Case Number: 3331735/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Caroline Robinson	**v**	Cambridge University Hospitals NHS Foundation Trust

Heard at: Cambridge

On: 3, 4, 5, 6 and 9 December 2019
19, 20, 21, 22, 23 and 28 April 2021

29 April, 21 June and 8 September 2021 (In chambers discussion – no parties in attendance)

Before: Employment Judge Ord

Members: Ms S Blunden and Mr C Davie

Appearances
For the Claimant: Ms S Bewley (Counsel).
For the Respondent: Mr R Hignett (Counsel).

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that the Claimant's complaints are not well founded and the claim is dismissed.

REASONS

1. The Claimant was employed by the Respondent latterly as a Specialist Research Nurse from 7 July 2008 until 5 April 2018 when she tendered her resignation with immediate effect.

2. Following a period of early conciliation between 15 April 2018 and 15 May 2018 the Claimant presented her claim form to the Tribunal on 1 August 2018. In that claim form the Claimant made the following complaints:

   (i) That she was (constructively) unfairly dismissed;

(ii) That her dismissal was in breach of contract;

(iii) That she was due payment for accrued annual leave which she had not taken at the time of her resignation;

(iv) That she was the victim of unlawful discrimination based on the protected characteristic of age; and

(v) That she was the victim of unlawful discrimination on the ground of disability (associative discrimination).

3. The complaints relating to disability are claims for associative discrimination. The Claimant's eldest son (who suffers from Autism) and the Claimant's mother (who suffers from dementia) were both accepted by the Respondent as being disabled persons within the meaning of s.6 of the Equality Act 2010. The Respondent also accepts that all material times they had knowledge of the disabilities of both the Claimant's son and the Claimant's mother.

The Issues

4. Following a preliminary hearing on 15 February 2019 when a draft list of issues was available the parties co-operated to establish an agreed list of issues for determination by the Tribunal. After discussion and consideration, the list of issues was agreed with the Tribunal as follows:

Constructive Unfair Dismissal (ERA 1996 s.95(1)(c))

4.1 Was the Claimant dismissed by the Respondent having regard to s.95(1)(c) ERA 1996? The Claimant says she was dismissed. The Respondent says that the Claimant resigned voluntarily and there was no dismissal.

4.2 Was there a breach of the Claimant's contract of employment by the Respondent?

The Claimant alleges breach of the implied duty of trust and confidence based on the final straw doctrine. The Claimant alleges trust and confidence had been eroded in the period from December 2016 which included the Respondent's alleged failure to resolve the Claimant's grievances including the Claimant's belief that she had been subjected to unlawful discrimination and the discrimination itself.

The Claimant says the *"final straw"* was Professor Karet's treatment of the Claimant on 29 March 2018 which included criticism of the Claimant for arriving a few minutes late for work in the context of her regularly working late; pestering the Claimant to obtain physician level permission from IT; criticism of the Claimant and the

statement that she "*couldn't follow instructions*" by Professor Karet; and Professor Karet's reference to when the Claimant had dropped her ID badge when she had previously been close to resigning.

4.3 Did the Respondent's conduct amount to a fundamental breach of contract entitling the Claimant to resign from her employment with the Respondent?

4.4 If the Claimant was dismissed, what was the reason for dismissal?

4.5 If the Claimant was dismissed was the dismissal fair?

Wrongful Dismissal

4.6 Was the Claimant dismissed by the Respondent? The Claimant says she was constructively dismissed. The Respondent says that the Claimant resigned voluntarily and there was no dismissal.

4.7 Viewed objectively, did the Respondent breach the Claimant's employment contract so that the Claimant was entitled to be paid in lieu of notice?

Holiday Pay

4.8 What, if any, payment is the Claimant owed in respect of holiday pay?

4.9 The Claimant believes that she is entitled to be paid for holiday that would have accrued during her notice period. The Respondent denies that the Claimant is entitled to be so paid.

Disability Discrimination

4.10 The Respondent admits that the Claimant's son has a disability within the meaning of section 6(1) of EqA 2010. He is registered as disabled and suffers from autistic spectrum disorder.

4.11 The Respondent admits that the Claimant's mother has a disability within the meaning of section 6(1) of EqA 2010. She suffers from dementia.

Direct disability discrimination by association (EqA ss 13(1) and 39(2)(d))

4.12 Did the Respondent treat the Claimant less favourably than they treated or would have treated other persons because of the Claimant's son's or mother's disability? The Claimant relies on a hypothetical comparator. With the exception of the alleged discriminatory acts in paragraphs where the association is solely with the Claimant's son and where the association is solely with

Claimant's mother, the discrimination is by association with the Claimant's son and mother.

4.13 The Claimant relies on the following as acts of discrimination by the Respondent:

a. on 13 December 2016 Professor Karet telling the Claimant that the Claimant's contract would not be renewed at the end of March 2017;

b. on 15 December 2018 Professor Karet further discussion of the Claimant's health related issues and her sarcastic comment, *"I suppose you do at least work four days a week"*.

c. on 1 February 2017 Gayle Lindsay stating that Dr Sandford had warned that it was going to be "*very busy*" and that the Claimant would have to "*keep up*".

d. failure to investigate or address serious issues properly or at all as evidenced in the Respondent's grievance outcome letter of 10 July 2017;

e. failure to investigate or address serious issues properly or at all or uphold any of the Claimant's grievance complaints as confirmed in the appeal outcome letter 13 November 2017;

f. despite the Claimant's many attempts to negotiate adjustments to her working hours to accommodate her needs as a carer, the Respondent made minimal token concessions reluctantly;

g. Professor Karet's remark in response to the Claimant's requests in late July/August 2017 for flexibility: "*Your son can't be very disabled if he stays at home on his own all day*".

h. the excuses made by the Respondent in Professor Karet's email of 7 September 2017 about being *"keen to maintain a productive working team"* in response to the Claimant's request for flexible working;

i. refusal on 4 January 2018 by Professor Karet to allow the Claimant to work at home to write an abstract for a paper;

j. Dr Sandford's remark to the Claimant in February 2018 "*Perhaps with all your family responsibilities you shouldn't be working*";

k. not granting compassionate leave when the Claimant's mother had to be taken by ambulance to A&E on 5 July 2017;

l. ignoring and failing to record the Claimant's comments and concerns about her July 2017 appraisals by Professor Karet and other managers and ignoring the Claimant's request for an appraisal review;

m. Professor Karet holding the flexible working review two months late on 29 March 2018 at which she criticised and patronised the Claimant;

n. failing to respond to the Claimant's request for a review of her appraisal and failing to address this in final grievance outcome dated 19 July 2018.

Harassment (EqA 2010 ss26(1) and 39(2))

4.14 Did the Respondent engage in unwanted conduct related to disability? Namely:

a. on 13 December 2016 Professor Karet telling the Claimant that the Claimant's contract would not be renewed at the end of March 2017;

b. on 15 December 2018 Professor Karet's further discussion of the Claimant's health related issues and her sarcastic comment, "*I suppose you do at least work four days a week*";

c. Dr Sanford's remark to the Claimant in February 2018 "*Perhaps with all your family responsibilities you shouldn't be working*";

d. Critical comments and treatment of the Claimant by Professor Karet including putting the Claimant under unnecessary pressure at the meetings on 29 March 2018;

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

4.16 In considering whether the conduct had the relevant effect, ET should take into account:

a. the Claimant's perception;

b. the other circumstances of the case;

c. whether or not it was reasonable for the conduct to have that effect.

Age Discrimination

Direct age discrimination (EqA ss 13(1) and 39(2))

4.17 Did the Respondent treat the Claimant less favourably than it treated or would have treated other persons because of the Claimant's age? The relevant age group is those over 60. The Claimant was 60 on 11 February 2015. The Claimant relies on an actual comparator. The actual comparator is Susana Borja-Bolunda. Ms Borja-Bolunda is believed by the Claimant to be in her 40s.

4.18 The Claimant relies on the following as acts of discrimination by Respondent:

a. On 13 December 2016 Professor Karet telling the Claimant that the Claimant's contract would not be renewed at the end of March 2017;

b. Professor Karet referring to the Claimant as being "*slow*";

c. on 14 December 2016 Professor Karet raising the Claimant's age related health issues including the comment "*but Caroline your eye condition is progressive*" when referring to the Claimant's macular degeneration;

d. on 15 December 2018 Professor Karet further discussion of the Claimant's health related issues and her sarcastic comment, "*I suppose you do at least work four days a week*";

e. on 20 December 2016 Gayle Lindsay from HR stating "*Caroline, you're over retirement age*";

f. the oral comments related to the Claimant's health and age the announcement that her contract would be terminated;

g. On 1 February 2017 Gayle Lindsay stating that Dr Sandford had warned that that it was going to be "*very busy*" and that the Claimant would have to "*keep up*";

h. failure to investigate or address serious issues properly or at all as evidenced in the Respondent's grievance outcome letter of 10 July 2017;

i. failure to investigate or address serious issues properly or at all or uphold any of the Claimant's grievance complaints as confirmed in the appeal outcome letter 13 November 2017;

j. treating the Claimant differently from Susana Borja-Bolunda in accommodating home working to facilitate care arrangements and adjustments to working hours;

k. the excuses made by the Respondent in Professor Karet's email of 7 September 2017 for treating the Claimant differently from Susana Borja-Bolunda;

l. refusal on 4 January 2018 by Professor Karet to allow the Claimant to work at home to write an abstract for a paper;

m. Dr Sandford's remark to the Claimant in February 2018 "*Perhaps with all your family responsibilities you shouldn't be working*";

n. not granting compassionate leave when the Claimant's mother had to be taken by ambulance to A&E on 5 July 2017 in contract to granting compassionate leave to Susana Borja-Bolunda because her husband was away on business;

o. treating the Claimant less favourably than Ms Borja-Bolunda concerning permission to work from home;

p. ignoring and failing to record the Claimant's comments and concerns about her July 2017 appraisals by Professor Karet and other managers and ignoring the Claimant's request for an appraisal review;

q. Professor Karet holding the flexible working review two months late on 29 March 2018 at which she criticised and patronised the Claimant;

r. failing to uphold the Claimant's grievance of 3 April 2018;

s. failing to respond to the Claimant's request for a review of her appraisal and failing to address this in the final grievance outcome dated 19 July 2018.

