RESERVED **CASE NO: 2600346/2021**

EMPLOYMENT TRIBUNALS

Claimant: Mrs Kerry Annable

Respondent: The Honey Pots Day Nursery Ltd

Heard at: Nottingham **On:** 20 and 21 September 202

Before: Employment Judge Rachel Broughton
Sitting with Members Mr Blomefield and Mr Tansley.

Representation
Claimant: Mr Randall of Counsel
Respondent: Mrs Holden of counsel

RESERVED JUDGEMENT

1. The claim of harassment pursuant to section 26 of the Equality Act 2020 (EqA) is not well founded and is dismissed.

2. The claim of constructive unfair dismissal pursuant to section 95 (1)(C) Employment Rights Act 1996 (ERA) is well founded and succeeds.

3. The Respondent is ordered to pay to the Claimant the following sums;

   3.1 Basic Award: £1,211.85

   3.2 Loss of statutory Rights: £500

   3.3 ACAS uplift on the loss of statutory rights: £50

REASONS

Background

1. The Claimant was employed by the Respondent from 1 November 2017. She gave notice of resignation on 10 October 2020. Her employment ended on 6 November 2020.

2. The ACAS early conciliation period started on 13 October 2020 and ended on 27 November. The Claimant issued her claim form on the 16 February 2021.

3. The Claimant brings claims of;

3.1 Constructive unfair dismissal : section 95 (1)(C) ERA
3.2 Harassment related to disability : section 26 Equality Act 2010 (EqA)

Issues

4. At the commencement of the hearing, the Tribunal discussed with the parties the list of issues which had been prepared and agreed between them.

5. The proposed list of issues included whether the Claimant was disabled within the meaning of section 6 EqA however, the Respondent confirmed that this is no longer an issue. It concedes that the Claimant was a disabled person because of Complex Regional Pain Syndrome throughout the relevant period. The Claimant's evidence which is not disputed, is that in December 2021 she was informed that the correct diagnosis for her condition is in fact Functional Neurological Disorder, however neither party considers the change in diagnosis to be material.

6. What the Respondent does not concede, however is that the Respondent had knowledge of the disability at the relevant time.

Disability – Relevant period

7. The material time for the purposes of the harassment claim is 17 and/or 18 September 2020. That is when the Facebook Posts were made and/or the Claimant had seen them.

In the course of employment

8. Another matter which the Tribunal raised with the parties, and in particular Mr Randall, was paragraph 9 of the list of issues; " …*was the conduct of Sharon Redfern done in the course of employment or, was she acting as agent for the Respondent and with the Respondent's authority".*

9. In essence, the claim is that Ms Redfern put a comment on her personal Facebook social media account and that others, including her partner (not employed by the Respondent) Scott Clacher and Tammy Friend (employed by the Respondent as a manager) followed up with other comments/posts. It is contended that the Respondent is vicariously liable for all those comments through the conduct of Ms Redfern.

10. The issue for determination as identified by the parties, is only whether the conduct of Ms Sharon Redfern was carried out when she was acting as an agent for the Respondent and with the Respondent's authority. It is agreed between the parties that Ms Redfern was **not** an employee of the Respondent.

11. The Tribunal sought to establish at the outset, whether or not it was the Claimant's position that Tammy Friend (manager of the Respondent) was acting in the course of her employment when she posted her relevant Facebook comments because this was not addressed in the agreed list of issues. Mr Randall was quite clear that it is **not** the Claimant's position that Ms Friend was acting in the course of her employment and therefore this is not an issue the Tribunal needs to determine.

12. The claim advanced by the Claimant is that Mr Clacher and Ms Friend's Facebook

posts "flowed" (adopting the language of Mr Randall) from the posts made by Ms Redfern and as Ms Redfern was acting as agent of the Respondent, the Respondent is liable for the alleged harassment arising/ "flowing" from the posts she made. Section 111 EqA was not pleaded, was not raised in the list of issues and not raised in submissions. Hereafter any reference to a relevant Facebook posts is foreshortened to Post/s for ease of reference.

Constructive Unfair Dismissal

13. Another matter which the Tribunal clarified at the outset in discussion with counsel for the Claimant, was the alleged conduct which the Claimant relies on for her constructive unfair dismissal claim.

14. In her witness statement, the Claimant had referred to resigning because of the Posts (which is the basis of her harassment claim) **and** the way her grievance was managed. However, her Claim Form reads as though in terms of the constructive unfair dismissal, the breach relied upon is purely the handling of the grievance. Paragraph 15 of the claim form reads as follows; " *The Claimant believes that the Respondent's failure to deal with her grievance constituted a fundamental breach of trust and confidence entitled the Claimant to resign*." That position is repeated within paragraph 12 of the list of issues which cross-refers to paragraph 15 of the claim.

15. Given that what was set out in the agreed list of issues appeared to be at odds with what the Claimant had alleged were the reasons for her resignation in her evidence in chief, the Tribunal sought clarity from Mr Randall. Mr Randall informed the Tribunal (and repeated this in his closing submissions), that the only conduct relied upon in terms of the constructive unfair dismissal claim is indeed the handling of the grievance only and **not** the alleged harassment.

16. The issues to be determined by the Tribunal as agreed between the parties are therefore as follows:*(The numbering of the issues is as per the agreed list of issues. The first paragraphs from the list of issues are not included because they relate to the issue of disability now conceded);*

3. *During the material time (from 17 September 2020 to 6 November 2020) did R know of the Cs disability or was it reasonable for R to have known of the Cs disability?*

Harassment

4. *The Rs Sharon Redfern made a Facebook Post on or around 17 September 2020 which referred to how ' shocking and disgraceful work shy some people are' and how they embarrass themselves. The C was made aware of this Post on 18 September 2020. The Post was commented upon by Scott Clacher (Sharon Redfern's partner), Tammy Friend (the Nursery manager) and others. When the C sought to Post a defence to the original Post from Sharen Redfern Tammy Friend (the Nursery Manager) commented, with "#fabricatillness". The C contends the original Post was directed towards her. The R disputed that the Post was directed towards her and dispute the Cs position"*

5. *Was the C subjected to the conduct set out in paragraph 4 above?*

6. *If so, was this conduct unwanted?*

7. *If so, was the conduct related to the Claimants disability?*

8. *If so, did the conduct have the purpose or effect violating the Cs dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

   8.1 was it reasonable for the conduct to have that effect, considering the perception of the Claimant and the circumstances of the case?

9. *If so, was the conduct of Sharen Redfern done in the course of her employment or, was she acting as agent for the R and with the Rs authority?*

10. *Is the Claimants disability claim time barred?*

    10.1 do the allegations set out in he Claimant's claim form part of a continuing act under section 123 (3)9a) of the EQA?
    10.2 would it be just and equitable for the Tribunal; to extended time for submission of the claim under section 123 (1) (b) of the EQA

Constructive unfair dismissal;

11. *On the 21 Sept 2020 C raised a grievance about the conduct namely the Facebook Post, and subsequent comments which were aimed at C.C will say that the grievance was not taken seriously, that there was no investigaionr or proper meeting and the response was simply that Sharen Redfern considered the matter closed and there was no offer of an appeal. R disputes this .*

12. *Did the conduct set out in paragraph 15 of the Claimants clam occur as a matter of fact?*

13. *Did the R breach the implied term requiring an employer not to conduct itself without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence by way of the conduct alleged in paragraph 15 of the Claimant's claim?*

14. *If a breach of contract is proven was it repudiatory?*

15. *Was any breach of contract waived?*

16. *If the breach was not waived, did the Claimant resign in response to the breach?*

17. *Was the Claimant entitled to consider herself as being dismissed?*

18. *If the Claimant was entitled to consider herself as being dismissed was there a potentially fair reason for the dismissal?*

19. *Was the Claimants dismissal fair in all the circumstances?*

Evidence

17. The Claimant had prepared a witness statement and a separate impact statement (p.266 – 270), gave evidence under oath and was cross examined. The Claimant called Scott Clacher as a witness, he had prepared a witness statement, gave an affirmation and was cross examined.

18. The Respondent called 3 witnesses who had prepared witness statements, gave evidence under oath or gave an affirmation and were cross examined.

19. The agreed bundle with some additional disclosure, numbered 306 pages.

Findings of Fact

20. All findings of fact are based on a balance of probabilities. All the evidence has been considered but only the evidence considered relevant to the determination of the issues is referred to in this judgment.

Background

21. Ms Redfern bought a nursery located in Derby in 2000 and in 2007 formed a limited company (the Respondent), she was and remains the sole director and shareholder. Ms Redfern secured a mortgage to purchase a second nursery located in Swadlincote. Ms Redfern has overall day to day management control of both nurseries. She has an application on her mobile telephone showing which managers are in work each day and which children are in each day, thus giving her day to day oversight. There are also bi-monthly team management meetings which she chairs with the managers and deputy managers from both nurseries and she gives directions at that meeting on all management issues.

22. The evidence of Mrs Redfern, which is not disputed, is that she does not draw a salary, she receives dividends in her role as a director.

23. The Respondent has a business Facebook social media page and there is no dispute that Ms Redfern is the only person permitted to post on that site.

24. The Claimant was employed as qualified nursery practitioner and only ever worked at the Burton site.

25. Cheryl Pointon was a Manager of the Burton site at the relevant time and Gemma Dougherty was the Deputy Manager to whom the Claimant reported.

Relationship between Claimant and Ms Redfern

26. The Claimant and Ms Redfern had known each other prior to the Claimant working for the Respondent and were on friendly terms.

27. Ms Redfern, the Tribunal accepts, accommodated various requests from the Claimant including to reduce her hours of work for personal reasons in around October 2018. There is the Tribunal find, no evidence of any history of problems in the Claimant's working relationship with Ms Redfern.

Disability

28. The Claimant had an accident while attending a spa on 4 July 2019. She fell off a chair as it collapsed and landed on her right knee. The Claimant experienced pain in the right knee, ankle, foot and back which subsided after a period but she continued to get what was described in a medical report dated 30 October 2019 (p. 253) as quite significant pain in her right knee.

29. The Claimant returned to work after the accident. The Claimant worked term time. There was only about a week remaining after the accident before she was due to stop work for the summer period. The original diagnosis was soft tissue damage. She worked for that remaining period, having been assigned light duties. She was not due to work during the remainder of July and August 2019 and was not due to return to work until the start of the school term in September 2019.

30. The Claimant went on holiday to Cyprus in August 2019 during which time her condition deteriorated.

September 2019 : start of sickness absence

31. The Claimant was unable to return after the summer break, in September 2019 because of the problems with leg and back pain.

32. The Claimant's sickness absence following the accident in July, therefore started in September 2019. She remained on statutory sick pay (SSP) until this expired in March 2020**.** The Claimant did not receive (and does not claim she was entitled to receive) any pay from the Respondent from March 2020 (other than accruing annual leave).

33. Ms Tammy Friend gave evidence which the Tribunal accept, (the Claimant accepting that it was possibly the case) that she had been on maternity leave in July 2019 when the Claimant's accident happened and returned to work at the Swadlincote nursery in mid-September 2019.

34. Tammy Friend worked for the Respondent as a nursery nurse, she was promoted to the nursery manager at the Swadlincote nursery in 2017.

35. Ms Friend and the Claimant never worked together but would see each other sometimes in team meetings.

36. The Claimant's evidence is that Ms Friend should have had no direct knowledge of her sickness or injury because she had no management responsibility for her but alleges that she did know.

37. Ms Friend conceded in cross examination that she was made aware of the Claimant's accident when she returned to work in September 2019. We address further in this judgment the extent of her knowledge.

September 2019: meeting

38. The Claimant met with Ms Redfern at the end of September 2019. The Claimant took in her sick notes and her evidence is that she told Ms Redfern about her disability, however her evidence in chief is vague about what she had actually told her at that stage in terms of its day to day impact. The meeting was not minuted.

This the Tribunal find is a reflection of the lack of formality with the way in which the Respondent operated. Its team meetings were also not minuted.

39. By the end of September 2019, as is apparent from the medical evidence, the Claimant was complaining of knee pain and had been off work for 4 weeks from 2 September (according to the undisputed fit notes from her GP) and then 2 weeks from 29 September 2019 for right knee pain. She had not been diagnosed as having Complex Regional Pain Syndrome at this stage. She was recorded in her GP records (p.130) as presenting with a sprain of the knee joint on 25 August 2019. Although by 25 September 2019 the notes record neck pain since the fall, it records no radiation of pain and she is given a fit note for 2 weeks until she is due to have an injection and some knee physiotherapy, and "*then possible phased return"*. The GP notes do not support at this stage a belief that the condition would be long term.

40. In the absence of any clear evidence from the Claimant or indeed the Respondent, about what was discussed at this meeting in September 2019, and taking into consideration the content of the GP records and state of the medical knowledge at this time, the Tribunal find that by this stage neither the Claimant nor her GP expected her condition to deteriorate as it did and that it was not likely at this stage, to last for 12 months. The Tribunal find that Ms Redfern would not at this stage have had actual or constructive knowledge that the condition was likely to be long term.

41. The Claimant alleges that at this meeting Ms Redfern made the following comment to her, the implication being that the Respondent was concerned/would not want her to return to work if her mobility continued to be restricted; *"I can't have another one not being able to walk".*

November 2019: request for light duties

42. The Claimant asked her manager Cheryl Pointon, in November 2019 if she could return on light duties. Ms Pointon informed the Claimant that Ms Redfern had said that it would have to be at the Swadlincote site and the Claimant could catch the bus. The Claimant informed Ms Pointon it was too far for her to drive because of her leg and that she could only drive short journeys. The journey to Swadlincote involves two bus journeys and a 20 minute walk from the bus. There was no further discussion with the Claimant about how she may be accommodated at the Burton site.

43. There was another member of staff who had hurt her leg (Sophie) and was using crutches during this period, and the Claimant believes that this is the other person Ms Redfern was referring to when she made the comment at the September meeting: *"I can't have another one not being able to walk".* Ms Redfern denies making this comment. There is no reference to this comment in the grievance the Claimant raised later or elsewhere in any of the documents. This does not appear to be consistent at first sight with Ms Redfern's response when the Claimant requested in around November 2019 to return to work on light duties, because Ms Redfern agreed she could return albeit it would have to be at the Swadlincote site. However, the failure the Tribunal find by Ms Redfern to take into account that the Claimant rejected the offer of work at Swadlincote because of the travel involved and the failure to engage thereafter with the Claimant about how she may be accommodated at the Burton nursery (including perhaps moving staff between sites, which the Tribunal were informed did happen to cover staff absences), does the Tribunal find indicate a lack of engagement with the Claimant's health problems

and whether it was reasonable to make other adjustments for it.

44. The Tribunal consider that it is reasonable to draw an inference from that lack of engagement over adjustments, which is adverse to the Respondent. Although the burden of proof lies with the Claimant, on balance, the Tribunal consider it more likely than not, that Ms Redfern did make a comment to the effect that having someone else with walking difficulties would be problematic because clearly it was considered a problem to accommodate her at her normal place of work.

45. The concern over the Claimant's restricted mobility may well have been a reasonable concern given how physical the work is and that the Burton site is a smaller operation (including in terms of physical space and staffing) .The Claimant in evidence accepts that; *"Everything about a nursery practitioner's job is very physical and my injuries would not let me do my job*." (p.268). However, Ms Redfern does not attempt to justify making the comment, she simply does not accept she made it. The Tribunal however on balance find the Claimant's evidence more credible, taking into account the reasonable inference to be drawn from the lack of engagement over accommodating her at her normal place of work.

