2018 and the Claimant being misled about this amounted to was discrimination arising from disability.

182. The last act for that was the 12 March 2019 which on the face of it is out of time. We considered whether it is just and equitable extend time and conclude it is. The Claimant at was misled in relation to the permanent appointment of Ms Cawthorne and was only aware of fact that Ms Cawthorne was permanent in on 30 August 2019 when Ms Cawthorne told her. In the circumstances we conclude that it is just and equitable to extend time and as such the Claimant's claim for discrimination arising from disability in respect of the claims in the Schedule 2 a – e succeeds.

Unfair constructive dismissal

183. In respect of the Claimant's unfair constructive dismissal we have made findings and conclusions above in respect of direct disability discrimination and discrimination arising from disability and we do not repeat the reasoning for the similar allegations under schedule 3 where it is not necessary to do so.

Schedule 3 - Allegations for Unfair constructive dismissal

a. On or around November 2018 Shelley Cawthorne was given the Claimant's permanent role during her sickness absence for cancer;

b. On or around 24th November 2018 Shelley Cawthorne's acceptance of the Claimant's role (Head of Installations) was advertised on LinkedIn network;

c. The Claimant raised this issue with HR on or around 26th November 2018 but was told that it would not affect her role;

d. The Claimant was removed from the Respondent's organisational structure charts on or around November 2018;

184. In respect of allegations under schedule 3 a – d we repeat our conclusions outlined above at paragraphs 163 – 168. These allegations have been established.

e. The Respondent allegedly undertook a 're-structure', without any or any adequate consultation with the Claimant. Alternatively, the re-structure was a sham to cover the fact that Shelley Cawthorne had already been given the Claimant's role on a permanent basis (date unknown by the Claimant);

185. We do not conclude that the Respondent undertook a restructure without any or any adequate consultation with the Claimant. The consultation commenced at the meeting on 20 June 2019. Whilst the Claimant did not agree with the restructure it was not a sham. We accept the Respondent's rationale as a way of more effectively enhancing revenue streams using the resources it had available and reducing pressure of work. Had the Claimant not been absent previous the review would have likely happened anyway, and in view of Claimants perception of her status she would have been likely to react in a similar negative manner.

f. Before returning to work, on or around 2nd July 2019, the Claimant was told not to contact staff members within her team unless the communication had been agreed by Steve Garrod;

186. This email was not unreasonable and in the context of the agreed phased return to work plan to work on IMS projects and the consultation relating to where tasks would be assigned going forward.

g. When the Claimant returned to work after 29th July 2019, her duties were not defined;

h. When the Claimant returned to work after 29 July 2019, she had in effect been demoted and several key responsibilities had been taken away from her responsibilities;

187. The Claimant was supposed to be under an agreed 6-week phased return to work plan on 29 July 2019, following medical advice working on the IMS project when she returned to work and discussions were ongoing on the roles to be undertaken when the phased return to work was complete.

188. The Claimant did not agree with the restructure and commenced sickness absence due to stress were under the phased return to work plan. At this stage we conclude that the Claimant unreasonably sought to retain her full role to see what she could and could not do. This was unreasonable in view of the medical advice they were following under the phased return to work and would have been operationally unworkable.

189. The Claimant was not demoted. She was to be assigned Head of Installations - Key Accounts, subject to consultation. This was not fixed and further discussion was

invited. The Claimant had no contractual right to be the only Head of Installations and she had no contractual right to prevent a change the structure. The Claimant had a reasonable expectation to be properly consulted and this occurred. She disagreed and believed that her views should be accepted and could not accept when it was not.

190. We conclude that the reason for the Claimant's resignation was her erroneous perception of her status. Indeed, she stated that she would have accepted the reassignment of responsibilities proposed by Mr Garrod if she could be given the title of Installations Director. This erroneous view of status was a hangover from her previous post at Acketts that the Claimant had evidently failed to internally resolve.

i. The Claimant considered that the role she was offered was regulatory non-compliant;

191. There is no merit in this aspect of the Claimant's claim. The Respondent was not in breach of CDM regulations in respect of the restructure. This underlines the Claimant's erroneous view of her status within the merged organisation and her unwillingness to engage in discussion if it was not consistent with her way of seeing things.

j. The Claimant raised a grievance on 31st July 2019 which was not dealt with adequately by the Respondent (12th August 2019).

k. There was no investigation or no adequate investigation into the Claimant's grievance (12th August 2019);

192. We conclude that Mr Grimmer considered the Claimant's grievance timeously and adequately in the circumstances. Paragraph 178 above is referred to in this regard.

l. The Claimant sought to appeal and was told by the Managing Director of the Respondent company on the 2nd September 2019, that he was 'very surprised and very disappointed' that the Claimant wished to pursue an appeal.