<u>Harassment (EqA 2010 ss26(1) and 39(2))</u>

4.19 Did the Respondent engage in unwanted conduct related to the Claimant's age? Namely:

a. on 13 December 2016 Professor Karet telling the Claimant that the Claimant's contract would not be renewed at the end of March 2017;

b. Professor Karet referring to the Claimant as being "*slow*";

c. on 14 December 2016 Professor Karet raising the Claimant's age related health issues including the comment "*but Caroline your eye condition is progressive*" when referring to the Claimant's macular degeneration;

d. on 15 December 2018 Professor Karet further discussion of the Claimant's health related issues and her sarcastic comment, "*I suppose you do at least work four days a week*";

e. on 20 December 2016 Gayle Lindsay from HR stating "*Caroline, you're over retirement age*";

f. Gayle Lindsay's comments related to the Claimant's health and age and the announcement that her contract would be terminated;

g. Patronising and critical comments and treatment of the Claimant by Professor Karet including putting the Claimant under unnecessary pressure at the meetings on 29 March 2018.

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

4.21 In considering whether the conduct had the relevant effect, the Tribunal should take into account:

a. the Claimant's perception;

b. the other circumstances of the case;

c. whether it was reasonable for the conduct to have that effect.

<u>Victimisation (EqA s27) and 39(4))</u>

4.22 The Claimant contends that she did the following protected acts, complaining of discrimination contrary to EqA 2010:

a. the grievance letter dated 10 April 2017;

b. Mark Dale's email of 28 July 2017;

c. the Claimant's grievance of 3 April 2018.

4.23 Do some or all of the alleged protected acts in fact amount to protected acts?

4.24 If so, did the Respondent victimise the Claimant because of one or more of those protected acts by:

a. not investigating properly or upholding the Claimant's grievance of 10 April 2017;

b. failing to uphold any of the complaints of 12 July 2017 grievance;

c. refusal on 4 January 2018 by Professor Karet to allow the Claimant to work from home to write an abstract for a paper;

d. Dr Sandford's remark to the Claimant in February 2018 "*Perhaps with all your family responsibilities you shouldn't be working*";

e. ignoring and failing to record the Claimant's comments and concerns about her July 2017 appraisals by Professor Karet and other managers and ignoring the Claimant's request for an appraisal review;

f. failing to provide the Claimant with a replacement laptop for many months;

g. not complying with the Claimant's Data Subject Access request under the Data Protection Act 1998 dated 8 August 2017 within the 40 day statutory limit and failing to disclose a number of documents that should have been provided;

h. failing to uphold the Claimant's grievance of 3 April 2018;

i. failing to respond to the Claimant's request for a review of her appraisal and failing to address this in the final grievance outcome dated 19 July 2018.

Time Limits

4.25 In relation to alleged omissions, when did the Respondent decide not to act? (section 123(3)(b) EqA 2010)

4.26 Does the conduct of the Respondent as set out in paragraphs 12 to 24 above, or any part of that conduct, amount to "*conduct extending over a period*" within the meaning of section 123(3) of EqA 2010?

4.27 Were any of the Claimant's complaints brought outside the relevant time limit specified in section 123 of EqA 2010?

4.28 If so, would it be just and equitable for the Tribunal to extend time?

Remedy

4.29 If any of the Claimant's claims are upheld what compensation, if any, should the Claimant be awarded?

ACAS Code on Grievance and Disciplinary Procedures

4.30 Did the Respondent breach the ACAS Code on Disciplinary and Grievance procedures by failing to allow the Claimant to appeal the grievance outcome dated 3 April 2018?

5. In relation to the alleged protected acts, the Respondent agreed that the Claimant's grievance of 10 April 2017 and her further grievance of 3 April 2018 were protected acts. It was not agreed that Mr Dale's email of 28 July 2017 was a protected act.

The structure of this Judgment

6. Mr Hignett had helpfully categorised the complaints of discrimination into a chronological order and identified the types of discrimination which each complaint was based upon. For convenience we followed that template where appropriate whilst being aware that our duties include, when considering the matter as a whole, to consider the overall picture when considering drawing inferences including any additional background information which was relevant.

The Hearing

7. The Tribunal heard evidence from the Claimant and from her Trade Union representative Mr Mark Ferron (Employees United Union). Mr Ferron's evidence was interposed part way through the claimant's evidence due to his limited availability.

8. The Respondent called evidence from Professor Fiona Karet (Honorary Consultant with the Respondent), Doctor Richard Sandford (Honorary Consultant in Clinical Genetics and Specialty Lead with the Respondent), both of whom are employees of Cambridge University but hold Honorary positions within the Respondent. Evidence was also heard from Charlotte Mills (Divisional Head of Workforce), Gayle Lindsay (Clinical Trial Co-ordinator) and Nacha Somaila (Research and Development HR Manager).

9. Reference was made to an extensive bundle of documents. As well a list of issues the parties submitted a chronology of key dates, on behalf of the claimant Ms Bewley submitted a written opening outline and for the Respondent Mr Hignett produced a summary of the allegations in the

case. Each Counsel submitted written submissions in closing and added to those orally.

The Facts based on the evidence which we have heard

10. We have made the following findings of fact.

11. The Claimant's employment was on a series of fixed term contracts, the continued renewal of which were dependent upon the renewal of research funding.

12. The Claimant's immediate managers were Professor Karet and Doctor Sandford. Neither of these individuals was employed by the Respondent, both being employed by Cambridge University but holding Honorary Clinical contracts with the Respondent; Professor Karet as a Consultant in Renal Medicine, Doctor Sandford as Honorary Consultant in Clinical Genetics and as Speciality Lead.

13. The Claimant was employed as a Band 7 Specialist Research Nurse.

14. Professor Karet and Doctor Sandford were engaged in the recruitment of the claimant into her post in 2008 part way through a 5 year research funding cycle. The funding is reviewed in 5 year cycles by the National Institute for Health Research (NIHR) Medical Research Centre (MRC).

15. The renewal applications are on a competitive basis and individual post holders are named in the relevant applications.

16. In 2016 the Claimant was named in the renewal application.

17. The Claimant had a significant degree of flexibility regarding her working hours although she worked a full time (37.5 hours) week. The Claimant's start and finish times would vary which neither Professor Karet nor Doctor Sandford objected to as the claimant was working productively throughout her employment.

18. The Claimant's employment proceeded without incident of note for a number of years.

19. In her 2014/15 appraisal (appraisal discussion on 26 May 2015) the Claimant identified that she would *"like to reduce working hours as I head towards retirement*". The Claimant self-assessed herself with a score of "3" (achieved expectations), Professor Karet graded her as a '4' (exceeded expectations) in relation to her values and behaviour. Against "Performance Standards" the Claimant self-scored herself as a '2' (partially meets expectations) whereas Professor Karet scored her at '2.5' (between partially achieved and achieved).

20. The Claimant identified difficulties with the Respondent's electronic patient system which had been introduced in October 2014 and that she had fallen behind in the preparation of some written work.

21. Both Professor Karet and Doctor Sandford were of the opinion that the Claimant was being *"side lined"* by her carrying out administrative tasks which could and should have been carried out by others to the detriment of her own work.

22. The Claimant's 2015/16 appraisal took place on 25 May 2016 again jointly conducted by Professor Karet and Doctor Sandford. The Claimant had completed a pre-appraisal form which included reference to her having a *"difficult year"* due to work and family reasons. She said that she might have to reduce to a 4 day week because of heavy family commitments (although she expressed concern about the impact on her pay and pension) and said she had no long term career aspirations.

23. Additionally, the Claimant referred to approaching retirement age with some minor health problems emerging. She referred to a need to re-evaluate her nursing credentials as *"not applicable"* as she *"hope(d) to be retired by 2019"*.

24. As in the previous year the Claimant self-scored herself lower than the appraisers did. She self-scored herself 2-3 for values & behaviours and for performance. The latter was increased by Professor Karet and Doctor Sandford to a score of 3.

25. As to reduced hours, the *"manager's comments"* record that *"the completion of* [the Claimant's] *paper was a good milestone but other tasks have had to slow down. We have agreed that* [the Claimant] *will do a mapping exercise to see if working over 4 days is feasible"*.

26. According to Professor Karet whose evidence was not challenged on this point that 'mapping' exercise was not carried out. Rather the Claimant brought a sheet with 'bullet points' showing her work done *"December 2016 to present"* to her 2017 appraisal on 7 July that year.

27. In October 2016 the research grant renewal application was submitted. It referred to the Claimant's post. For two years it identified the Claimant and the post was graded as a Band 7 post. Thereafter it was graded at a lower band. This was done, according to Professor Karet and Doctor Sandford, without their knowledge. We accept that evidence which is corroborated by the email from Professor Karet to Professor Lucy Raymond on 17 October 2016 where Professor Karet said she had *"never seen the numbers"* (the numbers showing a reduction in the salary for the post) which Professor Karet said she *"cannot guarantee"*. Professor Raymond reported that if the Claimant did not retire then they would need to find the funding to meet her salary requirements going forward. An apology was made by the individual who had prepared the budget. None of this was known to the Claimant.

28. There was an incident regarding the Claimant's conduct at a mandatory moving and handling training session on 15 November 2016 but no action was taken regarding the matter. It did not form part of the matters about which the Claimant complains in these proceedings.

29. Professor Karet referred to a discussion with the Claimant on 13 December 2016 on which day the Claimant complained that her workload was too great. Professor Karet was concerned that the Claimant continued to carryout tasks which were administrative (e.g. taking calls from patients who wished to change their appointments).

30. Professor Karet suggested that the Claimant could be seen by Occupational Health as she was concerned by the claimant's low mood which the Claimant did not wish to consider. The Claimant asked Professor Karet if she should resign. The Claimant had expressed a desire to work part time.

31. The Claimant had previously told Professor Karet that she wished to stay in post until mid-2017. Professor Karet was to be on sabbatical from 20 December 2016 to 19 June 2017. Professor Karet's version of events is that she told the Claimant that as funding for her role had not yet been confirmed it was not clear whether her contract would be extended beyond 31 March 2017.