46. The Claimant does not advance a claim however of a failure to make reasonable adjustments.

Sick/ fit notes

47. Ms Redfern does not dispute that she received a number of sick notes from Claimant and it is not in dispute that they show a progression in terms of a worsening of the condition;

(p.92): 2 September 2019 for 4 weeks : knee injury **[first fit note]**
(p.93): 29 September 2019 for 2 weeks: right knee pain
(p.94) 7 October 2019 for 3 weeks: knee injury
(p.95) 25 October 2019 for 2 weeks: ongoing R pain under investigation
(p.96) 7 November 2019 for 2 weeks: ongoing right knee pain
(p.97) 19 November 2019 for 4 weeks: complex regional pain including right knee
(p.98) 20 November 2019 ***for 3 months****: suspected complex regional pain syndrome*
(p.99) 14 February 2020 for 2 months: suspected complex regional pain syndrome
(p.100) 13 April 22020 for 4 weeks: suspected complex regional pain syndrome / back pain. Under secondary orthopaedic care
(p.101) 10 May 2020 for 2 months: suspected complex regional pain syndrome
(p.102): 8 July 2020 for 2 months: suspected complex regional pain syndrome / back pain
(p. 103) 4 September 2020 for 2 months : suspected complex regional pain syndrome / back pain. Under secondary orthopaedic care

48. The Claimant alleges that she was speaking regularly with her manager and keeping her informed about her condition and she believes that Ms Redfern would have been aware of how the condition was affecting her day to day . The Claimant does not however address in her evidence in chief what precisely she was communicating to her manager during this period and specifically what she was telling her about its impact on her day to day activities. Ms Hall confirmed in oral evidence that she passed on any medical evidence to Ms Redfern which the Claimant asked her to pass on.

49. Ms Redfern conceded however in cross examination that by November 2019 (p.98) it was obvious that there was a deterioration in the Claimants' condition. Ms Hall gave evidence that from her coming back in October 2019 things progressed and changed quite rapidly with the Claimant's condition.

50. The Claimant's undisputed evidence is that the impact as described in her impact statement, was by October 2019 such that she was in an incredible amount of pain, in her back, right leg and foot (p.258). The Tribunal find on a balance of probabilities, that the Claimant was communicating this information to her manager, and that this is consistent with the comment made by Ms Redfern about her concerns over the Claimant returning if she was unable to walk.

17 February 2020 meeting

51. On the 17 February 2020 the Claimant met with Ms Redfern and Lucy Hall.

52. Lucy Hall worked at Swadlincote from 2018 until Ms Friend came back from maternity leave. Ms Hall then went to work at the Burton nursery in October 2019 and shared the manager role with Cheryl Pointon. Ms Hall then went on maternity leave around March 2020 and returned in January 2021.

53. The Claimant alleges that she asked for the meeting to take place at her home however the Respondent insisted it take place at the nursery. The Tribunal find on balance, taking into account the inferences drawn about the approach to adjustments, that it is more likely than not, given her limited mobility that she asked for this adjustment which was refused. In any event, whether she asked for it or not, it would have been reasonable for the Respondent to have made enquires with the Claimant, given the nature of her condition, about whether she required any adjustments for the meeting. The Respondent does not assert that it did so. This the Tribunal finds further indicates a lack of consideration at best for the Claimant's condition and her welfare and appreciation of its obligations as her employer.

54. The Respondent disclosed during the afternoon of the first day of the hearing, the notes which Ms Hall had taken of this meeting (p.57A). Mr Randall applied and was granted leave to interpose the Claimant to address this additional disclosure. The Claimant had not seen the minutes of the meeting before this hearing.

55. Ms Hall's undisputed evidence which the Tribunal accept, is that she made those notes within days of the meeting and denies that the Claimant had asked for a copy of the notes. A copy of the notes should as a matter of best practice have been sent to the Claimant whether she asked for them or not, however the Claimant did not complain in her evidence in chief that she had asked for the notes and there is no documentary evidence to establish that a request was made (even though after this meeting the Claimant had exchanged private Facebook messages with Ms Hall). On balance the Tribunal do not find that the Claimant had asked for the notes but in any event, there is only one area of dispute regarding their accuracy. The Claimant denies that the following comment was made in this meeting:

"*It has been discussed with Kerry that it may be more beneficial to work on a Zero hour contract and she can work when she is well enough. If there is a longer term issue it may be that Kerry is no longer fit to work within the role and that Kerry's contract is terminated.*"

56. Ms Hall and Ms Redfern both gave oral evidence that there was a discussion about

a possible termination if the condition continued long term.

57. Ms Redfern accepted that she knew the Claimant was pursuing a personal injury claim because as the Claimant volunteers in her evidence in chief, she had mentioned this (w/s paragraph 19) .

58. The Tribunal consider that it is unlikely that if the rest of the notes are accurate this one entry has been fabricated. We found Ms Hall to be a generally credible witness of fact who gave direct answers to questions. We take into account the evidence of Ms Hall which supports Ms Redfern's but also that it is plausible that at this stage, having been absent on sick leave for about 5 months and given the content of the medical reports the Claimant had produced, the discussion may have reasonably included an indication of the possible outcome if the absence continues long term. Further, the Claimant accepts that she made the comment at this meeting that; "*you have to do what you have to do*" which would indicate a response to a comment about a possible termination of her employment, consistent with the notes.

59. The Claimant disputes however that she wanted her contract to be terminated and accepts that she was told that the Respondent still wanted her to return. The Respondent does not deny that. Ms Redfern gave evidence that she was hopeful the Claimant would still be able to return to work.

60. It was put to the Claimant in cross examination, that being dismissed because of the injury would assist her personal injury claim, however it was not really explored by counsel in cross examination why this would necessarily be the case beyond a general proposition put to the Claimant. The Tribunal fail to see and nor did counsel expand on this in cross examination, how, given that the Claimant was not receiving any wages from the Respondent by this stage, it would make any material difference whether she was out of work or in work but not being paid. Further, there was no other evidence to support how and why a dismissal would be advantageous to her personal injury claim nor any evidence from the witnesses that the Claimant said anything to indicate that she held this view.

61. The Claimant brought to this meeting a letter from Mr Malay consultant orthopaedic surgeon dated 30 October 2019 (p. 253) and Dr Bukowski consultant in pain medicine dated 7 February 2020 (p.255) . Ms Hall took copies of them.

October 2019 report

62. The report dated 30 October 2019 (p.253) included the following:

> *"Diagnosis: Right knee pain following an injury with* ***persistent pain*** *over predominantly the medial aspect along with some electric shock like sensations and a bubbly feeling*
>
> *Plan: Chase MRI scans and X-rays from Royal Derby Hospital and see back in Clinic with the results of those.* ***Most likely to be complex regional pain syndrome…****hence Gabapentin started for 2 weeks. Previously seen Mr Straw as well. [Tribunal stress]*

February 2020 report

63. In the report of the 7 February 2020 (p.255) it included the following comments;

"Many thanks for asking me to see this lady with a history of unexplained pain in her right knee which started after a twisting injury to the knee and her lumbar spine in July 2019 when she landed heavily on the floor when a chair she was sitting on collapsed. Today she arrived accompanied by her husband. She tells me that her main problem in pain in the inner aspect of the right knee and in the foot. In the last few weeks she also reports pain in her right thumb. ***She normally mobilises with an elbow crutch on the right side.*** *Before the accident she used to work as a Nursery Nurse but since September last year she has been unable to return to her . Her Sleep is disturbed every night and her mood is low*.

…
Her current medications consist of Citalopram , Pizotifen for migraines , Gabapentin 1.2 pm per day and Co-codamol for pain…""

On examination: today she performed reasonably well however she appeared ***quite unsteady on her feet with low level of confidence without crutch****…" [Tribunal stress]*

64. Ms Redfern was made aware from these reports produced at this meeting of the Claimant's very limited mobility such that required the aid of a crutch.

65. Ms Redfern's evidence under cross examination, is that she did not contact the Claimant's GP because the Claimant had supplied the two reports. It was also 'possibly' she said, because the GP wanted to charge for copies of her records however her evidence is that if she had wanted them, she would have paid. The Tribunal therefore accept the Claimant's evidence that she volunteered to get information from her GP but she was told there was no need because the Respondent knew what the situation was.

66. Ms Hall also gave evidence that at this meeting the Claimant produced a leaflet to explain Chronic Regional Pain Syndrome. The Tribunal accept her undisputed evidence that this information was also supplied although unfortunately a copy of it was not in the bundle and there was no evidence given about what information it contained.

67. The notes of the meeting include the following comments;

"Kerry explains that she had Right knee pain which aggravates with walking and movements, There was a query Complex Regional Pain Syndrome, Kerry believes there to be nerve damage to the knee and she is on a high dosage of Gabapentin . Kerry has been referred to a pain specialist under the NHS but has yet to receive an appointment.
..
Kerry has contacted Lucy Hall (manager) on Saturday 22 February 2020 on Facebook stating she has been to A & E with severe back pain and that her MRI results were ready to be reviewed. She has stated " it has been confirmed that she has a herniated disc that is severely affecting the nerves on her right side" and that her back is now "horrendous" Kerry has been referred to a see a spinal specialist. And she now has Morphine to take at home for the pain (currently every night)…"

68. There was no prognosis in terms of a return date at that point.

March 2020

69. By March 2020 (p.100) the Respondent and in particular Ms Redfern, knew from the fit notes supplied that a second consultant was now involved in the Claimant's care and so while it is alleged they remained still hopeful she would still return, Ms Redfern in cross examination accepted that it was "*obvious*" her condition seemed to be getting worse.

70. At some point before 11 March 2020 (p.88) the Claimant contacted Ms Hall to enquire about her holiday accrual (p.88). The Claimant informed Ms Hall that she was accruing holiday while off and that it may be worth asking Ms Redfern what she wanted to do about it. Ms Hall confirmed in cross-examination that she did pass this message on to Ms Redfern .

71. However, the onset of the Covid pandemic meant that the nursery was closed from March 2020. The Claimant complains that she had no communication from the Respondent during the closure and was not contacted again until August 2020. The Claimant's undisputed evidence is that she emailed Ms Redfern a few times during this period to update the Respondent on her health but received no response. We were not provided with copies of any of those messages but on balance accept the Claimant's evidence.

June/July/August 2020 – holiday query

72. The Claimant gave oral evidence in response to a question from the Tribunal, that her husband took in a sick note into the Respondent for her in August 2020 and that at around this time the Claimant messaged Ms Redfern about her holiday and was told she could take it as time off in lieu when she returned but that she could not have it paid. The Claimant complains that it was about a week after this that the Posts appeared. However, the dates are not consistent with her evidence in chief where she alleges that this message about annual leave, occurred in about June/July 2020. The Claimant it is accepted, contacted the external payroll provider to check how much holiday had accrued, and Ms Redfern shortly thereafter sent a message to all staff informing them not to contact their external payroll but to contact Ms Redfern with their queries. Ms Redfern's evidence is that their payroll provider had contacted Ms Redfern and asked that staff contact her direct.

73. The GP fit notes during this period are dated 8 July 2020 for 2 months (p.102) and then 4 September 2020 (p.103) . There is no fit note provided in August 2020.

74. The Tribunal find on a balance of probabilities, that the date the Claimant's husband took in the fit notes is likely to be the beginning of July 2020 and that the events around holiday pay therefore on a balance of probabilities, took place at around the same time in July which is consistent with her evidence in chief. Thus this was circa 6 weeks at least before the Posts appeared.

75. Further, the Tribunal consider that it is plausible and more likely than not, that an external payroll provider would expect to deal with enquiries direct from the employer, rather than field day to day enquiries direct from their staff and that this was the reason why Ms Redfern sent out the message to staff. It is not in dispute that the Claimant was paid her full accrued annual leave on termination, she does not complaint of any difficulty in being paid what she was entitled to.

August 2020 holiday

76. The Claimant referred only to taking a holiday to Cyprus, in August 2019 in her evidence in chief, however under cross examination she alleged she had also taken a holiday in 2020 which she believed Ms Redfern would have been aware of, albeit she does not allege that she mentioned it to her directly. The Claimant believed that she put something on her Facebook page about the holiday but there was no screen shot of this in the bundle and no application was made to admit this into evidence. Given how relevant to her claim this is, it is therefore surprising that this was not included within the Claimant's disclosure or that she had not mentioned it within her evidence in chief.

77. Ms Redfern however gave oral evidence under cross examination that she may have been aware that the Claimant had taken a holiday in August 2020, although she could not recall, however she denied being aware that the Claimant had driven to the airport.

78. The Tribunal consider on a balance of probabilities, that given the dialogue about her accrued annual leave and that contact was resumed in August 2020, and Ms Redfern's evidence that she may have been aware of the holiday, that on balance Ms Redfern did know that the Claimant had gone on holiday albeit possibly through a manager. The Claimant does not allege that she had mentioned driving to the airport and the Tribunal find on a balance of probabilities that this was not mentioned by the Claimant, however it would be reasonable to assume that the Claimant had to travel and most likely by car, to get to an airport.

September 2020 : 12 months absence

79. Ms Redfern accepts that by **17 September 2020**, she had received the various fit notes, had sight of the two reports from the Claimant's treating consultants and had discussed her health issues with the Claimant. She also accepted that the fit notes had originally been for a few weeks but had from November 2019 been for longer periods of weeks or months. Ms Redfern accepted that by 20 November 2019 the diagnosis was no longer just knee pain but the fit note was for 3 month and referred to suspected Complex Regional Pain Syndrome and by 13 April 2020 also included reference to back pain.

80. Ms Redfern gave evidence that she did not seek HR support but by September 2020 she accepted that the Claimant's condition was considerably worse. the Claimant had been absent for 12 months and she conceded that by this stage it was now reasonable to assume that the Claimant had a disability.

81. The Claimant mentioned only under cross examination, that she had also asked Ms Redfern again about her accrued annual leave holiday in September 2020 but accepts there is no record of that. That she had asked again is also not consistent with her evidence in chief, where she refers only to a discussion in June/ July (para 21 w/s). The Tribunal are not satisfied on the evidence that the Claimant has shown on a balance of probabilities, that she raised the holiday pay issue again in September 2020

Mrs Redfern put a Post on Facebook : 17 September 2020

82. The Respondent has its own social media Facebook page. We are not concerned

with that but with what was Posted on Ms Redfern own personal Facebook page.

83. Ms Redfern Posted on her personal Facebook page, and the Tribunal accept her undisputed evidence that this happened on the evening of 17 September 2020 while she was at home. Mr Clacher was living with her at the time and at home with her that evening. He was her long-time partner.

84. The wording of the relevant Post (p. 58) is ;

"*Back in the day I set out with a mind set that WORK and hopefully benefit and continue to do so WORK WORK, life owes you nothing. Everyone I'm sure agrees these are challenging times but NEVER have I seen so much [pooh emoji] shit times and for <u>those</u> trying to screw the system ….. [sic] embarrassing for themselves and for <u>those</u> work shy! SHOCKING & DISGRACEFUL. Good luck with your future, I'm aiming for a clear conscious [sic]"*

85. It is not in dispute that a number of those who replied to the Posts were employees of the Respondent, albeit there is no dispute that Ms Redfern's Facebook 'friends' extended beyond the Respondent's employees'.

86. The Facebook comment the Claimant accepted, under cross examination, does not specifically ask people to comment or share their views. The Post states " *Everyone I'm sure agrees*..." The Tribunal find that this assumption around a shared opinion, is in the context of these being 'challenging times', not in the context of agreeing with her sentiment about people manipulating the system.