193. We are critical of Mr Grimmer and his email 2 September 2019 where he says was very surprised and disappointed. It was inappropriate to reference being disappointed in the context of exercising appeal rights but it was not inappropriate to say he was very surprised as he was he was responding to the Claimant's request for an appeal and he believed his meditative approach to the Claimant's grievance should have succeeded. Mr Grimmer's email goes on to outline the next steps for the grievance appeal and the Claimant proceeded accordingly.

m. The Claimant requested documents to support her grievance appeal, but these were not sent;

194. The Claimant requested financial documentation to support her grievance and these were and not sent. A reasonable explanation why they were not sent was provided by Ms Spencer- Lee with the caveat that if the Claimant could the refocus provide the request of documents that she sought to rely on they would be sent. No focused request was made and in any event the financial documentation would not have addressed the key reasons for the reorganisation and expected growth in key accounts.

n. The Claimant was locked out from her work email and accessing the Respondent's network on the 9th September 2019;

195. We have found that the Respondent had genuine concerns about the Claimant being able to access sensitive information whilst being approached by a competitor whilst on stress related absence. The Claimant was provided access to all her historic emails and stored documents to further her appeal.

o. The Respondent failed to deal with the Claimant's grievance promptly and fairly between the 31st July 2019 and the 27th September 2019;

196. We do not conclude that this was the case. Our conclusions at paragraph 178 – 180 above are referred to.

p. The Respondent discriminated against the Claimant because of her cancer diagnosis, which is recognised as a disability under the Equality Act 2010;

197. The Claimant has established that she was discriminated against arising from her disability as outlined above.

q. The Respondent victimised her because she raised a complaint of discrimination arising from her disability.

198. We do not conclude this is the case. Our reasons are outlined below under victimisation.

r. The Claimant considered that the delay to the grievance appeal meeting was the final straw.

199. There was no unreasonable, blameworthy conduct in the handling of the grievance appeal. We do not conclude that the handing of the appeal amounted to a last in a series of acts or incidents which cumulatively amounted to a repudiation of the contract by the Respondent.

s. The Claimant was dismissed (constructive) on the 27 September 2019.

200. In summary, we accept that the Claimant was misled in relation to the permanent appointment of Ms Cawthorne to Head of Installations in November 2018. The Claimant was aware that she was not part of the current organisation structure in March 2019 when Mr Garrod sent an organogram to her. The Claimant reasonably concluded that this was a temporary arrangement until the Claimant returned. When the Claimant returned discussion took place regarding assignment of responsibilities for an optimal structure. This was not a sham. We are also critical of Mr Grimmer's email of 2 September 2019 expressing disappointment in the Claimant appealing. However, we do not conclude that the Claimant resigned because of these matters We conclude that she resigned because she was unable to 'negotiate' a Director title and status in the new structure. She was in a far bigger organisation than Acketts and was not contractually entitled to a higher title.

201. Ultimately, this is a sad case. The Respondent sought to be supportive and was clumsy in its process in permanently appointing Ms Cawthorne and in its communication of this to the Claimant. The Claimant returned to work with

suspicions about her role and motivation for the reorganisation but following explanation it should have been clear to her that her suspicions were not well founded because there were justified business reasons for the changes. The Claimant was unwilling to engage and work in the new structure, had she done so she perhaps could have demonstrated her worth and progressed within it.

202. In these circumstances the Claimant's claim for unfair constructive dismissal fails and is dismissed.

Wrongful dismissal

203. The Claimant has not established that there was a breach of an express and/or implied term of the contract for her to consider that the Respondent no longer wished to be bound by the contract. Her claim for wrongful dismissal therefore fails and is dismissed.

Victimisation

204. It was accepted that the Claimant made the following protected acts:

a. The Claimant's email of 19 July 2019
b. Her grievance of 31 July 2019
c. Her grievance appeal letter 2 September 2019

205. Our conclusions in respect of the alleged acts of detriment are as follows:

a. Failure to investigate her grievance in the first instance (12 August 2019);

206. We have not concluded that there was a failure in this regard.

b. Email from Richard Grimmer, dated 2 September 2019, where he said he was 'very surprised and very disappointed that you wish to take this further.'

207. Whilst we are critical of Mr Grimmer in respect of this email we do not conclude that it was because the Claimant had done a protected act. It was because the meditative approach he thought would resolve matters did not.

c. Decision on the 9th September 2019 by senior managers, including Steve Garrod to block her access to the Respondent network and email system.

208. The Claimant's removal of access was for reasons explained by Ms Spencer-Lee regarding the Claimant's interaction with a competitor and being signed off for stress absence. and not because of any protected act.

d. Failure to investigate and deal with her grievance in an appropriate manner between 31st July 2019 and 27th September 2019;

e. Failure to investigate her appeal in a prompt and appropriate manner (between 2nd September 2019 and 27th September 2019);

209. We do not conclude that the Claimant has established either of the above.

f. Failure to acknowledge the Claimant's resignation when it was sent on 27 September 2019.

210. This was not due to any protected act. Focus was on organising the grievance appeal meeting that the Claimant did not attend.

211. The Claimant's claim for unlawful victimisation therefore fails and is dismissed.

Remedy – Next steps

212. The Claimant is ordered to provide a schedule of remedy to the Respondent by 21 May 2021.

213. The Respondent is ordered to provide a counter schedule of remedy to the Claimant by 28 May 2021.

214. The remedy hearing will take place on 22 June 2021 at 12pm if the matter is not otherwise resolve. The issues for the remedy hearing are:

214.1 What amount of compensation is due for the Claimant's successful claims under Schedule 2 a – e above.

214.2 Whether there should be any adjustment to compensation for failure to follow the ACAS code on disciplinary and grievance procedures.

Employment Judge Burgher

7 May 2021