32. We find as a fact that what the Claimant was told on 13 December was that funding for her continued role had not at that stage been confirmed. We reach that conclusion for the following reasons:

    32.1 The contents of the discussion between Professor Karet and the Claimant was set out in an email from Professor Karet to Doctor Sandford on 13 December 2016 at 23:21 hours. There was expression of concern about the prospect of part time working and job sharing (due although not expressed in the email, to Professor Karet's concern with alternating dates for clinics between Tuesdays and Thursdays).

    32.2 The submission for funding had already been made and included the Claimant as a named post holder for the first 2 years of the 5 year cycle (with the remaining 3 years, we find as fact, her omission being an error).

    32.3 The Claimant sent Professor Karet a text message on 14 December 2016. This was in reply to Professor Karet's text informing the Claimant that the Respondent would like her to be referred to Occupational Health *"as we are all concerned about you"*. It suggested a further discussion the following day (this timed at 18:07 in the evening of 13 December). The Claimant's reply dealt with her concern, at length, about *"bitching"* by Ms Borja-Bolunda and absence of team working.

32.4 Indeed, in a number of emails which were sent afterwards the Claimant does not refer at any time to being told that her contract would not be renewed.

33. We find as a fact therefore that what the Claimant was told was that funding was not yet confirmed for the continuation of her post which she knew was research funding dependent. Whether the Claimant misheard or misunderstood this is immaterial. She was not told that her contract would not be renewed and indeed had the position been that funding was not renewed the Claimant would have been engaged in discussions regarding re-deployment and alternative posts as she well knew.

34. The Claimant makes a further complaint that at the meeting on 13 December 2016 Professor Karet referred to her as being *"slow"*. The Claimant says this was said by Professor Karet when the Claimant's caring responsibilities for son and her mother were being discussed.

35. Professor Karet conceded in her evidence that she may have referred to the Claimant *"slowing down"* but the wider context of this is that the Claimant herself had already accepted that was the case in particular in her 2016 appraisal. The Claimant herself referred to her being less productive.

36. We are satisfied that there was a mutual agreement between the Claimant and Professor Karet that the Claimant had been *"slowing down"* but not that she was *"slow"*.

37. We note that no complaint was made about this at the time and indeed no complaint about this alleged remark was made at any stage until the Claimant referred to it in a grievance meeting on 26 April 2017 (having not referred to it in her grievance letter earlier that month).

38. In addition, there was a further discussion on 14 December 2016 between the Claimant, Professor Karet and Doctor Sandford. There are again two slightly different versions of the notes of this meeting, both prepared by Professor Karet, one bearing the date Wednesday 14 December the other Thursday 15 December. It is agreed that the meeting in fact took place on 14 December.

39. The Claimant alleges that at this meeting Professor Karet referred to the Claimant's condition of macular degeneration and said that *"but Caroline your eye condition is progressive"*.

40. The Claimant had long standing problems with her eyesight. This had manifested itself previously when the Claimant had complained that she was struggling to see the computer screen so that a larger screen was ordered for her.

41. At the time of this remark the Claimant had been told by her optometrist that her vision problems were due (in the optometrist's opinion) to macular degeneration.

42. There had been no formal diagnosis and that, Professor Karet said, was of concern to her.

43. The context of this alleged remark was the opinion of the optometrist, reported by the Claimant to Professor Karet. If the Claimant was suffering from macular degeneration then the remark that that condition is degenerative is a statement of fact and nothing more.

44. If the remark was made in the words alleged by the Claimant, therefore, it is a statement of fact. If it was made the wider context of the condition itself being a degenerative one that was also correct.

45. We accept Professor Karet's evidence that she was concerned that the Claimant had not had a formal diagnosis and that the discussion took place in that context.

46. We also note that again there was no contemporaneous complaint about this remark. The claimant had a meeting with Human Resources on 20 December 2016, 6 days after the meeting but did not raise any complaint about this comment then nor at a later stage until her grievance in April 2017 when at the initial grievance meeting on 26 April the Claimant stated that:

> "There seemed to be a great deal of concern about my eye condition and on the 14 December at a joint meeting with Professor Karet and Doctor Sandford I was told – "But Caroline your eye condition is progressive" – and I said "I know it's progressive but it is not progressing very fast"."

47. That, we find, puts the matter into clear context.

48. The Claimant then alleges that the following day, 15 December, she was told by Professor Karet that *"I suppose you do at least work 4 days a week"*.

49. This is simply denied by Professor Karet.

50. The Claimant kept a record of what she said was significant events in a calendar. This is not referenced on her calendar. It was not the subject of any complaint at the time, did not form part of her grievance in April 2017 nor her second grievance in April 2018. The issue was raised for the first time when the Claimant lodged her claim form in the Employment Tribunal on 1 August 2018.

51. The Claimant gave no explanation as to why this alleged comment had not been the subject of any earlier complaint.

52. In the circumstances we are not satisfied on the balance of probabilities that the comment was made.

53. The Claimant met Gayle Lindsay (HR Advisor) on 20 December 2016 following a request in an email of 14 December 2016 from the Claimant.

54. In the agreed list of issues, the Claimant's complaint was that Ms Lindsay said to the Claimant *"But Caroline you're over retirement age"* which was repeated (save for the word *"but"*) in the Claimant's witness statement.

55. In her oral evidence, however, the Claimant changed this allegation and said that Ms Lindsay's comments was the Claimant *"could have retired at 60"*. That allegation was not put to Ms Lindsay in cross examination.

56. We note that the Respondent has no formal retirement age.

57. The purpose of the meeting, as expressed in the Claimant's request for it on 14 December, was *"to discuss early retirement options or alternative employment options"*. An expression of an ability to retire (based on the pension arrangements within the Respondent and the wider NHS) at 60 would hardly then be inappropriate.

58. The allegation however is that the Claimant was told that she was *"over retirement age"*. We are not satisfied that on the balance of probabilities and based on the Claimant's own evidence which shifted away from this allegation, that the comment was made particularly as if it referred to retirement from the Trust it made no sense as the Trust has no *"retirement age"* as Ms Lindsay confirmed in her evidence.

59. If it had been made, however, and related to the pensionable age within the Claimant's NHS pension scheme, it was a factually correct statement.

60. The Claimant accepted in her evidence that she was passed the age for *"early retirement"* and beyond the age when she could access her pension.

61. Further, the Claimant made no complaint about this alleged remark until she presented her claim form. It was not raised in either of her earlier grievances.

62. We find as a fact that what the Claimant was told was that she was over the age when she was entitled to retire under the NHS pension scheme. There was no 'early retirement' discussion to be had and it is far more likely that the Claimant was told that she could have accessed her pension (i.e. could have retired) at age 60 as she referred to in her oral evidence and then being told she was *"beyond retirement age"* when there was no retirement age within the Trust. The Claimant accepted in her evidence that she was beyond the age for *"early retirement"* and beyond the age when she had access to her pension. The Claimant made no complaint

about this alleged remark until she presented her claim form. It was not raised in either of her grievances.

63. In December 2016/January 2017 there were emails passing between Professor Karet, Doctor Sandford and others regarding the renewal of funding. The sequence of events (which were discussed at length before us but which do not form part of any of the Claimant's complaints) are as follows:

    23/12/16 – following her meeting with the Claimant Ms Lindsay asked Doctor Sandford to enquire about the funding position.

    31/01/17 – Doctor Sandford told the Claimant that he did not know if funding had been renewed.

    31/01/17 – Ms Lumley wrote directly to the person dealing with the funding application and was told by return that funding had been approved and that the Claimant's contract could be extended.

64. It has not been suggested nor does it form any part of the Claimant's complaints that Professor Karet or Doctor Sandford were aware of the funding renewal but had deliberately withheld that information from the Claimant.

65. The Claimant says that on 1 February 2017, the following day, Ms Lindsay told the Claimant that Doctor Sandford had advised that the department was going to be *"very busy"* so that the Claimant would be required to *"keep up"*.

66. The Claimant originally claimed that this comment was an act of discrimination on the ground of age and/or disability but in evidence stated that it related to age only.

67. According to the Claimant's witness statement she was told by Ms Lindsay that Doctor Sandford said that the Claimant's contract would be renewed for 2 years only.

68. The Claimant also stated (although it was not part of her complaint) that Susana Borja-Bolunda saw her on 2 February 2017 and said *"Good news … I hear your contract is going to be renewed"*.

69. Ms Lumley's notes of the discussion with the Claimant confirmed that she had met Doctor Sandford on 1 February and he confirmed a 2 year extension to the Claimant's contract and that the Claimant needed to meet the expectations of a Band 7 Nurse and that if she did not then a performance process could start.

70. The Claimant was told by Ms Lindsay that a display screen equipment assessment would be required after her self-referral to Occupational Health.

71. We note that the Claimant did not raise any complaint about being told to *"keep up"* and that she would be *"very busy"* when she raised her grievance in April 2017.

72. Ms Lindsay did not recall using the phrase *"keep up"*.

73. On the evidence we have heard we unanimously find that the Claimant was told that the level of busyness within the department was to increase and that she would be expected to perform at the required level of a Band 7 Nurse.

74. In terms the comments alleged (other than the phrase *"keep up"*) were, we find, made but they were said as an indication that the Claimant could expect the workload to be challenging in the period ahead.

75. The Claimant was absent from work on sickness leave from 9 February 2017 until 11 April 2017. On the day before she returned to work, 10 April 2017, she submitted a written grievance to the HR department.

76. The grievance letter was short. It referred to *"unfair and detrimental treatment in December* [2016*] when I was told by managers suddenly and without due process that my contract was not going to be renewed"*.

77. The Claimant also referred to *"some of the issues"* discussed being *"discriminatory on the grounds of my age, my early stage but progressive eye condition and my responsibilities as a carer for my disabled son"*.

78. The Claimant referred to the Equality Act 2010, what she described as an unpleasant atmosphere at work and that *"some of the attitudes and behaviours of the wider team towards me amount to bullying and harassment"*.

79. Save for the issue of contract renewal, which by 10 April 2017 had been long resolved, there is an absence of detail in this grievance.

80. The Claimant had a grievance investigatory meeting with Jo Piper on 26 April 2017 which was attended by the Claimant's Trade Union representative.