87. There is then a further Post from Ms Redfern ;*"Why do some people think they have every right to be work shy? And think everyone else needs to pay for it DISGUSTING". (p.60)*

88. This message is replied to by Sharon Owen Yates who is not an employee of the Respondent. Her response is not alleged to be aimed at anyone in particular;*" I wish I knew the answer hun, must admit I'm absalutely sic] shattered but sleep with a clear conscious [sic]. Expecting some people to do the right things is wasted energy. Talk about different page, they are in a different book".*

89. Ms Redfern then Posts again in reply to Ms Owen Yates: " *I've had NO helping hand to do what I have done (mountain of challenges) and yet some think they are owed more… for what reason? Go [swear emoji] yourself and try working*!" (p..59); and *"Been in it far too long for the lows to get me down."*

90. The Claimant gave evidence under cross examination that Ms Owen Yates would not have known what Ms Redfern was talking about but the Claimant interpreted the comment as being about her and another employee who was off work sick and that others who work for the Respondent would have known that Ms Redfern's Posts were about them.

91. The Claimant in cross examination gave evidence that she believed the comments had been Posted on the evening of the 17 September however, she had not seen them until the 18 September 2020.

92. The Claimant in her evidence in chief does not identify any potential catalyst for the Posts made by Ms Redfern . The Claimant refers to the issue over holiday pay in her witness statement albeit does not quite go as far as alleging this was the cause

and does not identify anything specifically which happened in the interim which may have prompted the comments. In cross examination she admitted that she considered that these comments had come '*out of the blue'* .

93. The Tribunal find that the Claimant by this stage had a concern that Ms Redfern may have had her and her colleague in mind but that it was the follow on Posts from Mr Clacher and Ms Friend which she considered were clearly aimed at her.

94. In her letter of complaint (p.74) which she would later present to Ms Redfern, the Claimant describes her response to the Posts as follows;

*"**As people start adding comments it become clear** that whilst no names are mentioned it is in my opinion targeted at myself .." Tribunal's own stress.*

95. In her evidence in chief she also states; *"The comments from Scott Clacher and Tammy Fried I believe are about myself…" (para 29 w/s) ; and*

"What made me know it was about myself was the comments from Scott Clacher and Tammy Friend talking about driving to an airport, sitting on a plane and not being able to drive to work." (para 35 w/s)

96. The Tribunal find that had Mr Clacher and Ms Friend not put their Posts, the Claimant would have had nothing more than a mild concern or suspicion that the comments by Ms Redfern may have been written with her and her colleague in mind and would not have been sufficiently concerned to raise a grievance. In fact, the Claimant responds to the Posts by Ms Redfern to express agreement with the frustrations expressed by her.

97. What follows from Ms Redfern's Posts is the following Post from Scott Clacher, who was not and never has been employed by the Respondent; "*You mean when **someone** goes on holiday but makes out they're in absolute agony [4 x laughing emojis] "(p.62) Tribunal stress*

98. This Post the Tribunal finds is personal, it is about "*someone*" rather than an apparent general complaint about the behaviour of some people.

99. There is then a follow on Post from Ms Tammy Friend (p.62): *"[clapping hands emojis] fortunately there's a clause in my diagnosis **that says I can drive** to the airport and sit on a plane but cannot drive to work….sorry " [Tribunal stress]*

100. The clapping hands we find, indicate agreement with the comments of Scott Clacher. Objectively on reading this Post, the Tribunal consider that they read as if Scott Clacher and Tammy Friend are both alluding to a specific person. They both use the singular pronouns; *"I"* and "*someone".*

101. Mr Clacher writes again: "*these doctors [frustrating emoji faces] you'd think they'd be able to tell when **someone** is pulling the wool over their eyes with made up ailments. Anything for an easy life !" [Tribunal's own stress]*

102. There are then a few other comments including from Liz Clacher who is not an employee; " …*Don't let **a few** despicable people spoil it . I am very proud of you xxx*" (p.64).

103. The Claimant responds;

"*It is annoying . I took Charlie to St Anne's for two nights before a medical appointment in Manchester. The poor kid hadn't been out for months . I dosed myself up with morphine and took a wheelchair with me, as there was no way I could walk around*

But you are right its annoying as it take away from those with real medical problems" (p. 64)

104. Ms Redfern follows up immediately with this comment: *"unnecessary strain on services, strain on the good taxpayer xx*" (p. 65)

105. The Claimant Posts again in apparent agreement with Ms Redfern (p. 66) :"*I agree. I don't receive any benefit payments except an incredible small amount due to the National insurance contributions have paid since 18. I don't receive tax credits nothing, we support ourselves" (p.67)*

106. There is then immediately following that Post by the Claimant, a Post by Ms Tammy Friend: " *"#fabricated illness*" (p.67)

107. It is reasonable the Tribunal find, for the Claimant to perceive that this Post from Ms Friend is a comment on the Post immediately preceding it or about the person who made that last Post i.e. the Claimant.

108. Ms Friend removed the hashtag Post a few minutes after posting it. She alleges she did this because she thought people may not understand what she meant by it. The Tribunal consider that an alternative explanation could of course be that she realised she had taken a step too far and quickly regretted posting it. On balance the Tribunal consider that it is more likely than not to be the latter, because for the reasons set out below, the Tribunal find that Ms Friend's Post was directed at the Claimant. The Tribunal did not find Ms Friend to a credible witness when explaining the motive behind her Posts and who/what they were meant to relate to.

109. The Claimant gave evidence under cross examination that she believed these Posts were about her because: *"after the accident in July 2019 I had a holiday booked to Cyprus in August, I believed I would get better in weeks, I went on holiday but after the accident I did not return to work,"*

110. The Claimant in her evidence in chief (paragraph 29) therefore asserts that the Posts may have been made because she went on the 2019 holiday but then informed the Respondent that she could not drive to Swadlincote in November 2019. It was only when it was put to her under cross examination, whether she was alleging that Ms Redfern put on the Posts because she was so aggrieved about a holiday taken the year before (while she was not due to be at work anyway), that the Claimant raised for the first time the holiday she had taken with her family in August 2020 and that this may alternatively have been the trigger.

Intention of Ms Redfern.

111. The Tribunal heard evidence from Ms Redfern's then partner, Mr Clacher. He gave sworn evidence. However, the Tribunal has serious concerns about Mr Clacher's motive in giving evidence adverse to his former partner and thus his credibility as a witness of fact.

112. An application was made for Ms Redfern to listen to the evidence of Mr Clacher via CVP from another room in the Tribunal. That application was uncontested and easily accommodated and therefore granted. It is not alleged that any threats had been made by Mr Clacher however it appears clear that the relationship between Mr Clacher and Ms Redfern (supported by the evidence of Mr Clacher) has broken down and there is at best, what the Tribunal understands to be a fair degree of animosity between them.

113. Mr Clacher gave evidence that he was with Ms Redfern at home when the relevant Posts were made by them both. He alleges that they were sat together when she made the Posts on Facebook. Ms Redfern's account is that she was in a different part of the house from him when she made the Posts and that he made his Posts separately from her and of his own volition.

114. Mr Clacher alleges that something had happened on the 17 September regarding the Claimant that '*irked'* Ms Redfern and Ms Redfern vented her anger and frustration via Facebook and that her comments were aimed "*100%"* at the Claimant.

115. Mr Clacher could not recall what had "*irked"* Ms Redfern, he thought it was possibly some correspondence received that day. The Claimant was unable to identify anything that may have happened on 17 September or any day around that date and certainly no correspondence was identified.

116. The Claimant has not established on a balance of probabilities anything that happened on 17 September 2020 which may have caused Ms Redfern to be angry or annoyed with her or her absence from work.

117. The Claimant had by this stage been absent for a year and was not receiving any pay. The Claimant had enquired about holiday several weeks before and that had been responded to. It is not alleged that the Claimant complained or otherwise challenged the suggestion that she take her leave as TOIL when she returned.

118. Had Ms Redfern been aggrieved by the Claimant, Ms Redfern could have taken steps to terminate the Claimant's employment; there was no clear prognosis on her condition and she had been absent on sick leave for a year by this stage however, the Claimant accepts that there were no steps taken by the Respondent to do so .

119. Mr Clacher also alleges that his Posts were directed at the Claimant and that he knew about her absence because Ms Redfern had shared confidential information with him about the Claimant's health condition and that he knew the Claimant had been on holiday because Ms Redfern had told him.

On the instruction of Mrs Redfern?

120. Even if Ms Redfern's had been angry when sending the Post and had the Claimant in mind, Mr Clacher regarded her comment as "*somewhat ambiguous in that it did not name the Claimant".* Further, as we have addressed above, we find that the Claimant was not certain prior to Mr Clacher and Ms Friend's Posts, that Ms Redfern's Post was about her.

121. Mr Clacher alleges that Ms Redfern had asked him to comment on her Post. It was put to Ms Redfern in cross examination that she encouraged Mr Clacher to make his comments, which she denied. Mr Clacher's evidence when asked by the

Tribunal to be precise about what he alleges Ms Redfern had said to him, gave evidence that she had asked him; "*can you put something on there*" and to comment on her Post. He confirmed that this was the full extent of what she had said. He did not allege that she had told him what to say, that she asked him to direct his Posts about the Claimant or otherwise told or encouraged him to make any particular comment.

122. The Tribunal do not find on a balance of probabilities, that Ms Redfern had instructed Mr Catcher to make the comments which he did, even if she did ask him to comment on her Post, there is no evidence that she asked him to make the Posts which he did in fact make. The Tribunal find that there is no evidence that Ms Redfern had intended or encouraged Mr Clacher to Post something which would identify the Claimant and with the intention of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Indeed, Mr Clacher's evidence, even if it were to be accepted, is that Ms Redfern: *"prompted me to comment on the Post* ***but in a way that wouldn't suggest the Post was about Kerry****". Tribunal's own stress*.

123. The Tribunal however have serious reservations about the credibility of Mr Clacher's evidence and therefore have approached his evidence with a significant degree of caution.

124. Mr Clacher had been in a relationship with Ms Redfern at the relevant time. Their relationship had (albeit there had been two periods of prior separation) been long standing over a period of 10 years during which they had lived together and had a child together. Their relationship ended at the beginning of 2022. Mr Clacher denied in oral evidence that it was a 'bad breakup', he describes it has having run its course and finding the strength to leave. However, his rather sanguine view of the ending of the relationship is not we consider, consistent with his evidence in chief in which he described it as an abusive relationship.

125. Mr Clacher attempted to present as not upset that the relationship had ended however, the Tribunal were not convinced that Mr Clacher was as accepting of the situation as he maintained. In his evidence in chief he referred to it as "*very controlling" "coercive* "and a "*highly toxic"* relationship but denied giving evidence against Ms Redfern out of spite. He accepted in cross examination however that his relationship with Ms Redfern was not good at present but did not elaborate on the reasons why.

126. In his witness statement (paragraph 4) Mr Clacher clearly implied that he had ended the relationship; "*My relationship …came to an end…when I decided I could no longer put up with the emotional and psychological abuse."* He denied under cross examination that Ms Redfern had ended the relationship because of his debts although he accepted that she had paid off some of his personal debts in 2020 however, he alleges this was before the relationship ended. Ms Redfern gave evidence that these were gambling debts he had accrued and when she later become aware of other debts, that led to the breakdown in the relationship. Mr Clacher accepted in cross examination that Ms Redfern had asked him to leave the home they shared together and the Tribunal accept on balance, Ms Redfern's account of the reason for the ending of the relationship.

127. Mr Clacher accepted that he was also aware that Ms Redfern was in a new relationship.

128. Mr Clacher denied that during a previous breakup he had reported the Respondent to Ofsted but accepted he had reported the business to HMRC in 2014 during a breakup ; "*yes I may have done*". His response was not unequivocal, however the Tribunal consider that he would definitely know whether or not he had reported his partner's business to HMRC and his response the Tribunal finds, was therefore less than candid, implying an implausible degree of doubt over whether he had done so. Further, he did not affirmatively deny that his motive in contacting HMRC had been an act of spite, responding only that his complaints were not unfounded. The Tribunal make no finding on whether the issues he raised were well founded or not only that his behaviour shows a propensity to harm Ms Redfern's business interests out of malice.

129. Mr Clacher also accepted under cross examination that he had covertly recorded private conversations he had with Ms Redfern since 2019. His evidence was that this was to record the abuse he suffered. However, when asked by the Tribunal why he had recorded private conversations and what he intended to do with the recordings, he was unable to provide a satisfactorily explanation. Such apparent underhand behaviour coupled with his propensity to want to harm Ms Redfern's business interests following a break-up, gives the Tribunal serious concern over the credibility of his evidence where it is adverse to Ms Redfern.

130. Although under cross examination Mr Clacher at first gave evidence that he could not recall that this tribunal claim involved a complaint about the Posts he had personally made on Facebook, he went on to give evidence that he was aware that the claim related to all the Posts and aware that he was therefore a key witness. His evidence was also at times therefore contradictory on other matters.

131. However, the Tribunal find that Mr Clacher had provided some support to Ms Redfern with the running of her business during the period they were still together, not in an official capacity but as her long-term partner. She was the sole owner and she accepts that she would seek his advice on some business matters. He had proof read documents for her and on occasion she asked for his advice.

132. Mr Clacher gave evidence that Ms Redfern would give him her log in details for her phone and iPad and that he had "*full visability*" of all the confidential documents including the Claimants medical notes produced by her solicitor (paragraph 6). The medical notes produced by her solicitor however would have been provided after her employment ended to the extent it related to the tribunal proceedings.

133. Mr Clacher alleged under cross examination that he was shown fit notes and medical notes for the Claimant throughout her employment, the grievance process and these proceedings. He also alleges that he had drafted the responses to the grievance however Ms Redfern denied this. Mr Clacher referred to evidence of these drafts being sent to Ms Redfern however the emails were not disclosed in the bundle and no application was made to submit them into evidence' although he indicated he could have disclosed them.

134. Ms Redfern initially denied sharing any confidential information with Mr Clacher. Ms Redfern did however, in response to a question from the Tribunal accept that Mr Clacher would know about the Claimant's situation and that she was off sick because she may need to change the rotas. She accepted that she may well have mentioned it and accepted it would be discussed in general conversation with him. She denied however that Mr Clacher had access to the Claimant's medical information. However, the Tribunal do not find that credible. They were in a long

term relationship, Ms Redfern was the sole director and shareholder, she had no business partner to discuss her business with, there was we find an informality in how the busines was run, evidenced by the lack of minutes of some meetings, the '*chatty'* style of the team management meetings and the way in which Ms Redfern dealt with the grievance process (which we shall turn to later in this judgment) . The Tribunal consider it reasonable to draw an inference from all those factors, that it is more likely than not that Ms Redfern discussed with Mr Clacher the Claimant's absence and the circumstances relating to it in, probably some detail.

135. Mr Clacher under cross examination gave evidence that he did not however know whether or not the Claimant was able to drive a car and gave no details about any holiday she had taken other than he was led to believe she had been on holiday but he did not know the specific times or dates or where she had been. The Tribunal have no reason not to accept his evidence on these issues.

136. Mr Clacher also gave evidence that Ms Redfern had an issue with the Claimant's absence, that she believed there was nothing really wrong with the Claimant and that Ms Redfern and other members of the management team would parodically check on the social media profiles and screenshot what activates the Claimant had been up to. If they did however, what they had seen was never raised with the Claimant in the context of challenging the veracity of her illness and Mr Clacher did not elaborate on what it was the Claimant had been seen to be doing. Ms Friend and Ms Redfern deny this and on balance the Tribunal is not satisfied that the evidence supports a finding that they did check up on the Claimant as alleged. There is no indication from the Claimant that Ms Redfern or any of the managers indicated any scepticism about the nature and seriousness of her condition.

Tammy Friend

137. Ms Friend was on maternity leave in July 2019 when the Claimant had her accident. She returned in September 2019 and was then on furlough leave with other staff from March 2020 to September 2020 (she works term times) and then returned to work at the Swadlincote nursery.

138. Ms Friend gave evidence that she was aware that the Claimant was absent from work on sick leave but was not aware that the Claimant was not able to drive. However, she accepts that there were bi-monthly management meeting where the managers at both nurseries got together. In terms of the formality of those meetings, she gave evidence that they were quite '*chatty'.* It is a team of only five managers across both sites and those '*chatty'* meetings were not minuted.

139. Ms Friend accepted in oral evidence that the managers had discussed at one of those meetings, the Claimant moving to Swadlincote and the adjustments that could be made for her there. However, Ms Friend denies knowing the reasons why the Claimant could not move to Swadlincote, namely that she would need to catch a bus because she could not drive. The Tribunal did not find Ms Friend's evidence on this issue to be plausible given the informality of these meetings and the small number of managers and employees.

140. Ms Friend also denied knowing that the Claimant had been on holiday in August 2020. Again, given the size of the team and given the Tribunal's finding that on balance Ms Redfern knew about this holiday, the Tribunal find that it is more likely than not that this had also been mentioned in passing or at the 'chatty' team management meetings.

141. Ms Friend under cross examination confirmed that she was aware that the Claimant said she could not work at the time she made the Posts, that she could not drive to work but denied being aware that she had been on holiday and driven to the airport. Later in response to a question from the Tribunal Ms Friend appeared to contradict herself and stated that she did not realise the Claimant could not drive because she was aware that she collected her children from school.

142. In terms of the coincidences between the Posts Ms Friend had put on Facebook and the Claimant's situation, Ms Friend had no explanation for them other than these were indeed just coincidences. However, the Posts she was responding to from Mr Clacher mentioned only going on holiday, it did not mention driving to the airport or sitting on a plane, these were details Ms Friend had added. She had then gone on to put a Post immediately after the Claimant's, which said: "*fakeillness#"*. Ms Friend's evidence about why she made this last comment, was not the Tribunal consider, credible. In cross examination she gave evidence that she had made her Post in response to Mr Clacher's and that she believed that he was making a joke. She denied that her Post was about the Claimant, she referred to the Claimant having a diagnosis and that her Post was about people who **do not have** a diagnosis and *'play the state'*, however that explanation makes no sense because in her Post she states;

*" fortunately there a clause **in my diagnosis** that says **I can** drive to the airport and sit on a* plane *…" [Tribunal stress]*

143. Her Post is clearly therefore about a person who has a diagnosis relating to some condition.

144. Ms Friend gave evidence in chief is that she had watched a film about a mother who fabricated her daughter's illness and other programmes about people playing the system, and this prompted her Post. That the Tribunal find is also not plausible, because her Posts are very specific in terms of the detail and there is objectively no link between what she is referring to and someone with Munchausen disease. The Tribunal find it a creative but ultimately disingenuous explanation.

145. Ms Friend gave evidence under cross examination that she had actually not seen the Claimant's comment (p.62) when she put the #fabricatedIllness Post underneath it, because she had not clicked on all the comments. The Tribunal accept that it is possible to comment or like a post without reading the last posts. However, Ms Friend in response to the Tribunal gave evidence that she did not appreciate that a 'hashtag' indicates that a comment is part of a topic or ongoing conversation and could not explain why she had used one. That the Tribunal finds is also not plausible, given that she could not explain why she had therefore added the 'hashtag'.

146. If Ms Friend's evidence is to be believed, she had seen the original Post by Ms Redfern, she had seen the comments by Mr Catcher and then she had gone back to Facebook and added the "*#fabricatedIllness"* Post without checking what other comments had been added in the interim. She risked therefore causing serious offence by adding this comment without first checking what the preceding post was.

147. The Tribunal do not find it credible that Ms Friend would not have checked the more recent comments before adding *#fabricatedIllness.* Therefore, the Tribunal find on balance that Ms Friend added this comment and in doing so was directing her

accusation of a feigned illness toward the Claimant but then had second thoughts and removed it minutes later but not soon enough, because the Claimant had seen it.

148. Given the size of the management team, how 'chatty' their meetings were and that they discussed staffing over the two sites and the general issues over the credibility of Ms Friend's evidence, the Tribunal find on balance, that Ms Friend did know why the Claimant had not moved to Swadlincote and was also on balance, told what the Claimant's diagnosis/ condition was.

149. Taking into account its finding about the 'hashtag' comment, the knowledge which Ms Friend had about the Claimant's circumstances and the unexplained 'coincidences' in the scenario she referred to in her Post, the Tribunal find that it is more likely than not that her Posts were directed at the Claimant.

150. Ms Friend was a manager and the tone of her Posts was scornful and disparaging and mocking the genuineness of the Claimant's health problems.

151. Had the Claimant included Ms Friend as a Respondent to these proceedings and had the Claimant sought to argue that given the Posts she placed on Facebook were connected with work (in that they were directed at the impact of the Claimant's disability on her ability to work and Ms Friend only had access to this information in her role as a manager in the business), the Tribunal may well have found there to be a sufficient nexus between the conduct and the employment relationship for a finding that Ms Friend was acting in the course of employment. Had that been the finding then Ms Friend may well have been facing a claim for which she would have been personally liable to pay compensation.

152. The Claimant does not however argue that Ms Friend was acting in the course of employment and therefore in those circumstances she cannot be found personally liable for her actions under the Equality Act 2010.

153. The Tribunal find on balance that Mr Clacher's Posts were intended to be about the Claimant and that Ms Friend followed suit and aimed her comments at the Claimant. It does beg the question whether Ms Redfern was behind the scenes encouraging them to Post these comments because otherwise why would they know who the other was directing their comments at?

154. Mr Clacher alleges that there were WhatsApp messages going between the management team regarding the Posts on 17 September 2020 which is why Tammy Friend Posted her comment. Ms Hall and Ms Friend gave oral evidence that they were not aware of any management Whatsapp group. Mr Clacher did not elaborate on what he alleges was said in those messages. Given that Mr Clacher gave evidence that Ms Redfern did not want the Posts to identify the Claimant, the Tribunal consider it unlikely however even on his evidence, that she would have countenanced the Posts which were made by him and Ms Friend. Given the caution with which the Tribunal approach the evidence of Mr Clacher, the Tribunal do not find on a balance of probabilities, that the evidence supports a finding that there were messages sent via a Whatsapp group . The Tribunal consider that it is likely however that some comments had been made perhaps at the team-managers meetings about the Claimant's illness and how she could go on holiday if she was in so much pain and yet not be able to drive to Swadlincote. Perhaps Ms Redfern had expressed some frustration at home or at work about the Claimant's continued absence, however, the Tribunal find on a balance of probabilities, that the evidence

does not support a finding that she had personally instructed or encouraged Mr Clacher about what to say in his Post. The Tribunal find that Ms Redfern, even on Mr Clacher's own evidence, did not want the Claimant to be identifiable.

155. It is not the Claimant's case that Ms Redfern had instructed Ms Friend to follow up Mr Clacher's Post with her own Posts. It was never put to Ms Redfern in cross examination that she had asked Ms Friend to put a comment on her Facebook page, or that she had any discussion or communication with Ms Friend about her Posts that evening. This was also not put to Ms Friend in cross examination.

156. The Claimant's case is based on the premise that Ms Redfern was responsible for people following her Facebook comments and putting on their own Posts because their Posts 'flowed' from her comments. The problem for the Claimant however, is that it is not objectively reasonable to interpret Ms Redfern's comments as applying to any specific person and certainly not the Claimant.

Complaint

157. The Claimant then sent a message to Ms Hall on 18 September 2020 about the Posts (p.89 and 90); "*who is Sharon and Tammy and Scott talking about ? Me or Sophie or* both*?".*

158. Ms Hall replies that;*" I think just a general comment lots of people taking the piss especially since Covid x" (p.89)*

159. Ms Hall was still on her maternity leave and directed the Claimant to contact Gemma Doherty who was the deputy manager at the time. The Claimant referred to confidentiality and illnesses being discussed on social media platforms and ;(p 71A) " *It's ok. I think we can all clearly see what people's opinions are.* ***We are* just *not sure about whom they are talking****" [Tribunal stress]*

160. Ms Hall replies: "*no confidential information on there as far as I can see*" (p. 71B) to which the Claimant states; " *Anyway, As long as it's not talking about staff*". The Claimant under cross examination gave evidence that she simply decided not to ask Ms Hall anything further and that is consistent with the action she takes the very next day, which is to raise the issue again but this time direct with Ms Redfern. While the Respondent alleges that these comments are evidence that the Claimant did not know who the Posts were actually about, the Tribunal is persuaded that Mr Clacher and Ms Friend intended them to be about the Claimant and that the Claimant did perceive their Posts to be directed at her and reasonably so.

161. The Claimant contacted Ms Redfern on 19 September 2020 (p. 73A) and informs her that she is quite upset about the Facebook Posts where people have joined in conversations and asks;" *was you/them talking in general or was it about a specific member of staff?"*

162. Ms Redfern refers to it as a private Post, that confidentiality is not being breached that it is just generalisation and asks why she would think that. The Claimant did not respond but decided instead to raise a grievance. She does not refer to this as an informal grievance.

163. The Tribunal now turn to the facts directly relevant to the claim of constructive unfair dismissal.

Grievance

164. The Claimant submitted a grievance to her line manager, Gemma Doherty dated 21 September (p.74).

165. The Tribunal accept the Claimant's evidence that she did not believe Ms Doherty to be absent on annual leave at the time, there is no evidence to suggest that she knew or should have known.

166. The Tribunal also accept the Claimant's evidence that she did not have a copy of the grievance policy. The Claimant we accept, sent her grievance to Ms Doherty as she was the only manager who had not commented on the Posts.

167. The grievance policy was not disclosed in the bundle. There is a reference to the grievance policy in the handbook (p.291) which states; *"You should approach your manager before doing anything else, as we find most grievances can be resolved informally. If your grievance is about your manager – or there is some other reason you don't want to raise it with them – you must instead notify their line manager or somebody else holding the same level of responsibility as your manager."*

168. The Claimant makes it clear within the email that she is upset about the Posts by Mrs Redfern but also the Posts by Mr Clacher and Ms Friend.

169. The Claimant identifies that some employees of the Respondent have liked the Posts; she names Ms Doherty herself, Ms Hall, Ms Friend and two others. The Claimant asks for the Posts to be taken down and states she would like a response in writing. She refers to strongly believing the comments are aimed at her because she has a disability because of an accident and is on long term sick.

170. The grievance was received by Gemma Dougherty (p.76). She then contacted the Claimant and explains that the grievance policy provides that all grievance matters should be raised with Ms Redfern and asks the Claimant to confirm that she can pass the letter on to her; "*Please let me know if you want me to pass your letter directly to the managing director in line with the grievance* procedure". Ms Doherty does not specify how the Claimant is to respond and the Tribunal accepts the Claimant's undisputed evidence that she simply responded to the same email address.

171. The Claimant asks for a copy of the grievance policy and Ms Dougherty responds (p. 77) informing her that it would be better to contact Mrs Redfern for the policy

Grievance response from Ms Redfern

172. Ms Redfern then takes over the grievance and responds on 6 October 2020.

173. Ms Redfern had at this time free legal support available from the National Association of Day Nurseries (NADN) but did not avail herself of it.

174. Ms Redfern gave evidence that she *"presumed*" that Ms Doherty had provided the grievance policy to the Claimant In her resignation letter the Claimant raised that that she had asked for the grievance policy twice and that the polices had not been sent to her (p.81). In the email on 27 September 2020 (p. 77) Ms Doherty had informed the Claimant that it would be better to get in touch with Ms Redfern to get the policy. The Tribunal find on the evidence that the Claimant was not provided

with a copy of the grievance policy despite her requests for a copy.

175. Ms Redfern confirmed that members of the management team have experience of dealing with grievances, however despite the grievance being about her, Ms Redfern did not consider delegating the investigation of the grievance to any of the managers. She did not concern herself with the obvious risk of bias.

176. Ms Redfern does not invite the Claimant in for a meeting, she provides (as requested) a written response:

"*The first point I would make is that the Post you are referring to was Posted on my private Facebook account and had nothing to do with The Honey Pots Nursery. The second point I would make is that the Post neither blamed anyone specifically nor did it breach any confidentiality in either a personal or business capacity"; and*

" Am I not allowed to have an opinion on my private Facebook page?"

"*The Post will not be taken down. It's a private Post on a generic topic that I feel strongly about…"*

177. In terms of what Ms Redfern did to investigate the grievance, Ms Redfern gave oral evidence that it was difficult to investigate it because she wrote it and the grievance was about her. She alleged in response to a question from the Tribunal that she had spoken to Ms Friend who had assured her that her Posts were not about the Claimant . However, that she spoke to Ms Friend is not mentioned in the response to the grievance, it is not mentioned in her evidence in chief, it was not mentioned by Ms Friend in her evidence and here is no written record of any conversation.

178. Ms Redfern alleged that she asked Ms Friend about her Post probably on 19 September and that her response had been;*" she just said, one of them things*". She did not on her own evidence, explore with Ms Friend what she knew about the Claimant's absence and holiday or ask her to account for the similarities with the Claimant's circumstances and what is said in her Posts or to explain the use of: "fabricatedillness#"

179. The Tribunal are not persuaded that Ms Redfern had any conversation with Ms Friend as alleged, if she had it was in passing and not as part of any genuine attempt to understand her motives. The Tribunal find that Ms Redfern did not conduct any meaningful investigation.

180. Ms Redfern after dismissing the Claimant's accusation that the Posts were about her, then goes directly on to make an accusation of harassment and bullying by the Claimant;

*"Another point I would also like to bring to your attention is your conduct and professionalism in this matter. You have made demands regarding what you want to happen but also what **I can** only describe as the harassing and intimidation of the Acting Manager, Gemma Doherty . Throughout the last couple of weeks you have contacted Gemma through means outside of the workplace and outside of working hours despite also knowing that Gemma was on annual leave week commencing 28 September 2020 for 5 days." Tribunal stress*

181. Mr Redfern refers to the following contact;

Sunday 27 September 2020 at 10:38am – email received from yourself requesting a copy of the Social Media Policy that all staff have signed

Sunday 27 September 2020 at 12:37 am: response from Gemma – Regards policy, I am on annual leave so it would be best to get in touch with Sharon to gain policy

Sunday 27 September 2020 at 1:37 pm ; email relieved from yourself ' can you please ask Sharon to forward me the grievance policy and the social media policy via email and I am happy for you to forward the grievance letter to Sharon. This is despite Gemma informing you only an hour before that she was on leave

Friday 2 October 2020 at 2:17pm – message sent by you to Gemma via Facebook message – requesting confirmation that Sharon had the grievance about the Facebook conversation.

182. Ms Doherty had clearly invited the Claimant to respond to her about the grievance being passed to Ms Redfern and there is no evidence that she told her not to contact her again because she was on leave.

183. The Tribunal find that it is clear from the wording of the outcome letter that Ms Redfern is expressing a view that she herself considers the conduct of the Claimant in contacting Ms Doherty to be harassing and intimidating. However, in response to questions from the Tribunal, Ms Redfern was vague about what communications as set out at page 79 she believed amounted to harassment and sought to distance herself from those allegations, asserting to the Tribunal that it was not actually her description of the contact as harassment and intimidation, alleging that those words had been used by Gemma Dougherty. However, at page 83 she repeats that "*the using of messenger **I find** inappropriate and this could be considered harassment and intimidation of the acting nursery manager should Gemma have made a complaint*". Tribunal stress

184. The Tribunal have not been taken to any emails or messages sent to Ms Doherty by the Claimant which could reasonably on an objective basis be construed as bullying or intimidation. There is no document recording any concerns raised by Ms Doherty.