81. The Claimant's complaint is that Ms Piper failed to investigate and failed to consider or uphold her grievance.

82. After seeing the Claimant on 26 April 2017 Ms Piper interviewed Doctor Sandford, Professor Karet and Susana Borja-Bolunda. She completed her investigation and held a grievance outcome meeting with

the Claimant on 4 July 2017. Her findings were confirmed in writing on 10 July 2017 and in particular she confirmed that the grievance outcome was that:

82.1 At the time of the meeting in December 2016 funding for the Claimant's post was unknown but her contract was renewed when funding was confirmed, prior to any allegations being made.

82.2 That in relation to a complaint made at the grievance hearing on 26 April 2017 about home working (not raised in the original grievance) both Doctor Sandford and Professor Karet were open to consider home working for specific tasks but as the Claimant's role was predominantly patient facing there was some limitation on home working.

82.3 In relation to flexible working (also not in the grievance letter) there had been no flexible working request but the Claimant had been given the high level of flexibility on an informal basis.

82.4 That the *"wider team"* referred to in the grievance letter consisted solely of Ms Borja-Bolunda. One specific incident (a discussion about Ms Borja-Bolunda covering both her role and the Claimant's) was addressed and no other person had witnessed any bullying behaviour.

83. The grievance was not upheld.

84. Far from the Claimant's grievance not being investigated and addressed, it was investigated fully, including those matters which the Claimant had not raised in her initial grievance letter but which she raised at the grievance hearing. All the points which she raised were addressed.

85. Accordingly, we find as a fact that the Claimant's grievance was both investigated and answered. The complaint which the Claimant makes, it appears to us, is that the outcome was not favourable to her but there is no evidence which points to the outcome of the Claimant's grievance being motivated by any discriminatory or unfair approach whatsoever, indeed Ms Piper confirmed under cross examination that she was not motivated by the Claimant's caring responsibilities, the disabilities of her mother or her son, her age or the fact that she had made a complaint of discrimination when making her findings. There was no evidence to the contrary.

86. The Claimant appealed against the outcome of the grievance and also complains before us that Mr Kelleher who conducted the grievance appeal conducted it in a flawed manner because in her opinion there was no proper investigation and he failed to answer or uphold the grievance which the Claimant says was an act of disability discrimination, age discrimination and victimisation.

87. When the matter was put to her in cross examination, however, the Claimant agreed that Mr Kelleher was not motivated by these matters.

88. The appeal was lodged on 12 July 2017 and the Claimant met Mr Kelleher on 26 October 2017.

89. Under the Respondent's policy the purpose of a grievance appeal is to *"investigate any concerns … with regard to the findings of the first formal stage".*

90. The appeal grounds were first, that no reasonable employer would have come to the decision on the evidence presented, second that there was not a full and proper investigation. The Claimant said she did not agree with the findings and remained aggrieved.

91. The appeal was not upheld. All grounds of the appeal were properly answered in the outcome letter of 24 November 2017.

92. The appeal outcome letter answered fully all of the Claimant's complaints and the Claimant had accepted under cross examination that Mr Kelleher was not motivated by the Claimant's age, any previous complaints or her association with her disabled son or mother.

93. In the meantime, the Claimant's mother had been taken by ambulance to Accident & Emergency on 5 July 2017. The Claimant complains that she was not given compassionate leave at this time which the Claimant says was discrimination on the ground of both disability and age.

94. We were not pointed to any request for compassionate leave having been made and find as a fact that none was made. The Claimant subsequently asked for half a day's leave which was granted.

95. Because the Respondent's holiday recording system (MAPS) does not permit retrospective entry, the leave could not be recorded for a day which had already passed so the Claimant proposed working one day at home the following week which she effectively took as leave. After discussion it was agreed that the Claimant should take a day as a day's annual leave. There was no request for compassionate leave and the matter was resolved by agreement.

96. The Claimant's appraisal for 2016/17 took place on 7 July 2017. Prior to the meeting the Claimant prepared the appeal form with her own comments but did not complete the self-assessment sections of the form.

97. In the 'Looking back 2016/17' section she set out her comments and priorities as required and referred in the "Personal Development" to needing *"direction, supervision and support"* with an article she was writing.

98. The Claimant's complaint as regards this appraisal is that Professor Karet and Doctor Sandford allegedly ignored her complaints and failed to record her comments and concerns in relation to her appraisal.

99. The signed appraisal form is dated 26 July 2017 and the Claimant under cross examination accepted that all of her comments and concerns were properly recorded. We found as a fact, based on the completed form and that evidence of the Claimant that they were properly recorded and not ignored.

100. The Claimant said that her real complaint was that she had not been fairly graded. That is not a complaint before the Tribunal.

101. The Claimant was invited to consider the position and after being given time to consider with her representatives (notwithstanding that she was in the midst of cross examination) whether she wished to apply to amend her claim in this regard no application to amend was made.

102. As a fact the Claimant's complaints and comments were considered properly and her concerns were recorded as the Claimant accepted in her evidence.

103. The Claimant was entitled to seek a review of her appraisal under section 5.4 of the Respondent's ADR and Pay Progression Procedure. Although the appraisal took place in July 2017 and the Claimant signed the completed appraisal form on 26th of July that year no application for review was made until 5 December 2017 (the Claimant having requested a review form which was sent out to her on 1 October 2017).

104. However, having submitted her application for review on 5 December 2017 (which was acknowledged on 7 December) the Claimant heard no more and on 9 March 2018 she chased for progress but no action was taken.

105. Ms Mills in her evidence stated that this was as a result of an error on her part, an oversight and no more.

106. The matter was raised by the Claimant as part of her grievance on 3 April 2018. Her complaint was that the Respondent had failed to comply with its own policy of responding to such requests within 10 working days. That part of the grievance was upheld. The grievance outcome letter from Joanna Outtrim (Outreach Nurse) found that there was *"no malice"* in this oversight but that the failure to deal with the Claimant's request for the review was *"unacceptable"* the Human Resources senior management team were to review the process for review to ensure there was no repetition.

107. The Claimant said that the failure to respond to the grievance was an act of direct discrimination on the ground of age or disability and an act of victimisation.

108. Under cross examination Miss Mills said that it was an *"unfortunate oversight"* for which she apologised. She had not seen the Claimant and their paths had not crossed before. It was put to her that she had failed to consider the application for a review because of the Claimant's previously raised grievance and her complaint under the Equality Act which Miss Mills denied.

109. On the balance of the evidence before us we have concluded that the Claimant's application for review and her subsequent email asking about progress were not actioned because of an error by Miss Mills. It is deeply regrettable that the Claimant's review was not concluded as it should have been (and it is not clear to us why it was not subsequently considered) but there is no evidence which could lead us to find that Miss Mills was motivated by any previous complaints of discrimination or event that she was aware of them. There was no evidence that she was motivated by the Claimant's age or the fact that she had responsibilities for her disabled son and/or mother.

110. We find as a fact that this was a serious but innocent oversight by Miss Mills and agree with the findings of the grievance in that regard.

111. The Claimant says that in July or August 2017, although she could not say if this was before or after her appraisal on 26 July, Professor Karet had said in reply to the Claimant's informal request for flexibility regarding her working that the Claimant's son *"Can't be very disabled if he stays at home on his own all day"*.

112. This alleged remark was not mentioned by the Claimant in either of the grievances that she raised. In her particulars of claim the Claimant (in paragraph 30 under the heading 'Flexible Working' simply recites the alleged remark. The Claimant accepted that this was the first time that she alleged such a remark had been made.

113. In her witness statement the Claimant again merely repeated the words. It is not said where she and Professor Karet were when the remark was alleged to have been made and the timescale of *"late July/August 2017"* has not been further clarified.

114. The complaint is presented as an allegation of direct (associative) discrimination.

115. Under cross examination the Claimant's recall of this remark was provided with significantly greater detail than had previously been provided. Under cross examination the Claimant said that the remark was made on 20 July 2017, in the afternoon, towards the end of a clinic. She said that at the time she was in the doorway of the measurements room and that Professor Karet came from behind a curtain and *"hissed"* the words at her. She referred to Jill Gray as a witness to the events.

116. The Claimant could not explain why this detail had not been previously supplied. Miss Gray was not called to give evidence.

117. Although the Claimant suggested that the remark was made in response to her flexible working request, that request was not made until 10 August 2017. It was discussed (and subsequently agreed) at a meeting on 7 September 2017 and the transcript of that meeting does not mention the alleged remark at all. There is no contemporaneous note or complaint about the remark nor was the matter referred to the Claimant's Trade Union representative who was actively involved in the flexible working request.

118. Given that the Claimant now says that the remark was made on 20 July 2017 it pre-dated any flexible working request.

119. Professor Karet simply denied the remark was ever made.

120. On the balance of probabilities, we are not satisfied that the remark was made. The alleged witness did not give evidence before us, the Claimant's reportage of the event was markedly more detailed under cross examination than at any time previously and we treat that evidence with a substantial degree of caution.

121. Further, if such a remark had been made, given the Claimant's willingness to raise issues of concern, we find it most unlikely that no note or complaint or reference of it to her Trade Union representative was made. We therefore do not find that the remark was made on the evidence before us.

122. One issue which ran through the period in which the Claimant was experiencing difficulties was the question of home working.

123. The Claimant complains that she was treated differently to her colleague Susana Borja-Bolunda regarding any arrangements to allow home working. The Claimant says this was an act of direct discrimination relating to her age.

124. The Respondent accepts that the Claimant and Ms Borja-Bolunda were treated differently but that was because of their roles and not their age.

125. Under the Respondent's homeworking policy managers must, in order to work from home, download and install certain software on their home computer. The policy document to which we were referred references a system known as TARA but it was common ground that this had been superseded by BYOD, the system in place at the relevant time.

126. BYOD is the software that allows access to the Respondent's intranet and (amongst other things) patient records.

127. The Claimant was unwilling to have BYOD installed on her home computer and said (for example at a meeting on 27 August 2017) that this was because her son used the computer and accessed particular websites (described by the Claimant as *"dodgy"*) although it was explained to the Claimant that as he did not have access to her log in or password he could not access any confidential information unless the security of the software was not in question.

128. The Claimant's named comparator Ms Borja-Bolunda had a laptop funded by her post on which BYOD was installed.

129. The Claimant complains in part that she had asked for a laptop, that it was agreed she could have one, but it was not provided.

130. In that regard the Respondent had agreed at the Claimant's appraisal on 7 July 2017 that they would obtain a laptop for the Claimant to enable her to work from home. It was not provided to the Claimant at any stage prior to her resignation on 5 April 2018.