185. The Tribunal find that the most likely explanation (none other having been put forward) for Mrs Redfern's attempt to distance herself from the accusation that she had levied in this letter, is that on reflection she appreciates that her description of the Claimant's conduct was not reasonable or justified.

186. We find on the evidence of Ms Hall that staff did use Facebook Messenger as a method of communication, including to send out rotas and Ms Hall gave evidence that in her capacity as a manager she would respond out of hours if she needed to.

187. Ms Redfern in cross examination accepted that it had not been reasonable to raise these allegations of misconduct by the Claimant in the response to her grievance and that if she had considered that the Claimant had breached the disciplinary policy, she accepted that the appropriate process would have been to invite her to disciplinary hearing, which begs the question therefore why she acted as she did.

188. Ms Redfern confirmed under cross examination that she could have sought assistance from the (NADN) but accepted that there was an "*element*" of defending herself, in how she responded to the grievance.

189. The Tribunal conclude that Ms Redfern made these allegations against the Claimant of bullying and harassment purely because she was annoyed and irritated that the Claimant had raised the concerns about what was written on her Facebook page and that she knew at the time the accusations she was making about the Claimant were unjust. The conduct of Ms Redfern the Tribunal find was retaliatory and malicious.

190. Ms Redfern's evidence is that there was in place a grievance policy at the time however a copy of it is not in the bundle, the Tribunal was told that this was because it had been updated since and the Respondent could not locate the policy which had been in place at the relevant time. However, Ms Redfern gave evidence that under the relevant grievance policy, if the matter was not resolved to the Claimant's satisfaction at this stage, the next stage would have been to instruct external HR. That this was the next step was not set out in the grievance outcome letter. Indeed the wording of the letter made it clear that as far as the Respondent was concerned, the matter was closed (p.80) . That was therefore the Tribunal find, a breach of the grievance policy. Ms Redfern attempted to assert that she thought the grievance had been resolved however the Tribunal do not find that explanation credible. Ms Redfern had not taken any steps to check with the Claimant whether she was content with the response and evidently she was not because she then within a few days, resigned. When asked by the Tribunal why she had not mentioned the appointment of external HR in the letter to the Claimant, Ms Redfern's only response was; "*I don't know – I must have missed it out"*

191. Ms Redfern also confirmed that the grievance policy provided for a right of appeal however, the Claimant was not offered a right of appeal in her grievance outcome letter. Ms Redfern told the Tribunal that she had been following the Respondent's grievance policy and when asked by the Tribunal why the outcome letter did not include a reference therefore to the appeal, her only answer was simply: "*I don't know*"

192. The Tribunal find that it is evident that Ms Redfern had not considered or engaged in any meaningful way with the Claimant's complaints and the grievance process and was not prepared to do so before receiving the Claimant's letter of resignation.

193. The manner in which Ms Redfern dealt with the complaints, was defensive and belligerent: *"Why am I not able to voice my opinions on my own page? Is everything I post going to be interpreted in some way to be used against me ?".*There was no attempt to consider whether the Claimant may have genuinely and reasonably been offended by what had been written in those posts.

Resignation

194. The Claimant resigned on 19 October 2020 (p. 81). In her resignation letter she sets out her reasons for resigning and refers to the Posts not being acceptable and feeling that they are bullying and harassing and amount to defamation of character.

195. The Claimant also refers to the grievance process being biased and impartial; *"There has been no suggestion of a meeting or appeal".*

196. The Claimant also complains of not receiving the grievance policy.

197. The Claimant also refers to the accusation of bullying and harassing Ms Doherty.

198. The Claimant in her resignation letter gives 4 weeks-notice as "*needed in my employment contract*" (p.81).

199. The contract of employment (P.56) provides that the notice period is 1 month.

200. Ms Redfern responds at length in a two page letter (p.82- 84). In essence, Ms Redfern still maintains that there is no evidence that the Posts or comments are aimed at her but states that she is willing to hold a meeting

201. The Claimant under cross examination gave evidence that if the Respondent had involved an external investigator and that independent investigation had reached the same findings of Ms Redfern, she would *"very possibly"* have still resigned.

202. The Claimant gave evidence, under cross examination that she resigned for two reasons; the way the grievance was dealt with and the Facebook Posts.

203. The Claimant disputed under cross examination that she resigned because she could no longer work . The Claimant had remained in employment since March 2020 even after her SSP had expired and she had given no earlier indication that she was considering resigning . She resigned promptly after the outcome of the grievance. The Tribunal do not find on balance, that the Claimant resigned because she was not able to return to work. There was no evidence that the Claimant was financially better off after resigning although it was suggested by counsel in cross examination that it would help her personal injury claim, there was no evidence to support this assertion which was rejected by the Claimant.

204. The Claimant alleged in oral evidence, that Ms Redfern removed her as a Facebook friend on 18 September 2020. However, the Claimant did not include this allegation within her evidence in chief and nor was this put to Ms Redfern in cross examination. On balance the Tribunal do not find evidence to support this allegation.

Since resignation – disability

205. It is not in dispute that the Claimant's condition has been given a different diagnosis following her resignation, however the Respondent take no issue with a change in the diagnosis.

Time limits – evidence

206. The Tribunal accept the Claimant's undisputed evidence that she instructed legal representatives in about November/ December 2020. Her evidence is that it was under her solicitor's guidance that she did not issue her claim until February 2021 because it was considered that there had been a continuing act. The Claimant gave evidence that the offending Posts remained on the Facebook site after her resignation and although she was not able to access the site to see them after 18 September (because she alleges Ms Redfern removed her as a 'friend' from her site), it was not until about Christmas 2020 that she informed her friends not to tell her anymore whether the Posts were still there or not.

207. The Claimant does not allege that she was wrongly advised.

208. In response to questions from the Tribunal, the Claimant explained that she went

through the ACAS early conciliation process and that ACAS told her about the time limits for presenting claims.

209. When asked by the Tribunal why she did not issue her claim earlier, she gave evidence that she was waiting for the 'right steps' and when asked what those steps were, she explained; *"the opportunity to sort it out before this."*

Remedy

210. We accept the Claimant's undisputed evidence that she did not work again until June 2022. The work she now does is office work, she completes administrative tasks such as filing. Her new job is not physical. It is not in dispute that her work with the Respondent was very physical. The Claimant mentioned that she could perhaps have returned to work for the Respondent with the right support however, there is no reasonable adjustments claim.

Submissions

211. The parties prepared written submissions and also made oral submissions. Those submissions have been considered in full. What is set out below is a summary of the submissions only. All the case authorities were we referred to have been considered.

Respondent's submissions

Harassment

212. The Respondent submits that its 'overarching' point is that the Facebook Posts were written on a private Facebook page and commented on people cheating the benefit system and not working. That Ms Redfern was venting in the evening following a television programme she had watched on that subject.

213. The Claimant mistakenly believed this comment was about her, she raised a grievance and it is submitted that Ms Redfern did all she could to reassure her that Post was not about her.

214. It is submitted that the Claimant resigned simply because of a mistaken belief that the Facebook Posts were about her. There is no point taken by the Claimant about whether Tammy Friend was acting in the course of her employment or not.

215. It is submitted that the Claimant did not initially identify when she complained about the Posts, that she had been on holiday the week before and cannot drive to work and that this is the reason why she believes the Posts are about her. She did not identify those reasons in the grievance or resignation letter or in the claim form.

216. The Claimant gave evidence that she relies on 2 factors to link these Posts to her; the meeting in September 2019 and discussion about moving to Swadlincote and the holiday she had taken in Cyprus. The Claimant gave oral evidence that the holiday she took was in August 2020 i.e. not long before the Posts however counsel submits that this was not mentioned in her witness statement, she referred only to a holiday she had taken back in 2020. It is submitted that there was nothing to show that she went on holiday in August 2020 and nothing to show that Ms Redfern would have been aware of that .

217. The Respondent alleges that this 'shift in position' regarding her evidence is detrimental to the Respondent and the Tribunal is invited to find against the Claimant on that evidential issue.

218. With regards to accrued holiday pay; there is a reference in the Claimant's witness statement to this issue being raised by the Claimant with Ms Redfern however, there is no suggestion of any further correspondence after July 2020 and again it is submitted that the Claimant's shift in evidence is detrimental to the Respondent.

219. On the issue of knowledge of disability, counsel submits that Ms Redfern did not know of the disability including did not have constructive knowledge as of September 2020. Counsel submits that whether Ms Redfern had knowledge is relevant but accepts that it is not definitive

220. If acting as an agent, it is submitted that Ms Redfern must still act as part of her authorised functions but that when she made the Posts on her personal Facebook page, it cannot be said that she was acting on behalf of the nursery.

Grievance

221. The Respondent submits there was no failure to deal with her grievance because as requested by the Claimant, Ms Redfern responded in writing.

222. The Respondent contends that there was no requirement for an investigation beyond the response by Ms Redfern because the grievance related only to the Posts and that although there was no offer of an appeal, it was reasonable for Ms Redfern to conclude that matters were closed which is in accordance with the Respondent's policy of resolving grievances more informally.

223. It is submitted that the without the Claimant making a specific request that someone dealt with her grievance externally, Ms Redfern was " the most suitable person" to respond to it, that her actions were not calculated or likely to destroy or seriously damage the relationship of trust and confidence and her intention to assist was shown after the Claimant's resignation by the offer of a meeting and further response.

224. Counsel for the Respondent acknowledges that a breach of trust and confidence is usually treated as a repudiatory breach.

225. It is submitted that the Claimant affirmed the breach however, by giving notice rather than resigning immediately, demonstrating that she was willing to still be associated with the Respondent.

226. It is submitted that the Claimant did not resign in response to how her grievance was dealt with. It is alleged that her comment in February 2020 ; "*you got to do what you got to do*" indicated that she understood that there was no chance of returning and she intended to resign before she was dismissed. It is also submitted that the Claimant had financial motives connected with her personal injury claim and the constructive unfair dismissal claim, for resigning. In cross examination, she stated that she would have liked resigned even if an independent person had found that the Facebook Posts were not related to her and counsel submits therefore that the way the grievance was managed was not the cause of her resignation.

Loss of statutory rights

227. It is submitted by counsel for the Respondent that an award for loss of statutory rights in not appropriate because the Claimant was unable to work at the time and it is more likely than not that she would have had to resigned in any event.

ACAS

228. The Respondent submits that there was no unreasonable failure to follow the ACAS code of practice ,the Claimant resigned before the Respondent had the chance to offer her a meeting or an appeal, and Ms Redfern followed the process which she understood the Claimant wanted. The Claimant it is submitted knew about the right to appeal because she referred to the ACAS code in her resignation letter but failed to appeal and any compensation should be subject to a deduction for her own breach of the ACAS code..

Time Limit – jurisdiction

229. It is submitted that as the dismissal is not based on the alleged harassment of the Facebook Posts, it cannot be said to be a continuing act and thus the harassment claim in any event is out of time. Counsel referred to the authorities of:: **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA**, **British Coal Corporation v Keeble and ors 1997 IRLR 336 EAT** , **Southwark London Borough Council v Afolabi 2003 ICR 800 CA**, **Adedeji v University Hospitals Birmingham NHS Foundation Tryst 2021 ICR D5 CA.** It is submitted that it would not be just and equitable to extend time because the Claimant has no good reason why she presented her claim late and she had the benefit of legal representation from November/ December 2020. The Claimant referred to the ACAS conciliation process as a reason for not presenting the claim in time but she had the benefit of the extension so that cannot be a reason. The mistaken belief it was a continuing act does not make sense when the only discrimination claim she has actually pursued is the making of the Facebook Posts on 17/18 September.

Remedy

230. When considering an award for injury to feeling it is submitted that it is relevant that the Claimant was not in active employment at the time of the alleged conduct.

Claimant's submissions

231. Mr Randall invited the Tribunal to amend his written submissions at paragraph 46 on page 11 to remove the reference to the breach of trust and confidence being reinforced by the harassment, on the basis that the Claimant's case is not that the harassment supports the constructive unfair dismissal claim. He also invited the Tribunal to remove the reference in paragraph 48 to a '*last straw'*.

232. Counsel addressed the evidence of Mr Clacher; he submits that there was no evidence to support the allegations about his debt or having reported matters to HRMC before and invites the Tribunal to prefer his evidence.

233. Counsel referred to Mr Clacher and Ms Friend joining in with the Posts and although not in the course of their employment, the Claimant was aggrieved by their comments. Mrs Redfern it is submitted accepted she had knowledge of disability and the Posts related to the Claimant's disability.

234. Although made on her private Facebook page, Ms Redfern owns the business and she managed it, all her actions affect the company, she was the one in control and her Posts were about work. A director acts on the instruction of the shareholders and it is submitted that it must be implied that she had the authority to act.

235. It is submitted that without the *'opening'* Posts from Ms Redfern, the Posts from Mr Clacher and Ms Friend would not have been made.

236. The Posts Ms Redfern made were about work and that he submits, is key.

237. It was pointed out during submission by the Tribunal to Mr Randall that he had never put it to Ms Redfern that she intended to create the requisite environment for the Claimant. It was not put to Ms Redfern that she intended by putting on her Posts to 'whip up' more Posts and create an environment which was hostile etc to Claimant. Mr Randall accepted he had not done so '*in those terms'*.

238. Mr Randall was asked to clarify what the Claimant's position was with respect to the intention of Ms Redfern. Whether the Claimant was submitting that Ms Redfern Posted with intent to create the requisite environment. Mr Randall informed the Tribunal that the Claimant was in fact ' *relying more on effect than intention'.*

239. In his written submissions counsel submits that the Facebook Posts Ms Redfern made must when considering their intent, be considered alongside the following:

- The Respondent could not access the Claimant's medical records without incurring cost
- The Claimant was seeking payment of her holiday pay
- The Claimant had driven to an airport to take a holiday when she had told the Respondent she could not drive to Swadlincote
- She remained absent on long term sickness.

Constructive unfair dismissal

240. It is submitted that it is 'questionable' that Ms Redfern was the right person to deal with the grievance because she could not separate herself from her role with the Respondent. Ms Redfern was dismissive of the grievance and refused to take down the Posts (p.79). The matter is declared closed without the Claimant being invited to a meeting or a proper investigation having taken place. There was no offer of an appeal.

241. It was reasonable, it is submitted, for the Claimant to consider that the implied term of mutual trust and confidence was breached and to resign in response to it and the Respondent had not pleaded a potentially fair reason.

242. Following her resignation during the notice period, Ms Redfern tried unsuccessfully to correct the previous errors.

243. It is submitted that as a director, Ms Redfern had a duty to act in good faith and promote the success of the company and thus the argument that her personal Facebook page was separate from the business is flawed.

Remedy

244. Counsel submits that the Claimant is entitled to a basic award and compensation for loss of statutory rights but there is no claim for future loss as the Claimant was signed off as unable to work. The only other claim is for injury to feelings and counsel submits that an appropriate award would be the sum of £15,000..

Time limit

245. Counsel for the Claimant accepted that if the harassment took place on the 17 or 18 September 202 the claim is out of time. However, he submits that the Tribunal should find that by refusing to take down the Posts as part of the grievance process, that refusal amounted to a 're- posting' of the Posts and that is the last act. However, this was never set out in the list of issues despite having gone through the issues in detail with the parties at the outset of the hearing and no application to amend the claim was made. Mr Randall accepted that no application to amend had been made and informed the Tribunal that he accepted that: "*it is a just and equitable point, rather than a continuing act".*

246. Mr Randall submits that the Claimant did not present the claim sooner because she was following the ACAS process and giving Ms Redfern time to consult a solicitor and consider her position.

Case Authorities

247. Counsel referred in his written submissions to the following authorities;

Woods v WM Car Services Peterborough Limited (1981) ICR 66
Reed and Another v Stedman [1999] IRLR 299
Blinds Ltd v English UKEAT/0316/10
English v Thomas Sanderson Ltd [2008] EWCA Civ 1421

Legal Principles

Knowledge of disability

248. The Tribunal now turn to the legal principles it has applied. The relevant statutory provisions within the Equality Act 2010 are as follows:.

249. Section 26 : Harassment

(1)A person (A) harasses another (B) if—
(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—
(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.…
(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.
(5)The relevant protected characteristics are—

250. Section 40: Employees and applicants: harassment

(1)An employer (A) must not, in relation to employment by A, harass a person (B)—
(a)who is an employee of A's;
(b)who has applied to A for employment.

251. Section 109: Liability of employers and principals

(1)Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

*(2)**Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.***

(3)It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4)In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—
(a)from doing that thing, or
(b)from doing anything of that description.
(5)This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)). Tribunal's own stress

252. The relevant provisions of the EHRC code are as follows:

Para 7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before *it is deemed to be unwanted. A serious one-off incident can also amount to harassment.*

253. Purpose *or effect'*
7.16
*For all three types of harassment, if the **purpose** of subjecting the worker to the* conduct *is to create any of the circumstances defined in paragraph 7.6,* this *will be sufficient to establish unlawful harassment. It will not be* necessary *to inquire into the effect of that conduct on that worker.*
*7.*17
Regardless *of the intended purpose, unwanted conduct will also amount to* harassment *if it has the **effect** of creating any of the circumstances defined in*

7.18
In deciding whether conduct had that effect, each of the following must be taken into account:
a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.
b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.
c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.

254. Principals

10.48

Principals are liable for unlawful acts committed by their agents while acting under the principal's authority. It does not matter whether the principal knows about or approves of the acts of their agents. An agent would be considered to be acting with the principal's authority if the principal consents (whether this consent is expressed or implied) to the agent acting on their behalf. Examples of agents include occupational health advisers engaged but not employed by the employer, or recruitment agencies.

Knowledge of disability

255. In **Hartley v Foreign and Commonwealth Officer Services 2016 ICR D17 EAT:** the EAT made the following observations :

"23. The question posed by section 26(1) is whether A's conduct related to the protected characteristic. This is a broad test, requiring an evaluation by the Employment Tribunal of the evidence in the round — recognising, of course, that witnesses will not readily volunteer that a remark was related to a protected characteristic. In some cases the burden of proof provisions may be important, though they have not played any part in submissions on this appeal. The Equality Code says (paragraph 7.9):

7.9. Unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. …"

*24. **A's knowledge or perception of B's characteristic is relevant to the question whether A's conduct relates to a protected characteristic but there is no** **warrant** **in the legislation for treating it as being in any way conclusive**…" Tribunal's own stress.*

256. The ECHR Code makes the important point that knowledge of a disability held by an employer's agent or employee will usually be imputed to the employer (see para 5.17).

Harassment : 3 components

257. Mr Justice Underhill, then President of the EAT, expressed the view that it would be a 'healthy discipline' for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements of harassment; unwanted conduct, that has the proscribed purpose or effect, and which relates to a relevant protected characteristic : ***Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT.***

Unwanted conduct

258. Unwanted conduct means unwelcome and unwanted by the employee: ***Reed and anor v Stedman, Insitu Cleaning Co ltd v Heads 1999 IRLR 299, EAT, Thomas Sanderson Blinds Ltd v English EAT 0316/10.***

Purpose

259. A claim brought on the basis that the unwanted conduct had the purpose of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment involves an examination of the perpetrator's intentions.

260. Tribunals may infer purpose regardless of whether the Claimant has expressly objected to the conduct :***Stevenson v Avon Cosmetics ET Case No.1806178/13***

Effect

261. Harassment can arise regardless of intent and regardless of whether or not the alleged harasser knows that the victim has a particular protected characteristic: ***Noble v Sidhil Ltd and anor EAT 0375/14*** the EAT held that even where an employer had no reason to know that an employee was depressed, it could still be liable for harassment.

262. In deciding whether the conduct has the effect referred to in section 26(1)(b) each of the following must be taken into account: the *perception* of B, the *other* circumstances of the case, and *whether* it is reasonable for the conduct to have that effect. The test therefore has both subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser (A) has on the complainant (B). The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

263. In ***Pemberton v Inwood 2018 ICR 1291, CA*****,** Lord Justice : '…*The relevance of the subjective question is that if the Claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'*

Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant

264. The word environment has been held to mean a state of affairs, it may be created by a one off incident but its effects must be of longer duration : **Weeks v Newham College of Further Education EAT 0630/11.**

265. **Reed and anor v Stedman 1999 IRLR EAT** : EAT gave guidance that tribunal should adopt a cumulative approach rather than measure the effect of each individual incident.

266. EHRC para 7.8: a serious one of incident can amount to harassment.

Other circumstances of the case.

267. The 'other circumstances' of the case to be taken into account under S.26(4) will usually be used to shed light both on the complainant's perception and on whether it was reasonable for the conduct to have the effect.

268. The EHRC Employment Code notes that relevant circumstances can include those of the complainant, such as his or her health, including mental health; mental capacity; cultural norms; and previous experience of harassment. It can also include the environment in which the conduct takes place (see para 7.18).

Relevance of intent.

269. In **Richmond Pharmacology v Dhaliwal** (above) Mr Justice Underhill: 'One question that may be material is whether it should reasonably have been apparent

whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt'.

270. **HM Land Registry v Grant (Equality and Human Rights Commission intervening) 2011 ICR 1390, CA**, Lord Justice Elias confirmed that 'When assessing the effect of a remark, the context in which it is given is always highly material". Also see: ***Chawla v Hewlett* Packard *Ltd 2015 IRLR 356, EAT***.

271. The objective aspect of the test is primarily intended to exclude liability where B is hypersensitive and unreasonably takes offence: **EAT in *Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT*,** 'Whether it was reasonable for a Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.'

272. The difference in tone and intent will be an important factor when assessing compensation for injury to feelings: **Basi v Snows Business Forms Ltd ET Case No.3100944/09**

273. The tribunal must consider whether it was reasonable for the conduct to have the effect on that particular Claimant: ***Reed and anor v Stedman***

Related to a relevant protected characteristic

274. In order to constitute unlawful harassment under S.26(1) EqA, the unwanted and offensive conduct must be 'related to a relevant protected characteristic': ***London Borough of Haringey v O'Brien EAT 0004/16*.**

275. ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT 0039/19*.** The fact that the complainant considers that the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser.

Disability-related harassment : Establishing necessary link.

276. A claimant bears the initial burden of proof in discrimination claims, establishing facts from which the Tribunal could decide in the absence of any other explanation, that a person (A) contravened the provisions: section 136 (2) EqA.

Liability for conduct of employees

277. Section 109(2) EqA makes a principal liable for discriminatory acts committed by an agent while acting under the principal's authority. It provides that: *'Anything done by an agent for a principal, with the authority of* the principal*, must be treated as also done by the principal.' It does not matter whether that thing is done with the principal's knowledge or approval —* S.109(3).

278. The Court of Appeal in ***Unite the Union v Nailard 2019 ICR 28, CA*,** quoting Lord Justice Elias, who gave the lead judgment in ***Ministry of Defence v Kemeh 2014 ICR 625, CA*,** held that S.109(2) applies only where '*the agent discriminates in the course of carrying out the functions he is authorised to do*'.

279. Drawing guidance from the approach taken in employment cases, the EHRC Employment Code [para 10.46] provides:

"The phrase in the course of employment has wide meaning; it includes acts in the workplace and may also extend to circumstances outside such as work-related social functions or business trips aboard. For example, an employer could be liable for an act of discrimination which took place during a social event organised by the employer, such as an after- work drinks part."

280. **Jones v Tower Boot Co Ltd 1997 ICR 254 CA** : 'in the course of employment' is to be construed as every layperson would understand it and should be treated as a question of fact.

281. **HM Prison service and ors v Davis EAT 1294/98** One of the reasons the tribunal gave for this decision was that the employer's disciplinary code stated that the conduct of employees 'on and off duty' must not bring discredit on the Prison Service. The code also provided for disciplinary action to be taken when an alleged criminal offence was committed 'away from the workplace'. Since the employees were subject to a contract of employment that governed their behaviour 24 hours a day, it followed that R's off-duty conduct towards the applicant occurred in the course of employment. The EAT found this argument unacceptable. In its view, the fact that an employer can legitimately complain about an employee's activities outside employment does not bring that activity within the course of employment. The EAT held that the incident of harassment had only the most slender of connections with work and had not occurred 'in the course of employment'.

282. The EAT in ***Bungay and anor v Saini and ors EAT 0331/10*** : The tribunal *was* entitled to find that since B and P were managing the centre as part of their authority as its **directors,** they were acting as its agents even though they performed their duties in a discriminatory manner:

23. …the starting point has to be analysis of the common law rules of agency principles which were explained in Bowstead and Reynolds on Agency (18th edition-1–001) and which were approved in Yearwood v Commissioner of Police of the Metropolis [2004] IC 1660 [36] to the effect that:—

"Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party."

24. Thus the test of authority ***is whether when doing a discriminatory act the discriminator was exercising authority conferred by the principal (which in this case was the Centre)*** *and not whether the principal had (namely the centre) in fact authorised the Appellants to discriminate. Indeed in Lana v Positive Action Training Housing (London) [2001] IRLR 501 Mr Recorder Langstaff QC (as he then was) giving the judgment of this Appeal Tribunal had to consider a provision identical to that in Regulation 22(2) contained in section 14 of the Sex Discrimination Act 1975 when he said in respect of an argument that a party would only be liable for an act of discrimination which was done with the authority "whether expressed or implied whether precedent or subsequent to commit discrimination" :—*

"32. However, to read this subsection in that way would be to place an almost impossible restriction

upon its utility. It is difficult if not impossible to conceive any situation in which a contract could lawfully provide an agent with the authority to discriminate. It seems to us that the proper construction of section 41(2) is that the authority referred to must be the authority to do an act which is capable of being done in a discriminatory manner just as it is capable of being done in a lawful manner."

25. A similar approach was adopted by this Appeal Tribunal in Victor-Davis v London Borough of Hackney (EAT/1269/01) in relation to section 41 (of the Race Relations Act 1972) which is in the same term of Regulation 22(2) . Judge McMullan QC said that:—

"The proper approach was to consider whether, when doing the discriminatory act, the discriminator was exercising authority conferred by the respondent" [23].

283. The Companies Act 2006 sets out the duties on directors which include under section *172* the duty *to promote the success of the company*

(1)A director of a company must act in the way he considers, in good faith, would *be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to…*

Constructive Unfair Dismissal

284. The leading case is : ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*****,** the Court of *Appeal* ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: 'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no *longer* intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'

285. A constructive dismissal is not necessarily an unfair one: **Savoia v Chiltern Herb Farms Ltd 1982 IRLR 166, CA.**

286. A breach of trust and confidence may also arise not so much from the unfair rejection of a grievance as from the way in which the grievance was handled: ***WA Goold (Pearmak) Ltd v McConnell and anor 1995 IRLR 516, EAT***:

"…Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also consistent, of course, with *the Codes of Practice. That being so, the Industrial Tribunal were entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the Employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. It was in our judgment rightly conceded at the Industrial Tribunal that such could be a breach of contract.*

Further, it seems to us that the right to obtain redress against a grievance is fundamental for very obvious reasons….

It is of course regrettable, in this case, that the Employers have failed to comply with their statutory obligations, or to appreciate the need to provide a specific mechanism whereby a genuine sense of grievance can be ventilated and redressed. Instead, the Employees, in this case, were fobbed off, and Mr Maloney plainly felt his authority was threatened by the Employees wishing to speak to the Chairman."

287. ***Blackburn v Aldi Stores Ltd 2013 ICR D37,*** *EAT*, the Appeal Tribunal confirmed that a failure to adhere to a proper procedure is capable of amounting, or contributing, to a breach of the implied term of trust and confidence.

288. It is important, when considering whether a delay or other failure to conduct a grievance procedure properly is serious enough to amount to a breach of trust and confidence, that the employment tribunal does not fall into *the* trap of applying the 'reasonableness' test that applies to claims of unfair dismissal: ***Price v Revenue and Customs Commissioners EAT/0518/10***

289. If there is an underlying (or ulterior) reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal: ***Walker v Josiah Wedgwood and Sons Ltd 1978 ICR 744, EAT*.**

290. ***Abbycars (West Horndon) Ltd v Ford EAT 0472/07*,** 'the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon'.

291. Where there are mixed motives, a tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation but it need not be 'the' effective cause: ***Wright v North Ayrshire Council 2014 ICR 77, EAT*.** As Mr Justice Elias, then President of the EAT, stated in ***Abbycars (West Horndon) Ltd v Ford EAT 0472/07*,** 'the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon'.

Remedy

ACAS

292. Section 207A TULR(C)A. deals with the effect of failure to comply with Code. The employment tribunal's power to adjust compensation is engaged only where the employee's or employer's failure to comply with the **ACAS** Code's recommendations is 'unreasonable': S.207A(2) TULR(C)A.

293. S.207A(2) and (3) allow for an adjustment if the tribunal considers it 'just and equitable in all the circumstances'.

294. The Claimant relies in terms of the uplift sought only the failure to offer an appeal. The relevant paragraph in the ACAS code is as follows;

Allow the employee to take the grievance further if not resolved

41.Where an employee feels that their grievance has not been satisfactorily resolved they should appeal. They should let their employer know the grounds for their appeal without unreasonable delay and in writing.

295. Section124A ERA, provides that for the purposes of unfair dismissal compensation, any adjustment made in accordance with S.207A only applies to the compensatory award (not to the basic award or any other award).

Time limits – discrimination claims

Do the allegations set out in the Claimant's claim form part of a continuing act under section 123 (3)9a) of the EQA?

Would it be just and equitable for the Tribunal; to extended time for submission of the claim under section 123 (1) (b) of the EQA

296. The applicable time limit in respect of the claims of discrimination is set out in *section* 123 EqA. The relevant provisions provide as follows;

(1) …proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it

Extension of time: Just and Equitable

297. In ***Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA*****,** the Court of Appeal stated that when Employment Tribunal is consider exercising the discretion under what is now section 123(1)(b) EqA, there is no presumption that they should do so. This does not mean, however, that exceptional circumstances are required before the time limit can be extended on just and equitable grounds

298. The Tribunal have had regard to the guidance in: **British Coal Corporation v Keeble [1997] IRLR 336,** the Court of Appeal in ***Southwark London Borough Council v Afolabi 2003 ICR 800, CA***, ***Department of Constitutional Affairs v Jones 2008 IRLR 128, CA*** and ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2001] EWCA Civ 23***: The best approach for a Tribunal in considering the exercise of the discretion is to assess all the facts in the particular case that it considers relevant, including the particular length and reasons for the delay.

299. ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA*****.** The Court of Appeal held that the discretion under S.123 EqA for an employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the Claimant.

Analysis and Conclusions on Jurisdiction

300. The Claimant does not seek to rely on the act of dismissal as a further act or

continuing act of alleged harassment. We are concerned therefore only with the Facebook Posts on the 17/18 September 2020, as the relevant act of alleged harassment, not a continuing act as accepted by Mr Randall.