131. There was an issue, however, over funding in that there was no space in the relevant budget for the purchase of a laptop. Efforts were made by Doctor Sandford in particular to access funds from a 'departmental consumable' budget in November 2017 and from a central fund in February 2018 but the applications for funds for both of those places were rejected.

132. The Claimant has accepted (according to Professor Karet's investigation meeting regarding the Claimant's April 2017 grievance which she held on 3 May 2017) that she found working from home difficult and that she could not get a lot of work done. This was repeated in Professor Karet's evidence and not challenged. We accept that this is what the Claimant had said and that, as Professor Karet confirmed, issues at home prevented the Claimant from working efficiently when there.

133. Ms Borja-Bolunda did not have such difficulties and her role was a less patient facing one.

134. We find as facts that the Respondent agreed to purchase a laptop for the Claimant's use, could not access funds to do so despite their efforts and that that was the reason why no laptop was provided. We further find that Ms Borja-Bolunda could work more easily from home than could the Claimant due to not only her home surroundings but the nature of her work. Further she had BYOD installed on the laptop which she had and the Claimant refused to download BYOD onto her computer thus preventing her working from home.

135. The Claimant raised her first grievance in April 2017. She was dissatisfied with the outcome of that grievance and the appeal. On 8 August 2017 she made a data subject access request asking for her personal data and her

personnel file as well as all data relating to the subject matter of her complaints.

136. The request was answered on 15 September 2017 (38 days after the request was made). The Claimant complains in these proceedings that it had not been answered within the 40 day time limit but effectively withdrew this allegation during cross examination. It is a fact that the answer was made within the time limit.

137. The Claimant complains that the Respondent failed to disclose, as part of this process, statements obtained during the investigation into her grievance.

138. The Respondent's data protection policy states that "there are … reasons why access to personal data may be denied, including … where access would disclose information … provided by a third party and consent has not been obtained by that third party".

139. No consent from the makers of the statements/providers of information had been obtained. The Claimant accepted under cross examination that this was the reason why the statements were not provided and we find as a fact that the statements were not provided for the sole reason that no consent from the statement makers had been obtained. Further the Respondent's employee who managed the Claimant's data request was Michelle Ellerbeck who had no previous dealings with the Claimant and it was not suggested by the Claimant that Miss Ellerbeck had any discriminatory motivation when she did not disclose the statements.

140. Throughout the hearing the subject of flexible working was much debated.

141. The Claimant did not in fact make a formal request for flexible working until 10 August 2017.

142. Prior to that she had used, from time to time, holiday entitlement to effectively work a 4 day week on many occasions. Apart from clinics with set times the evidence of Professor Karet which we accept and which was not challenged was that the Respondent was flexible with the Claimant regarding her start and finish times at work.

143. Prior to making her formal request for flexible working the Claimant had expressed her concern that any reduction in her hours would result in a loss of salary which she might not be able to manage and a reduction in her pension accruals.

144. On 10 August 2017 the Claimant made her flexible working request. She asked for a 4 day week, working 10.30 am to 7.30 pm Monday to Thursday (replacing the current pattern of 11.00 am to 7.00 pm Monday to Friday) thus reducing her weekly hours from 37.5 to 34.

145. The Respondent's flexible working request form invites an employee making a request for flexible working to consider "If it is not possible to agree your request in full, what flexibility can you offer?" to which the Claimant replied that she was *"open to discussion"*.

146. A flexible working meeting was held on 7 September 2017 following which Professor Karet wrote to the Claimant that evening setting out the reasons why the Claimant's proposal of 4 long days would not work (including the need to have someone in the building each day and concerns over support during long days with lone working) and made two alternative proposals. These were discussed with the Claimant at a further meeting on 4 October and an agreed new work pattern was reached.

147. Although the Claimant in her sworn statement states that her original request was agreed and attributed this to the presence of her Trade Union representative this is simply not the case.

148. Some (albeit minor) changes were made by agreement to the Claimant's proposed working pattern. Importantly the Claimant would not work Mondays (she had requested not to work on Fridays) and there was adjustment made to her contracted hours with agreed start and finish times.

149. The Claimant subsequently complained that she was being criticised for not attending work on time. The claimant, we find, felt that the new agreed working pattern would still afford further flexibility as to start and finish times but the Respondent took the view, not unreasonably, that the Claimant having requested and agreed a specific working pattern would maintain it.

150. Subsequently the Claimant complained that she made a request to work from home on 4 January 2018 to write a paper extract.

151. The Claimant's complaint here was not supported by any evidence. There was no evidence of any request for a period of home working or leave on 4 January 2018.

152. The claimant did request one day's annual leave for 5 January 2018 (the request was made on 3 January). No reason for seeking leave was stated. The exchange of emails is informative:

    152.1 3 January 2018 at 18:31 – Claimant to Professor Karet and Doctor Sandford *"Please note my annual leave request for this Friday"*.

    152.2 3 January 2018 at 20:55 – Professor Karet's reply asking that the Claimant advise her and Doctor Sandford as soon as a request is made for leave as the Respondent's holiday system did not alert them to any such request.

152.3 4 January 2018 at 10:51 – from Claimant, *"If you wish I will cancel lunch with a friend and the washing machine repair man"*.

152.4 4 January 2018 at 13:08 – from Professor Karet, *"No need to change plans"* (Doctor Sandford had worked around the Claimant's absence) but asking, in future, for 2 weeks' notice of leave if possible and asking the Claimant to prioritise Friday Meetings unless notified otherwise (there was weekly team meetings from 11.00-12.30 each Friday).

153. The leave request that was made was granted. There is no evidence, nor any contemporaneous reference, to a request for working from home.

154. We note that this matter was not referred to in any grievance nor in the Claimant's resignation letter.

155. The Claimant had begun covert recordings of the Friday team meetings. The transcripts of some of these meeting are before us.

156. The Claimant says that in February 2018 Doctor Sandford at a team meeting in February told the Claimant that *"perhaps with all your family responsibilities you should not be working from home"*. Doctor Sandford simply denied making the remark.

157. We find as a fact that it was not made and we do so for the following reasons.

157.1 There was no recording of the team meeting in which this remark was said to have been made.

157.2 The Claimant kept a contemporaneous note in her calendar of incidents of significance and this is not recorded.

157.3 The comment is not put by the Claimant in any context whatsoever. It is highly unlikely, and we dismiss the possibility, that the remark was made *"out of the blue"*.

157.4 There was no contemporaneous complaint about this alleged remark nor did it form part of the Claimant's grievance which she raised on 3 April 2018.

158. The Claimant's flexible working arrangements, under the agreement reached, was to be reviewed after 3 months (i.e. on or about 5 January 2018). The meeting to review the agreement took place 2 months late on 29 March 2018.

159. The meeting began with an explanation for the delay by Professor Karet and the Claimant did not raise any objection to or complaint about the delay at the time.

160. In these proceedings she complains that the late holding of the meeting was an act of direct (associative) disability discrimination, harassment on the ground of disability, harassment on the ground of age and direct discrimination on the ground of age but the Claimant has not identified any detriment that she suffered as a result of the meeting being held 2 months late, did not adduce any evidence that she had requested it to be held prior to the date on which it was held nor did she raise any complaint at the time about delay.

161. The Claimant complains that the conduct of that meeting was the 'final straw' in relation to her complaint of (constructive) unfair dismissal. She referred to:

161.1 Criticism of her for arriving a few minutes late for work in the context of her regularly working late;

161.2 Her being *"pestered"* to obtain physician level permission from IT (to access confidential information);

161.3 Criticism of the Claimant – a statement that she *"could not follow instructions"*; and

161.4 Reference to an occasion when the Claimant had dropped her identity badge (at a time the Claimant says she was *"close to resigning"*).

162. This complaint forms part of the Claimant's grievance which was heard on 3 April 2018. The grievance manager was Joanna Outtrim.

163. The Claimant accepted both at the time of the meeting on 29 March 2018 and during her grievance meeting (as well as before us) that from time to time she was late for work. During the grievance it was recorded the Claimant had been late on more than one occasion during the 3 weeks prior to her review meeting.

164. The Claimant terminated her employment with immediate effect on 5 April, 2 days after raising her grievance. The only reference to the meeting of 29 March in that resignation letter was that:

> "[That day] Ended even worse than it began and would have been more sensible Fiona [i.e. Professor Karet] if you had just let the trivial issue of the damned email go until after Easter. What happened on Thursday [29 March] was hostile and seemed designed to humiliate, intimidate and upset me. It really was the last straw …"

165. The reference to the email was because Professor Karet had requested the Claimant to obtain physician level permissions from IT. Professor Karet had asked that this was done straight after the flexible working review meeting on 29 March. That meeting ended, according to the Claimant at 11.20. Professor Karet asked that the email request was made before the start of clinic at 1.45 pm that day.

166. The purpose of this level of permission, the Claimant confirmed in evidence, was to allow her to have maximum access to designing reports so that the Claimant could run more sophisticated reports.

167. In her evidence the Claimant said that during that time (11.20 to 1.45) she had been hoping to attend a first support meeting for Trust staff who were also carers. She did not say whether she did in fact attend the meeting.

168. The time and length of that meeting was not stated and at the time of the meeting with Professor Karet the Claimant did not raise this point at all.

169. It was not clear to us why the Claimant felt it inappropriate to make the request for physician level access during that period and we unanimously conclude that Professor Karet's direction that the Claimant should do so in that period was a reasonable one. This was the context of the *"not following instructions"* comment.

170. Indeed, it was agreed at the flexible working meeting according to the transcript which we have seen that seeking the permission would be the Claimant's *"first priority"* once the meeting was over.

171. The claimant says that the meeting was critical and patronising.

172. On our reading of the transcript we unanimously conclude that the meeting became difficult with the Claimant challenging points raised by Professor Karet and Doctor Sandford regarding her timekeeping in particular.

173. The claimant's resignation letter of 5 April 2018 identified as well as the meeting of 29 March:

173.1 A *"deterioration in working practices over 2 years which coincided with challenging times for* [the Claimant]". The Claimant here referenced her eldest son's autism, the likelihood that her youngest son had a minor form of the same disorder and the relocation of her mother to a care home due to her suffering from dementia.