301. The Facebook entries were made on 17 September 2020 and came to the Claimant's attention on 18 September 2020

302. The ACAS early conciliation process was not started until 13 October 2020 and completed on 27 November 2020. Based on the act taking place on 18 September 2020, the time limit for bringing a claim was **31 January 2021**, if the 17 September 2020, it was the **30 January 2021.** It was presented on **16 February 2022**. It was therefore brought circa 2 weeks outside of the primary time limit.

303. The relevant act is the making of the Facebook Posts. It is an act which had continuing consequences : **Barclays Bank plc v Kapur and ors 1991 ICR 208.** It is not submitted however that there was a continuing state of affairs, such that the act continued after the 18 September 2020.

304. The Claimant's evidence is that she did not file the claim on time not because she did not understand that there was a time limit, but as Mr Randall put it in submissions, it was because she was following the ACAS process and giving Ms Redfern time to consult a solicitor.

305. However, the ACAS process was completed by 27 November 2020 and yet she did not present her claim until 16 February 2021.

306. The Claimant provided no satisfactory explanation for why she waited 3 months after the ACAS process had completed and 2 weeks after the time limit for the harassment claim had passed.

307. The Claimant had the benefit of legal presentation from November or December 2020.

The length of, and reasons for, the delay

308. The length of the delay is a couple of weeks, not trivial but not a lengthy period. The reasons for not issuing in time, are not however satisfactory.

309. The Claimant does not assert that she needed further information in which to inform herself of the facts giving rise to her claim. She was of course aware of the Facebook Posts on the 18 September 2020 and resigned in October 2020.

The extent to which the cogency of the evidence is likely to be affected by the delay

310. The Respondent does not seek to argue that there was been any forensic prejudice caused by the delay.

311. The complaints refer to Facebook Posts which the Tribunal has been presented with and it is not alleged that there is any failure by the witnesses to recall why they wrote what they did at the time.

312. We have heard the evidence and it is not alleged that there would have been further witnesses or evidence which could have been put forward by the Respondent but for the delay. The complaint has been fully ventilated.

The prejudice that each party would suffer as a result of the decision reached

313. The Respondent does not plead any particular practical hardship caused by the delay. There is of course the potential liability it may face as a result of a finding against it, but that it not the result of the delay and arises in every case.

314. On the face of it, the claim has merit. The Tribunal has heard the evidence and this is not a claim that has little or no reasonable prospect of success.

315. If an extension was not permitted, the Claimant would be deprived entirely of her claim of harassment and the award she seeks is almost entirely reliant on that claim.

316. The reason for the delay is not satisfactory however, taking into account all the circumstances, including that this is a serious complaint of harassment, the fairly short length of the delay and the prejudice each party would suffer which falls in favour of the Claimant, the Tribunal consider that it is just and equitable to extend time to permit the claim to be presented on 16 February 2021.

317. The application to extend time on just and equitable grounds is granted.

Conclusion and Analysis – substantive claims

Harassment

During the material time (from 17 and 18 September 2020 to 6 November 2020) did the Respondent know of the Claimant's disability or was it reasonable for the Respondent to have known of the Claimant's disability?

318. Ms Redfern confirmed in cross examination that by 17 September 2020 she had sight of the medical reports (p.253 and 255), considered that it was not *necessary* to obtain further information about the Claimant's health from her GP, appreciated that the Claimant's health had deteriorated and she conceded that it was reasonable to believe that by that stage the Claimant had a disability.

319. The Tribunal is mindful that knowledge requires knowledge of the key components required by section 6 EqA at the requisite time, which includes not only that the Claimant has an impairment but the adverse effects on fay to day activities. There is scant evidence about what exactly the Respondent was told by the Claimant about the day to day impact although her evidence is that in general terms she was keeping her manager updated.

320. What the Respondent was clearly told however, was that the Claimant was in persistent pain . The October 2019 reported persistent pain and that the diagnosis *was "Most likely to be complex regional pain syndrome"* . She was also aware that the Claimant was taking pain relief medication .

321. The Respondent was also aware that the Claimant's mobility was significantly impaired. By February 2020 (p.255) the Claimant was unsteady on her feet *and* had a low level of confidence without a crutch. The Claimant had also turned down in November 2019 the chance to work at another nursery because of her restrictions around driving.

322. In any event, it is also necessary to establish what the employer might reasonably have been expected to know had it made reasonable enquires. Ms Redfern and the Claimant's manager, Ms Hill were both aware of her impairment and that it had been long term by September 2020. The Claimant had given authority for them to contact her GP and it would have been reasonable for them to do so but they chose not to. Had they made those further reasonable enquiries, the Tribunal is content that they would have been aware of the limitations/impact, which is detailed in her undisputed impact statement. The Respondent accepted that in fact the Claimant met the test under section 6 EqA based on the evidence she has set out regarding the impact on her day to day activities.

323. As set out in the ECHR Code knowledge of a disability held by an employer's agent or employee will usually be imputed to the employer (see para 5.17).

324. Given Ms Redfern's knowledge by 17 September 2020, the Tribunal are satisfied that she and the Respondent therefore, had knowledge of the Claimant's disability and even if not actual knowledge, had constructive knowledge: ***A Ltd v Z 2020 ICR 199, EAT*.**

325. The Tribunal have also found that Ms Friend was aware of the Claimant's sickness absence of over a year and in discussion at team meetings while not having had sight of the two medical reports, had sufficient information to either have actual or constructive knowledge personally that the Claimant was disabled. Ms Friend was the Tribunal find, aware of the reasons why the Claimant could not travel to the Swadlincote nursery and more likely than not aware of her diagnosis and restrictions around driving. Mr Clacher was also aware of the Claimant's medical condition and the length of her absence from work. The Tribunal concludes that both Ms Friend and Mr Clacher had actual or constructive knowledge of her disability.

326. In any event, it is not strictly necessary for there to be knowledge of the disability to commit an offence of harassment: ***Noble v Sidhil Ltd and anor EAT 0375/14*** and **Foreign and Commonwealth Officer Services 2016 ICR D17 EAT.** Knowledge may be relevant to the question of whether the conduct complained of relates to the protected characteristic but it is not conclusive.

Sharon Redfern made a Facebook Post on or around 17 September 2020 which referred to how 'shocking and disgraceful work shy some people are' and how they embarrass themselves. The Claimant was made aware of this Post on 18 September 2020. The Post was commented upon by Scott Clacher (Sharon Redfern's partner), Tammy Friend (the Nursery manager) and others. When the Clamant sought to Post a defence to the original Post from Sharen Redfern , Tammy Friend (the Nursery Manager) commented, with "#fabricatillness". The Claimant contends the original Post was directed towards her. The Respondent disputed that the Post was directed towards her and dispute the Claimant's position"

Was the <u>C subjected</u> to the conduct set out in paragraph 4 above?

Was Ms Redfern's Post <u>directed</u> to the Claimant?

327. The Posts which Ms Redfern made (p.58), do not name anyone. The Tribunal accept that the Posts objectively were a general rant about people being work shy and manipulating the benefits system.

328. The Tribunal is not persuaded by the evidence of Mr Clacher that Ms Redfern was intending her Posts to be directed at the Claimant. The Tribunal have not found that this was the intention of Redfern and neither does the Tribunal conclude that it was objectively reasonable for Ms Redfern's Posts to have been understood by the Claimant to be about her. Further, we conclude that the Claimant did not consider that Ms Redfern's Posts were about her and only became upset when the other Posts were made by Mr Clacher and Ms Friend, and only at that point did she consider that they related to her personal health situation and her disability.

329. The Claimant responded to Ms Redfern's Posts and even agreed with the sentiment expressed in them. The Tribunal accept that she may have felt that she was justifying herself to an extent however, the Tribunal conclude that she had nothing more than a suspicion or mild concern at that stage, that Ms Redfern had her situation in mind when writing those Posts.

330. Even if Ms Redfern had been motivated in part to Post the comments, because of the Claimant's absence from work or the issues she raised about holiday pay, the Tribunal conclude that the Posts she put on Facebook did not have the proscribed effect on the Claimant and were not intended to have.

Were Ms Friends and Mr Clacher's Posts about the Claimant?

331. For the reasons set out in the Tribunal findings, the Tribunal conclude that Ms Friend's and Mr Clacher Posts were about the Claimant and her personal circumstances, in particular her health and their doubts about the genuineness of the restrictions she was saying the medical condition had on her life and in particular her ability to work.

If so, was this conduct unwanted?

332. We find that the Posts made by Mr Clacher and Ms Friend were unwanted, they were unwelcome and the Claimant felt hurt and humiliated by them.

333. In terms of Ms Redfern's Posts, the Claimant responded to the Posts, adding her own comments and agreeing with the sentiment. The Tribunal accept the Claimant's evidence however, that she had some concerns about whether Ms Redfern had her in mind and thus her Posts were an attempt, albeit not expressed in this way, to justify her position. On balance, therefore we consider that the Posts were unwelcome or at least the initial Posts before the Claimant wrote her responses to them.

If so, was the conduct <u>related</u> to the Claimants disability?

334. The Tribunal have addressed the issue of knowledge of disability and conclude that the Respondent and in particular Ms Redfern and Ms Friend had actual or constructive knowledge of the disability.

335. The Posts made by Ms Redfern the Tribunal conclude, were not related to the Claimant's disability, they were general comments not about the Claimant's personal situation and not related to her disability. There was no reference to the Claimant or her health. The Posts were about those people who manipulate the benefits system. The Claimant has not established a causative link between her disability and the subject matter of the Posts by Ms Redfern.

336. However, for the reasons set out in its findings, the Tribunal conclude that the Posts made by Mr Clacher (who the Tribunal accepts had been informed by Ms Redfern about the Claimant's absence from work and in at least general terms the nature of her condition and that she had been on holiday), were about and related to the Claimant's disability.

337. The Tribunal also conclude that the Posts made by Ms Friend were related to the Claimant and her health. The Tribunal has taken in account that it did not consider Ms Friend to be a credible witness when explaining the intention behind her Posts and the similarities between the detail in the Posts and the Claimant's circumstances. The Claimant identified herself from the Posts and perceived the comments to relate to her disability and the Tribunal consider that it was subjectively and objectively reasonable for her to do so in connection with the Posts of Ms Friend and Mr Clacher.

If so, did the conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Did the Posts create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant ?

Effect

338. The Tribunal conclude that the pleaded effects of the Posts were not caused by the conduct/Posts made by Ms Redfern. Those Posts the Tribunal conclude, did no more than raise some level of suspicion or mild concern about who they may relate to, they certainly did not have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

339. The comments made by Ms Clacher and Ms Friend however, the Tribunal accept were directed at the Claimant and that given the mocking tone of these Posts and the public nature of how they were made, the Tribunal accept that the Claimant was humiliated by them, felt degraded and offended by them and it was objectively reasonable for her to be. Ms Friend's Posts in particular were more clearly directed at the Claimant and the "Fabricatedillness#" Post was particularly offensive and degrading, following on directly from Posts which the Claimant had made.

340. The comments made by both Mr Clacher and Ms Friend were not trivial and it certainly is not the case the Tribunal conclude that they had not intended to cause her offence. The remarks were barbed and sarcastic and Ms Friend's Posts in particular contained sufficient detail for those with some awareness of the Claimant's condition, to identify her from them. The "Fabricatedillness#" comment was the Tribunal find, clearly intended to cause offence.

341. The Posts were made by a manager and the partner of the Managing Director. The Tribunal conclude that the effect of the Posts, given the public, sneering and mocking tone of them was such that it did create a degrading, humiliating and offensive environment for the Claimant**.** The Tribunal do not find that the environment was such that the Claimant felt that it was intimidating or necessarily hostile because she did raise her concerns quite robustly about the Posts and the Tribunal is not satisfied that what she described was a feeling amounting to intimidation and hostility.

Did the conduct have the purpose or effect of violating the Claimant's dignity

342. A one off act might violate an employee's dignity: **Richmond Pharmacology v Dhaliwal [2009] I.C.R 724** and the Tribunal conclude that the Posts, given the similarities between the Claimant's circumstances around her health, the mocking tone and the public nature of the medium, the Tribunal accept that the Claimant did consider that the Posts of Ms Friend and Ms Clacher violated her dignity and it was reasonable for her to feel so impacted by them taking into account the context and their combined effect: **Reed and anor v Stedman 1999 IRLR 299 EAT.**

343. The Tribunal conclude that the Posts were intended to embarrass the Claimant and violate her dignity. Mr Clacher gave evidence that his Posts were about the Claimant and Ms Friend did not present as a credible witness in terms of her reasons behind the comments in the Posts and her explanation for their similarities with the Claimant's circumstances. The conduct the Tribunal conclude was offensive, it was mocking and the aim was the Tribunal conclude to ridicule the Claimant. It is both subjectively and objectively reasonable the Tribunal conclude, to infer a malign intent from the tone and content of those Posts.

344. The Claimant raised her concerns immediately with Ms Hall and then raised a grievance expressing her view that the Posts were about her and making it clear how upset she felt about. The Tribunal accept that the Claimant genuinely considered the Posts of Ms Friend and Mr Catcher to be directed at her. Although the Claimant wanted some reassurance they were not in fact about her, the Tribunal conclude that she had sufficient reason to believe that they were.

345. It is possible however, for remarks not directed at a Claimant to amount to unwanted conduct. Even if the Claimant was unsure whether they were definitely about her, given how similar the circumstances were to her own, the Tribunal would in any event, conclude that the Posts of Mr Clacher and Ms Friend had the proscribed effect on the Claimant. The Posts were mocking and ridiculing and calling into question the probity of those with diagnosed health concerns who appear nonetheless to be able to enjoy activities such as a holiday and driving. However, the Tribunal conclude that the Claimant genuinely believed that the Posts were aimed at her, while she may have wondered whether they were also about another employee off work sick , that does not mean that she did not consider they were also about her.

346. The comments were made in a few Posts over the course of a short period of time, however the Tribunal take into account the nature of the medium namely that it is not private, the Claimant had no control over who may see those Posts and could not remove them. The Tribunal also take into account the sneering tone of the comments and conclude that the intention and combined effect of the Posts of Mr Clacher and Ms Friend, was to create not only a degrading, humiliating and offensive environment but violated her dignity, and it was objectively reasonable for them to have those effects.

Was it reasonable for the conduct to have that effect, considering the perception of the Claimant and the circumstances of the case?

347. As addressed above, the Tribunal concludes that the Claimant genuinely perceived the Posts of Mr Clacher and Ms Friend to be about her and it was reasonable for the conduct to have the effects as set out above, taking into account all the circumstances including the fact that the Posts included detail so similar to her own

circumstances, the Posts were from a manager and partner of Ms Redfern who she reasonably believed would have access to this information about her, the environment in which the conduct took place and inability of the Claimant to control or prevent ongoing access to and distribution of the comments.

348. Further, the Tribunal consider that the Posts alone which Ms Friend made, had the effects. The "**fabricatedillness#"** Post, which was particularly offensive and coming directly after the Claimant's comments about her situation, were reasonably perceived by the Claimant to be directed at her.

349. The Tribunal do not consider that the relevant Posts made by Ms Redfern either had or were intended to have the proscribed effects and in any event, it would not have been reasonable for them to have that effect. The Tribunal has considered whether the Posts of Ms Redfern should be considered in terms of having contributed to the overall effect, whether they formed part of the cumulative effect: **Reed and anor v Stedman 1999 IRLR EAT.** However, while the Posts of Ms Redfern gave a work context to the Posts which followed and were a trigger for them (in the sense the Posts which followed carried on a theme), the Tribunal do not find they formed part of the effect for the purposes of the harassment claim. It was not until the later Posts that the Tribunal find the Claimant believed they were directed at her and became upset by them. Ms Redfern's Posts provide context in terms of the 'other circumstances' of the case to be taken into account under section 26 (4) EqA, but were not part of the 'effect'.