The Claimant complained by reference to this that Doctor Sandford and Professor Karet could have acceded to her *"sensible request to reduce* [her] *hours a little at this point".*

173.2 That she was told in December 2016 that her contract would not be renewed the following Spring and that it was *"subsequently re-instated"* after she raised a grievance.

173.3 That this *"triggered unpleasant behaviour"* which led to the Claimant taking 2 months absence through stress following which she raised a grievance. She said she was *"not really surprised"* that neither her grievance or appeal were successful because *"I'm not a very*

important person" and that she *"won the right to reduce her working hours a little (because it was a reasonable request)"*.

173.4 Finally, she expressed concern that her grievance, including complaints of discrimination exacerbated matters and led to her being victimised.

174. No formal request for flexible working had been made by the Claimant prior to 10 August 2017 and promptly thereafter it was dealt with correctly and a new working pattern was agreed. We have already found that the Claimant was not told that her contract would not renewed and indeed the Claimant's contract was renewed in early 2017, more than a year before the letter of resignation. The *"unpleasant behaviour"* was not detailed in any way and the Claimant gives a reason for the rejection of her grievance and appeal (which itself was not substantiated by any evidence) which was non-discriminatory and related to her status as a *"not very important person"*.

175. The resignation was acknowledged on 6 April 2018 by Stephen Kelleher, the Assistant Director of Operations (Research). He asked the Claimant if she wished to reconsider her resignation, referenced the grievance raised 2 days earlier (i.e. the day before the resignation) and offered to meet the Claimant to discuss. The Claimant confirmed her resignation and sought to process her drawing down on her NHS pension.

176. The Claimant's grievance was then acknowledged by Miss Somaila on 23 April 2018. She confirmed that the matter would be considered under the Respondent's 'ex-employee' stage of the grievance policy (which policy was also sent to the Claimant).

177. Under that section of the policy an ex-employee's grievance is considered, after which a written outcome would be provided but there was no automatic right to a hearing nor was there any right of appeal. The matter would only proceed that way if the ex-employee accepted the approach. The Claimant did.

178. Joanna Outtrim was appointed to investigate the grievance, supported by an external HR consultant. Ms Outtrim asked the Claimant for further information on 17 May 2018 which was not provided so she chased the Claimant for that information on 11 June 2018 and received it on 20 June 2018 (at four minutes past midnight).

179. The outcome letter was provided on 19 July. The Claimant's grievance was not upheld.

180. The Claimant complains that not upholding the grievance was an act of age discrimination but gave no explanation or evidence to support that contention either in her witness statement nor in her oral evidence. She did not suggest that Ms Outtrim was motivated by the Claimant's age.

181. The process followed was in accordance with the Respondent's policy yet the Claimant in her witness statement said that the absence of an appeal *"suggested that* [the Respondent] *had no intention to resolve the outstanding issues"*.

182. We are concerned that the Claimant submitted a grievance and resigned so promptly after lodging it that there was no opportunity for the outstanding issues to be resolved in a way that would enable the Claimant's employment to continue which is the primary purpose of a grievance process.

183. Ms Outtrim's letter of 19 July 2018 answers fully the Claimant's grievance and sets out the reasons in detail why it was not upheld save and except that it was acknowledged that the Claimant's request for a review of the 2017 appeal had not been actioned as we have already stated.

184. It is against this factual background that the Claimant brings her complaints.

The Law

185. Under the Employment Rights Act 1996, s.94, each employee has the right not to be unfairly dismissed.

186. Under s.95(1)(c) an employee is treated as dismissed if they terminate the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.

187. If an employee is dismissed under s.98 it is for the employer to show the reason (or if more than one the principal reason) for the dismissal and that it is a reason falling within sub-section (2) of that section of some other substantial reason of a kind to justify the dismissal of an employee holding the position which the employee held.

188. Under s.98(4) if those requirements are fulfilled by the employer the question of whether the dismissal is fair or unfair, having regard to that reason, depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

189. Under the Equality Act 2010 s.4 age and disability are protected characteristics.

190. Under s.13 a person discriminates against another if because of a protected characteristic they treat that person less favourably than treat or would treat others.

191. Under s.13(2) if the protected characteristic is age, a person does not discriminate against another if they can show that the treatment of that person was a proportionate means of achieving a legitimate aim.

192. Under s.26 a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating the other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

193. Under s.26(4) in deciding whether conduct has the effect referred to each of the following must be taken into account:

    a. The perception of the person allegedly harassed;

    b. The other circumstances of the case; and

    c. Whether it is reasonable for the conduct to have that effect.

194. We have been referred to the well known case of Shamoon v Chief Constable of the RUC [2003] IRLR 285 where it was determined that the issues of detriment and less favourable treatment should be construed widely and not restricted to cases where there is some definable physical or economic impact. The test is whether the treatment was of such a kind that a reasonable worker would or might take a view that in all the circumstances it was to their detriment and the test is to be applied considering the issue from the point of view of the victim.

195. In the same case Lord Nichols emphasised that it was not essential to consider the issue of less favourable treatment prior to the *"reason why"* issue as the two issues are inter-twined.

196. The case of Nagarajan v London Regional Transport [1999] IRLR 572 established that it is not necessary for the protected characteristic to be the sole reason for any less favourable treatment as long as it has significantly influenced the reason for the treatment.

197. In relation to motivation we have been referred to the case of R v Governing Body of JFS [2010] IRLR 136 where it was stated that in deciding what were the grounds for discrimination it is necessary to simply address the question of the factual criteria that determined the decision made by the alleged discriminator. The motive for the discrimination is not relevant. Further where the factual criteria which influenced the alleged discriminator are not plain it is necessary to explore the mental processes, not to examine motivation but in order to discover the facts that led them to discriminate.

198. In the case of R (on the application of the European Roma Rights Centre) v Immigration Officer at Prague Airport [2004] UKHL55 it was confirmed the subconscious stereotyping such as an assumption that old people are

becoming unable to fulfil their role or those looking after people with disabilities are not reliable or cannot perform their role are discriminatory reasons. Direct discrimination covers a situation where less favourable treatment occurs because of such stereotyping even if that stereotype has a factual basis and may be true.

199. In relation to harassment we have been referred to Richmond Pharmacology v Dhaliwal [2009] IRLR 336 where the factors set out in section 26 are to be considered separately. The 'purpose' and 'effect' are alternatives so an employer can be liable for effects even if they were not the purpose and vice versa but a claim based on purpose would plainly require analysis of the alleged harassers' motive or intention whereas a claim based on effect would not.

200. Under s.136 of the Equality Act 2010 if there are facts from which a court could decide in the absence of any other explanation that a person has contravened the provisions of the Act the court must hold that the contravention occurred unless the alleged discriminator can show that they did not contravene the provision.

201. Efobi v Royal Mail Group [2019] IRLR 352 confirmed a two-stage approach for Tribunals to follow; first the employee must establish facts from which a Tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the Tribunal must leave out of account the employer's explanation of the treatment. If the burden is discharged the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the Tribunal that it was not tainted by a relevant proscribed characteristic. If that burden is not discharged the case must be found to have been proved.

202. The Tribunal must consider the totality of the facts and inferences can be drawn from surrounding circumstances and background information (per Anya v University of Oxford [2001] IRLR 377).

203. The case of Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 establishes the steps the Tribunal has to consider when dealing with the question of whether conduct extends over a period. In particular it is for the Claimant to prove either by direct evidence or inference from primary facts, that the alleged incidents of discrimination are linked to one and another and are evidence of a continuing discriminatory state of affairs. The Tribunal should not adopt too literal an approach to the identification of a continuing act and the concepts of policy, rule, practice, scheme or regime are examples of acts which extend over a period of time. Tribunals should focus on the substance of the complaints and whether the Respondent was responsible for an ongoing situation or continuing state of affairs. There is a material difference between an act extending over a period as distinct from succession of unconnected or isolated specific acts (and also from an act which has a continuing effect).

204. Under s.120 of the Equality Act 2010 an employment tribunal has jurisdiction to determine a complaint relating to contraventions of the Equality Act under part 5 (work).

205. Under s.123 proceedings on a complaint within s.120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

206. Under s.123(3) conduct extending over a period is to be treated as done at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it.

207. Under s.123(4) in the absence of evidence to the contrary a person is to be taken to decide on a failure to do something when they do an act inconsistent with doing it or if they do no inconsistent act on the expiry of the period in which that person might reasonably have been expected to do it.

208. Applying the facts found to the relevant law we have reached the following conclusions.

Conclusions

209. After a lengthy career in the NHS and a period of successful working with Dr Sandford and Professor Karet in their research work, matters deteriorated and in December 2016 and thereafter, leading to the Claimant's resignation on 5 April 2018.

210. The Claimant attributes the deterioration in the working arrangements to the actions of the Respondent's employees and Professor Karet and Dr Sandford. She brings claims of discrimination on the grounds of age and (associative) disability as well as complaining that her resignation was an act of constructive dismissal and alleging that she was subject to victimisation.

211. The Claimant's complaints are as set out in the List of Issues, begin with her allegedly being told on 13 December 2016 that her *"contract"* (her post was research funding dependent) would not be renewed.

212. We have found as a fact that what was said at that meeting was that funding, including for her continued role, was not at that stage confirmed.

213. Not only was this factually correct, but the Funding Application which had been submitted included the Claimant as a continuing named person in the research programme.

214. In those circumstances we have not accepted that Professor Karet would allege that the Claimant's contract was not to be *"renewed"*.

215. What none of the Claimant, Professor Karet or Dr Sandford knew at that time was that the submission had, in error, extended the Claimant's role as a Band 7 nurse from the two of the five year funding cycle post, thereafter, being identified at a lower grade. The facts, however, are that the submission had been made, it included the Claimant and the outcome was not then known.

216. In those circumstances it is far more likely that the evidence of Professor Karet – that the Claimant was told that they did not know that funding generally, including for the claimant's role would be renewed - so that, in terms, the future was at that stage unclear, is correct, rather than the Claimant's allegation that she was told that her contract would not be renewed.

217. This is confirmed by future events. The funding was secured and the Claimant was given a two year extension to her contract.

218. On the basis that all the contemporaneous and subsequent evidence points to the contrary, the Claimant's allegation fails on its facts.

219. In any event, the discussion took place on 13 December 2016. If the Claimant was correct that she was told that her contract would not be renewed, she has not established any facts from which we could conclude that the Respondent was motivated by age or disability, or that the comments related to age or disability. It related to funding only.

220. The Claimant says that on the same day she was referred to by Professor Karet as *"slow".*

221. We have found as a fact that both Professor Karet and the Claimant were conscious that the Claimant was *"slowing down"*. In the Claimant's 2016 Appraisal, held in May of 2016, reference was made to other tasks (outside writing a paper) *"have had to slow down"*. In that same Appraisal we noted the Claimant referred to her hoping to have retired *"by 2019"* and *"thinking"* that she would have to reduce her hours because of heavy family commitments and *"approaching retirement age with some emerging minor health problems"*.

222. We have unanimously concluded that although both the Claimant and Professor Karet considered the Claimant was *"slowing down"* there was no repercussion or concern at that time based on age or disability. It was an agreed position based on the time the Claimant had taken to complete a written paper and its impact on other work.

223. The Claimant makes further allegations of a remark made the following day, 14 December 2016, by Professor Karet who according to the Claimant said that she had a *"progressive"* eye condition. This was said to be an act of direct discrimination and harassment on the basis of age.

224. The facts are that the Claimant had been told that she had macular degeneration by her optician but no formal diagnosis had been made. Professor Karet was concerned that a formal diagnosis should be made and further that the condition of macular degeneration is a progressive one.

225. In those circumstances, Professor Karet was expressing concern. What she said was factually correct and the comment was related to the early stages of a progressive condition. The Claimant accepts that the condition of macular degeneration is progressive (albeit she said that her condition was progressing slowly).

226. There had been earlier discussions between the Claimant and the Respondent regarding the Claimant's eyesight. The comment that cannot be reasonably construed to be harassing and could not reasonably have been perceived as such. It was not an act of less favourable treatment. It was an expression of concern.

227. On 15 December 2016, the Claimant alleged Professor Karet said to her that *"I suppose you do at least work four days a week"*.

228. We have found on the balance of probabilities that this remark was not made. It was denied by Professor Karet and there was no contemporaneous complaint – indeed, no complaint at all until the filing of the claim in these proceedings on 1 August 2018 – about this matter (that claim being lodged 19 months later.

229. The context of the alleged remark and its relevance to what was happening around that time were never explained by the Claimant and Professor Karet denied making the comment. We accept her evidence.

230. On 20 December 2016, the Claimant says she was told by Gayle Lindsay (Clinical Trial Co-ordinator) when she met the Claimant to discuss, at the Claimant's request, early retirement options that the Claimant was *"over retirement age"*.

231. The Claimant says that this is an act of direct discrimination and harassment based on the Claimant's age.

232. The facts are that the Claimant was beyond the age at which she had access to her NHS pension and further the Trust has no retirement age. Accordingly, such remark would make no sense.

233. The Claimant accepted that she was not of an age where *"early retirement"* was an issue. She could, if she wished, access her pension immediately and if the words *"retirement age"* related to that, then this is a factually correct remark.

234. The fact that there is no *"retirement age"* within the Respondent is also highly relevant.

235. The Claimant changed this allegation during the course of her evidence and alleged that in fact she had been told *"you could have retired at 60"*. This could not in any circumstances be seen as an act of less favourable treatment nor harassment on the ground of age. It was again, a statement of simple fact.

236. The Claimant was advised that her contract would be extended on 1 February 2017. The Claimant complains that at this meeting when she was given this information, Ms Lindsay passed on the comments of Dr Sandford that the department was going to be *"very busy"* and that the Claimant would have to *"keep up"*. This is said to be an act of direct discrimination on the basis of age and associative disability.

237. The contemporaneous note of the meeting makes no reference to this whatsoever. The Claimant did not raise any complaint about it in her Grievance of April 2017.

238. Ms Lindsay denied making the comment and Dr Sandford had said that it was not the sort of thing he would say, nor would he expect any issue of a level of busyness to be something which he would ask a Human Resource person to pass on to an employee.

239. We have found that the Claimant was told that the level of activity would be high and that she would be required to perform accordingly, but that is not an act of less favourable treatment. It is in fact a simple statement of the reasonable expectations of the employer.

240. The Claimant raised a first Grievance in April 2017. It was investigated by Ms Piper we have found that the investigation was complete and thorough. The Appeal which the Claimant brought when her Grievance was not upheld was hear by Mr Kelleher, who also conducted the Grievance Appeal properly and fully.

241. The Claimant complains that the Grievance and Appeal both failed to properly investigate her allegations, failed to answer the points about which the Claimant was aggrieved and failed to uphold her complaints. It is said they are acts of direct age and disability discrimination and acts of victimisation.

242. Absent any malign motivation or neglect in the process of investigation of the Grievance, the complaint about the outcome cannot form any basis of a complaint in these proceedings.

243. In her evidence the Claimant confirmed that she did not think either Ms Piper or Mr Kelleher were motivated by discrimination or that they were guilty of victimisation. She accepted that each of the allegations raised were answered. Her complaint is, in truth, that the Grievance was not

upheld. There are no facts established on the evidence that we heard that could lead us to the view that the reason why the Claimant's Grievance was not upheld was because of either her age, her association with disabled persons, or an act of victimisation. The complaints were investigated properly and fully, but they were not upheld on the evidence.

244. The Claimant complains that on 5 July 2017, she was not given compassionate leave when her Mother was taken to the Accident and Emergency Department of the Hospital.

245. There is, however, no record of any request for compassionate leave. The Claimant had arranged to work at home that day. An effort to retrospectively record the day as a day's leave failed because the Respondent's system does not prevent retrospective holiday booking. There was a discussion and the matter was resolved by agreement. This allegation fails on its facts.

246. The Claimant made two complaints regarding her 2017 Appraisal which had been held in July 2017.

247. The first was that her comments and concerns were not recorded and were ignored.

248. The Claimant, however, accepted during cross examination that all of her comments and concerns were properly recorded.

249. Her complaint then shifted during her evidence and become about her grading. She complained that she had been graded unfairly. After an adjournment to consider whether the Claimant wished to seek to amend her claim to advance this argument which had not been previously raised, the Claimant, through Counsel, advised that she did not wish to pursue an Application to Amend and there was no complaint before us about the grading.

250. The Claimant did also legitimately complain that her request for a review of that Annual Appraisal was not progressed.

251. The Claimant raised her Application for review on 5 December 2017 (the Appraisal had been signed by her on 26 July 2017 and she received a Review Form after a request for it on 1 October 2017). The request was not actioned. It was acknowledged but no further action was taken even after a *"chasing"* email on 9 March 2018.

252. The matter fell to be progressed by Charlotte Mills, who accepted in her evidence that she had by oversight, failed to progress the Claimant's original request for Review and had overlooked, also, her *"chasing"* email.

253. We have considered carefully whether there could be imputed into Ms Mill's inactivity any discriminatory motivation and have concluded that there cannot. The Claimant was unknown to Ms Mills, the Claimant

accepted this. Ms Mills denied any malign motive and we accept that this failing was an error on her part and nothing more than that.

254. The Claimant's next complaint in time related to an alleged remark by Professor Karet that *"your son can't be very disabled if he stays at home on his own all day"*.

255. Unfortunately, the Claimant's evidence in this regard developed dramatically during the course of the Hearing which led us to have concerns of not only that evidence, but her evidence generally.

256. There was no mention of this remark in either of the Claimant's Grievances, nor did she make any contemporaneous complaint about it, nor make any record of it.

257. In her written witness statement, the Claimant gave no particulars of where this remark was said to have been made, nor was it put in any context. It was said to have been made in *"late July / August 2017"*. In her oral evidence, however, the Claimant was able to give substantially more detail. She said that it happened on 20 July 2017. She said that at the time she was standing in a doorway at the Measurements Room and that Professor Karet came from behind a curtain and *"hissed"* the words to her. Additionally, the Claimant said that there was a witness to this event, Gill Gray.

258. The Claimant could not say how this level of recall had suddenly come to her and nor could she explain why the detail had not been provided previously. Ms Gray was not called to give any evidence.

259. We have found that the comment was not made. We conclude that the Claimant has gilded what was previously a very bare lily in this regard and we do not accept this sudden and detailed degree of recollection, which was not, inexplicably, previously disclosed. This has also led us to question, where the Claimant's evidence is in direct conflict to that of other witnesses and unsupported by any contemporaneous complaint or document, the veracity of the Claimant's evidence.

260. The remark we have found was not made.

261. The Claimant complained about being treated differently to Susana Borja-Bolunda as regards homeworking and attributes this to her age.

262. The reasons, established on the evidence, for the difference in treatment between the Claimant and Ms Borja-Bolunda in relation to homeworking were as follows:

262.1 The different nature of their roles. The Claimant's role was much more patient facing.

262.2 The Claimant did not have and would not agree to have the necessary software installed on her home computer.

262.3 The Claimant's post did not include funding for a laptop, whereas Ms Borja-Bolunda's did and it had the necessary software on it. Whilst the Respondent did make efforts to secure funds for a laptop for the Claimant, they were unable to do so.

262.4 In her evidence, the Claimant admitted herself that she did not work effectively from home.

263. There was a difference in treatment between the Claimant and Ms Borja-Bolunda in this regard but it related to their different roles and to the issue of software. It was not related to either age or disability.

264. The Claimant said that the Respondent did not comply within the 40 day time limit to a Subject Access Request and that statements obtained during the Grievance Investigation were not disclosed as part of that Subject Access Request. She attributes these as acts of victimisation.

265. The Claimant accepted in her cross examination, however, that the Respondent had complied within the time limit. The Subject Access Request was made on 8 August 2017, the 40 day period ended on 17 September 2017 and the answer was given on 15 September 2017 – 38 days after the Request.

266. The Claimant also accepted that the reason why the statements were not given was because the Trust's relevant Policies required third party consent for the disclosure of such documents and that no such consent was obtained. The non-disclosure, the Claimant accepted, was in line with the relevant Policies.

267. Accordingly, these complaints fail on their facts.

268. The Claimant's complaint about flexible working also developed during the Hearing.

269. The original complaint was that Professor Karet made *"excuses"* for not allowing flexible working and that Susana Borja-Bolunda was treated differently.

270. During cross examination, however, the Claimant's complaint became that Professor Karet should not have made alternative proposals to the Claimant's own flexible working request when she submitted it on 10 August 2017.

271. There was one specific event which was referred to. The Claimant says that she asked to work from home on 4 January 2018 to write an abstract for a paper and this was refused.

272. There was, however, no evidence whatsoever of any such request. The Claimant was on holiday on 5 January 2018 (at short notice) and on the basis of an email sent by her, this was to enable her to have lunch with a friend and to arrange a visit from the washing machine repair man. There was no mention whatsoever of working from home. The leave the claimant requested was taken by her.

273. The Claimant alleged that she was told by Dr Sandford in a weekly meeting in February 2018, that *"perhaps with all your family responsibilities you shouldn't be working from home"*.

274. The alleged remark was not put in any context by the Claimant and Dr Sandford denied making it. The Claimant was, by this time, covertly recording weekly meetings but no recording of this meeting was disclosed and no contemporaneous complaint was made. The Claimant's Grievance of 3 April 2018 does not mention it at all and indeed that Grievance does not raise complaint about Dr Sandford in any way.

275. On the balance of probabilities, therefore, we are not satisfied that the comment was made.

276. The Respondent's Flexible Working Policy specifically includes (and it is referenced on the Flexible Working Application Form) a request that if an employee's specific request cannot be agreed in full, how flexible they will be. The Clamant completed this part of the form and said she was *"open to discussion"*.

277. The Claimant submitted her Flexible Working Request on 10 August 2017. A meeting was held to discuss it on 7 September 2017, after which Professor Karet made suggestion of two alternative working patterns. A further meeting was held on 4 October 2017 and a new agreed working pattern was put in place. The Claimant was assisted and represented by her Trade Union Representative throughout the process.

278. The matter was concluded by agreement. What the alleged difference in treatment was said to be was not explained by the Claimant. She agreed a new working pattern with the Respondent promptly after her request was made. There had been no previous Flexible Working Request made by the Claimant.

279. Accordingly, the Claimant's amended or alternative complaint that Professor Karet should not have made alternative suggestions is without foundation. Professor Karet was acting in accordance with the appropriate Policy.

280. The flexible working arrangement was to be reviewed after three months, but the Review Meeting was not in fact held until 29 March 2018, approximately two months late. The Claimant says this is an act of direct disability discrimination, direct age discrimination and harassment on both protected characteristics.

281. The meeting was late. The meeting began with an apology by Professor Karet as to its not being held on time and the Claimant did not raise any complaint or objection. She had not prompted anyone to arrange the meeting. Further, the Claimant has not explained how holding the meeting two months late acted to her detriment or how it could reasonably be considered to be an act of harassment. The Claimant's flexible working pattern had been agreed and operated throughout the period.

282. The Claimant also complains about the way the meeting was conducted. Her complaint lacks any specificity or detail. She considers that Professor Karet was *"critical and patronising"*.

283. The Claimant complained that Professor Karet raised the issue of her time keeping. She accepted that she was late for work from time to time.

284. The Respondent, through Professor Karet, took the view that having requested and agreed to a specific working pattern, the Respondent could reasonably expect the Claimant to adhere to it. That related to time keeping only. It is not related to age or disability. The Claimant, we found, objected to this. She wanted not only the flexible working plan agreed, but to adhere to it as and when she felt obliged to do so, rather than to adhere to that to which she had agreed to.

285. We do not find, either in the Claimant's evidence or in our reading of the notes of the meeting, anything which could be considered *"patronising"* and nothing which points towards less favourable treatment or harassment on the grounds of age or disability.

286. The Claimant's second Grievance was raised on 3 April 2018. She resigned on 5 April 2018. The Claimant complains that the failure to uphold her Grievance was an act of direct discrimination on the ground of age and / or an act of victimisation. But there are no facts upon which we could conclude that was the case and the Claimant did not say why she believed it to be the case.

287. The complaint is that the Grievance was not upheld, but the Claimant does not explain at all why the Grievance Investigator, Joanna Outtram, would be so motivated.

288. In her witness statement the Claimant referred to the outcome and a lack of Appeal indicating that the Respondent *"had no interest in resolving the outstanding issues with me"*, but the Claimant had resigned two days after lodging the Grievance. Having left the Respondent's employment it is difficult to see how the complaints about working practices and behaviours (which were not in any event upheld other than the accepted failure to progress the Review of her Appraisal) could have been *"resolved"*.

289. The investigation was conducted properly, the outcome was detailed and as an ex-employee the Claimant had no right of Appeal under the Respondent's Policies.

290. The Claimant's further complaint was that Ms Outtram did not respond to her request for a Review of her Appraisal. But that part of the Grievance was upheld. The Claimant had not been given the Review of the Appraisal to which she was entitled and which she had requested. The complaint here is that the Grievance handler should have progressed that Review. Ms Outtram did uphold that part of the Grievance but accepted (as we have) the explanation given by Ms Mills as an error / oversight. No review of the Appraisal would have then had any merit. The Claimant had left the Respondent's employment.

291. The Claimant's resignation letter of 5 April 2018 raised the following issues as the reason for her resignation:

291.1 That about two years previously when the Claimant was facing a *"particularly challenging times"* in her home / family life, Professor Karet and Dr Sandford did not feel accede to her request to reduce her hours a little.

In fact, no request was ever made by the Claimant at that time. She was concerned that reducing her hours would impact upon her salary and her pension and she made no formal request for flexible working until 10 August 2017.

291.2 That she was told that her contract would not be renewed in December 2016 which was *"clearly not a funding issue"* and she *"raised a grievance and the like contract was subsequently renewed".*

The time line was that in December 2016 the Claimant was told that funding was not in place, which was correct. It was in place by the beginning of February 2017 when the Claimant was told that her contract would be renewed as funding was in place. The Claimant's Grievance was raised on 10 April 2016, more than two months after the funding position had been clarified and the Claimant was notified of her contract renewal. We have already found as a fact the Claimant was not told that her contract *"would not be renewed"*.

291.3 That this triggered *"unpleasant behaviour"* (not specified) after which the Claimant was absent from work through stress. She complained in her letter of resignation that her Grievance was not upheld and said this,

> *"…which did not surprise* [me] *as I am not a very important person"*;

And said that she later,

> *"won the right to reduce her working hours a little".*

The fact that the Grievance was not upheld was, as we have already said, the outcome of a fair and thorough process. The Claimant, who in these proceedings attributed that fact to discriminatory conduct, contemporaneously said that it was because she was *"not a very important person",* but this was not put to the Respondent's witnesses at all.

We have found the Grievance process to be thorough and fair. The flexible working request, once it was made, was properly considered and a new working pattern was agreed.

291.4 The Claimant complained of (also unspecified) *"a tirade of complaints, offensive remarks and behaviours"*, then referred to the meeting of 29 March 2018 as *"the last straw"*.

The particular issue which the Claimant raised in relation to the meeting of 29 March 2018 was Professor Karet's instruction to the Claimant to obtain physician level access to IT records. This was, as we have said, agreed as a *"first priority"* after the meeting. But in her letter of resignation the Claimant said to Professor Karet that,

> *"it would have been more sensible… if you had just let the trivial matter of the damned email go until after Easter".*

292. Having reminded ourselves of the legal basis of the claim for constructive dismissal, in particular by reference to Western Excavating (ECC) Limited v Sharp [1978] ICR 221, Lewis v Motorworld Garages Limited [1986] ICR 157, Omilaju v Waltham Forest LBC [2005] ICR 481 and Malik v BCCI [1997] IOR 606, we have objectively assessed whether the Respondent's conduct in so far as it has been found, was calculated or likely to severely damage or destroy trust and confidence.

293. We have found that not to be the case.

294. The *"final straw"* relied upon was itself an act which could not reasonably be considered to contribute to any such damage or destruction. The issue that the Claimant raised in her letter of resignation was a single and agreed instruction to the Claimant to obtain – as a first priority after the meeting – physician level access to IT and information. The Claimant offered no explanation as to why this was not done, save to make comment in cross examination that she had hoped to attend a meeting that lunch time. However, there was no such explanation given to Professor Karet and in her letter of resignation she simply states that in her view the matter could have been left over until after Easter. That is a further indication of the Claimant accepting those directions from her Managers which she agreed with and avoiding those which she did not.

No criticism of the Respondent's conduct can possibly inure from that situation and we find nothing in the meeting itself which could be considered unreasonable. The Claimant accepted that she was late for work on occasions and therefore the Respondent was perfectly entitled to raise the issue of time keeping with her.

295. The other matters referred to also fail to establish any acts or omissions of the Respondent which are, cumulatively or singly, calculated or likely to damage or destroy trust and confidence.

296. The question of reduced hours was dealt with once a formal request for flexible working was made. It was dealt with to the Claimant's satisfaction. The contract renewal was dealt with promptly, properly and honestly. She was told in December 2016 that funding was not in place, that in February it was and that her contract would be renewed. It was not extended because of any Grievance she raised two months later.

297. In all the circumstances the Claimant has not established any conduct on behalf of the Respondent which could justify her resignation. The only area of criticism which can be genuinely levelled against the Respondent is the failure to review the Claimant's 2017 assessment, but that was not one of the reasons why the Claimant resigned.

298. Equally, the Respondent being unable to provide a laptop might be an area of justifiable complaint, but again this was a funding issue and not one which the Claimant referred to when resigning.

299. For all those reasons the Claimant's complaints are not well founded. The complaints of discrimination fail on their facts and the Claimant's resignation was not made in circumstances where she was entitled to resign due to the conduct of the Respondent.

300. Had we been required to do so in relation to the complaints of discrimination, we would have had to consider whether any of them were presented in time and if not whether it was just and equitable to extend time (or whether they were part of a sequence of events, the last of which was in time). In the light of our findings, however, it is not necessary for us to do so.

301. The Claimant's complaint that she was unfairly dismissed is not well founded. Her employment ended by way of resignation. She was not dismissed within the meaning of Section 95(1)(c) of the Employment Rights Act 1996.

302. Her complaints of discrimination and victimisation fail on their facts.

303. For those reasons, the Claimant's complaints are not well founded and the case is dismissed.

23 September 2021

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Employment Judge Ord

Sent to the parties on: .....

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For the Tribunal Office