If so, was the conduct of Sharen Redfern done in the course of her employment or, was she acting as agent for the R and with the Rs authority?

350. Section 109(2) EqA makes a principal liable for discriminatory acts committed by an agent while acting under the principal's authority.

351. Was Ms Redfern when she put her Posts on her private Facebook page carrying out the functions she is authorised to do? **: *Unite the Union v Nailard 2019 ICR 28, CA***

352. We take into consideration that Ms Redfern is the sole director and shareholder of the Respondent. She is the 'face' of the Respondent and in day to day control of the management team.

353. Ms Redfern does not allege that her 'friends' on Facebook are not aware that she owns the Respondent business.

354. The Tribunal has had regard to counsel for the Claimant's submission that The Companies Act 2006 imposes an obligation on a director to act in a manner most likely to promote the success of the company for the benefit of its member*s* and therefore her argument that her comments on her Personal Facebook page are separate from the business is flawed. Counsel did not directly refer to the relevant provision of the Companies Act although the Tribunal has had regard to it but neither did he expand on this proposition nor refer to any case authorities in support of it.

355. Whilst the Tribunal appreciate that the argument is that Ms Redfern must have regard to her obligations as a director in her conduct outside of work, the Tribunal is not persuaded that this extends to conduct which is purely private and not connected to the company (although that may give rise to grounds for removal from

office subject to contractual terms in a Directors Service Agreement or the terms of the Articles of Association, neither of which the Tribunal were taken to, heard evidence about or was mentioned in submissions). That she owes statutory duties under the Companies Act however does not the Tribunal concludes, mean that her actions in her private life are functions she is authorised to do perform for the business: **HM Prison service and ores v Davis EAT 1294/98** .

356. In any event, the claim is presented on the basis that either Ms Redfern's Post was an act of discrimination (which the Tribunal have concluded it was not), or that it caused others to make comments which were discriminatory in that other comments 'flowed' from hers, and the Tribunal is not persuaded that it did so.

357. There is a separation between the Respondent's Facebook page and her personal one. Further, she was commenting on her Facebook site outside of working hours, in her home and in doing so not directly commenting on the business of the Respondent, but on her personal achievements and work ethic. When making this comments in her Posts, these are akin to comments she may make to a group of friends or acquaintances in her home. The Tribunal does not accept that Ms Redfern was exercising authority conferred by the principal i.e. the Respondent: ***Bungay and anor v Saini and ors EAT 0331/10***

358. Ms Redfern was not acting as an agent when she made the relevant Posts.

359. The Tribunal do consider however, that had Ms Redfern given an instruction to Ms Friend as her line manager, to make the Posts which Ms Friend did make about the Claimant, because the comments were about the Claimant (visa vie her absence from work) and included information about her health which she could only have obtained through her connection with work, that would be conduct by Ms Redfern which may well have taken the conduct in question (i.e. Ms Friend's Posts) into the scope of conduct '*in the course of employment'*. However, it was never put to Ms Redfern that she had given any such instruction and it is not pleaded that Ms Friend was acting in the course of employment.

Did the other comments flow from Ms Redfern's conduct?

360. The original Facebook page Ms Redfern made did not invite responses. Ms Clacher and Ms Friend put on their Posts the Tribunal accept in response to Ms Redfern's Posts however, the claim is not put on the basis of section 111 EqA.

361. Section 111(1)–(3) states that a person (A) must not instruct, cause or induce another person (B) to do in relation to a third person (C) anything which contravenes Parts 3–7, S.108(1) or (2), or S.112(1) of the EqA. This is referred to in the legislation as 'a basic contravention' and covers all forms of discrimination, victimisation and harassment in employment.

362. However, Mr Randall made no reference to this provision either in the list of issues or in the submissions nor did he put it to Ms Redfern that she had instructed or induced Ms Friend to make her Posts. The word 'cause' in a broad sense may cover the concept of the Posts 'flowing' from Ms Redfern's Posts which is how Mr Randall put the case however, section 111 (7) *provides that ;"This section does not apply* unless *the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B".*

363. In order for section 111 to apply therefore the relationship between the person

giving the instruction (Ms Redfern) and the person so instructed, (Mr Clacher and/or Ms Friend) must be in an employment relationship.

364. Mr Clacher is not an employee of the Respondent and it is not contended that Ms Friend was in a relationship covered by section 111 when she made the Posts.

365. Mr Randall is inviting the Tribunal to find, outside of the provisions of EqA, liability on behalf of Ms Redfern (and thus the Respondent) for an individual's action who it is not argued was an employee of the Respondent at the relevant time. It remains unclear to the Tribunal therefore on what legal basis Mr Randall alleges Ms Redfern could be held liable beyond the scope of section 111 EqA (which was not relied upon and in any event, could not apply given that it is not contended that the conduct of Ms Friend was committed within the context of an employment relationship).

366. The Tribunal has not found that Ms Redfern instructed Ms Friend or indeed Mr Clacher to make the Posts so as to give rise to an argument that they were in effect acting as her agents. In any event, that is not how Mr Randall put the argument either and he did not put it to Ms Redfern that this was the situation, certainly not in respect of Ms Friend.

367. The Tribunal consider, that given the stance Ms Redfern took during the grievance in dismissing the concerns of the Claimant, this may have properly given rise to a claim of victimisation, if the way the grievance was dealt with was on the grounds that the Claimant had brought complaints of discrimination against Ms Redfern. However, that was not the argument advanced. If was also not advanced on the basis that the conduct of the grievance was itself an act of harassment because it related to the Claimant's disability.

368. The Tribunal do not find that Ms Redfern nor the Respondent, is responsible in the circumstances, for the Posts made by Mr Clacher or Ms Friend, neither of which were acting the course of employment when they made the offending comments on their Posts or acting under the instruction of Ms Redfern to make those comments.

The Claimant of harassment is not well founded and is dismissed.

Constructive unfair dismissal:

On the 21 September 2020 the Claimant raised a grievance about the conduct namely the Facebook Posts, and subsequent comments which were aimed at the Claimant . The Claimant will say that the grievance was not taken seriously, that there was no investigation or proper meeting and the response was simply that Sharon Redfern considered the matter closed and there was no offer of an appeal. The Respondent disputes this .

Did the conduct set out in paragraph 15 of the Claimant's clam occur as a matter of fact?

[*Para 15 is : The Claimant believes that the Respondents failure to deal with her grievance constituted a fundamental breach of trust and confidence entitling the Claimant to resign : section 95 (1) 9c) and 98 (4) ERA 1996"*

Did the Respondent breach the implied term requiring an employer not to conduct itself

without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence by way of the conduct alleged in paragraph 15 of the Claimant's claim?

If a breach of contract is proven was it repudiatory?

369. Mr Randall in his written submissions referred to the harassment *"reinforcing*" the constructive unfair dismissal and also referred to a last straw scenario. However, in respect of both counts, he withdrew those comments in his submissions, stating that they were not relevant. He confirmed that the claim is not presented on the basis that his is a last straw situation and harassment is not part of the constructive unfair dismissal claim.

370. We are dealing purely with whether the handling of the grievance amounted to a fundamental breach of contract.

371. The agreed issues identify the breach as failure to take the grievance seriously, that there was no investigation or proper meeting and the response was simply that Sharon Redfern considered the matter closed and there was no offer of an appeal

372. The Tribunal conclude that Ms Redfern did not deal with the grievance in an impartial manner, she was faced with an obvious and significant conflict of interest but she decided nonetheless to deal with the grievance herself. This is not a situation where Ms Redfern did not have any choice but to deal with the complaint, she accepted that she had managers with suitable experience who could have dealt with the grievance but she did not even consider delegating this to them. That is not in itself the Tribunal consider however, a fundamental breach.

373. The Tribunal conclude however, that Ms Redfern then proceeded to 'not take the grievance seriously' in that she failed to engage in any meaningful consideration of the complaints. She did not conduct an investigation with Ms Friend, at best she may have spoken briefly to her, but there is no evidence of any meaningful discussion about the Posts, who they were about and why she mentioned the details which she did.

374. As Ms Redfern herself conceded, there was an element of defending herself in how she managed the grievance. The Tribunal conclude however, that in fact Ms Redfern had no intention of genuinely engaging with the concerns raised, she was intent on 'batting' them off.

375. Ms Redfern responded in writing as requested by the Claimant and while she cannot be criticised for an initial response in writing, she did so without any attempt to investigate with Ms Friend why she had made the Posts which she did. Further, she deliberately and without reasonable justification, levied unfair and serious accusations against the Claimant of bullying and harassment in retribution for her complaints. That was bullying behaviour and as she accepted, in breach of the Respondent's own grievance and disciplinary policy for which she provided no satisfactory explanation. There was certainly no reasonable cause for her actions. This was all part of her failure to take the grievance seriously and investigate it.

376. Ms Redfern's evidence is that the grievance process provides that external HR will be instructed if the matter is not resolved, however she did not offer this option to the Claimant. She rejected her grievance, informing her the matter was closed before giving the Claimant an opportunity to comment, to confirm if she was

satisfied or to ask for a meeting . Ms Redfern had no satisfactory explanation for this either or for not offering a right of appeal.

377. While counsel for the Respondent submits that it was reasonable not to offer an appeal because it was dealt with informally at this stage in accordance with the grievance policy, the Claimant was not provided with a copy of the grievance policy. Further, the Claimant did not identify her grievance as informal and Ms Redfern did not check with her whether she wanted to pursue it as an informal or formal grievance.

378. When asked why she failed to offer an appeal, Ms Redfern did not pray in aid the policy or understanding that it was informal, but offered no explanation for not doing so. She had also not informed the Claimant that it was being dealt with under the informal stage of the process and that she could then ask for it to be dealt with under the formal process if she was not satisfied.

379. The Tribunal find that Ms Redfern simply did not want to engage with the grievance and was not prepared at that stage to entertain it. The Tribunal conclude that it is an invention to assert that Ms Redfern was following the informal process.

380. The policies we accept are not contractual having regard to the Company Handbook but in any event important safeguards set out in the grievance policy were completely and utterly disregarded without reasonable and proper cause.

381. We find there was no attempt to carry out a fair and proper grievance process.

382. The Tribunal has reminded itself that it is not concerned with whether the Respondent's action lay within the band of reasonable responses because that is not the relevant test: **Bournemouth university education Corporation v Buckland 2010 ICR 908.** However, the Tribunal have little difficulty in finding in the circumstances that the way in which this grievance was dealt with did amount to a breach of the implied duty of mutual trust and confidence. The Respondent did not have reasonable and proper cause to breach the implied term: **Malik v Bank of Credit and Commerce International SA (In Liquidation) [1998] A.C 20.**

Was it repudiatory?

383. As conceded by the Respondent in submissions, any breach of trust and confidence will be regarded as repudiatory : **Woods v WM Car Services Peterborough)Ltd.**

Was any breach of contract waived?

384. The Claimant responded promptly to the breach. Although included within the list of issues the issue of waiver was not pursued by the Respondent in its oral submissions however in written submissions, the Respondent argues that the Claimant affirmed the breach by giving notice rather than resigning which was inconsistent with her intention to resign.

385. It is not asserted however that the Claimant gave more than her contractual notice: ***Cockram v Air Products plc 2014 ICR 1065, EAT***

386. The Claimant's complaint is about how the grievance was managed and she resigned 4 days after receiving the letter from Ms Redfern on the 6 October 2020

(p.78). The Claimant made up her mind to resign soon after the conduct of which she complains: Lord Denning MR in ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*.**

387. In an unfair constructive dismissal claim, the act of giving notice does not by itself constitute affirmation. Section 95(1)(c) ERA provides that a dismissal will take place where an employee resigns with or without notice 'in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct'.

388. Other than the act of serving notice, it is not alleged that the Claimant did anything else consistent with affirming the contract of employment and waiving the breach.

389. The Tribunal conclude that the Claimant did not waive the breach.

If the breach was not waived, did the Claimant resign in response to the breach?

390. The Tribunal have considered whether there was an ulterior reason for the Claimant's resignation and whether she would have left anyway irrespective of the Respondent's conduct in how it dealt with the grievance.

391. The Tribunal conclude that on the evidence, that the Claimant was clearly unhappy about the Facebook Posts, in her evidence in chief (although for reasons not clear to the Tribunal this did not find its way into the claim as put before us), she gives evidence (para 53 w/s) that she also resigned due to bullying, harassment and defamation of her character. She refers to being mocked. We conclude on the evidence that there were two core components to the reason for resigning: the Facebook Posts and the way her grievance was managed. She relies on only one reason in her claim .

392. It was put to the Claimant that resigning would assist with her personal injury claim but that was not explored in any detail in terms of how that would have assisted her and whether in fact it has done so. In terms of her constructive unfair dismissal claim, she is not seeking future losses and did not include the harassment allegations as part of it. The Tribunal conclude that there is no evidence to support a finding that the Claimant resigned when she did because it would help her personal injury claim or just to seek compensation in a claim before the Tribunal.

393. With respect to the proposition put forward by counsel for the Respondent that she resigned because she thought she would be dismissed anyway, the comment relied on by counsel in the February 2020 meeting, was made a number of months before the Facebook Posts and there was no indication that the Respondent was taking any steps to terminate her employment. The Tribunal conclude that the evidence does not support such an alleged ulterior motive.

394. If the Tribunal concludes that the Claimant would have left regardless of how the grievance was managed and thus the grievance process was not an effective cause of her resignation, her claim must fail. The Respondent submits that this is the case because under cross examination she gave evidence that if the Respondent had involved an external investigator and that independent investigation had reached the same findings of Ms Redfern, she would *"very possibly"* have still resigned.

395. However, what the Tribunal have to consider is, as at the date of resignation, what was operating on the Claimant's mind at that time. Projecting forward, she was being asked to anticipate how she would have responded to a finding that the

Facebook Posts were not harassment. That scenario however was not explored further with her, in terms of whether she would have resigned if she was satisfied that the external investigation was fair and she was assured by the findings that there was no intention to direct the Posts at her or whether she would have resigned had mediation been proposed as part of it.

396. The Claimant did not give evidence that she would have resigned even if Ms Redfern had dealt with her grievance properly when she first raised it, which is the breach we are concerned with.

397. The Tribunal is satisfied that the repudiatory breach, namely the way her grievance was managed, was ***an effective cause*** of the resignation **at the time the claimant resigned**. The repudiatory breach played a part in the dismissal, it was one of the factors relied upon : ***Wright v North Ayrshire Council 2014 ICR 77, EAT***. Mr Justice Elias, President of the EAT, in ***Abbycars (West Horndon) Ltd v Ford EAT 0472/07*.**

398. Although Ms Redfern wrote to the Claimant after her resignation, a repudiatory breach of contract cannot be cured unilaterally by the party in default: ***Bournemouth University Higher Education Corporation v Buckland*.**

Was the Claimant entitled to consider herself as being dismissed?

If the Claimant was entitled to consider herself as being dismissed was there a potentially fair reason for the dismissal?

Was the Claimants dismissal fair in all the circumstances?

399. The Respondent submits that even if a constructive unfair dismissal claim is found on the facts, the dismissal would be fair because the Claimant was given the option to have a meeting with the Respondent after handing in her notice.

400. The Claimant was entitled to refuse the Respondent's invitation to make amends through a grievance meeting**.** The Respondent cannot unilaterally cure a repudiatory breach. What the Respondent may endeavour to do to repair the situation after the event, cannot turn that termination into a fair dismissal. The Tribunal conclude that there was not fair reason for dismissal.

Remedy

401. The Claimant is not seeking loss of earnings from the date of termination

Loss of statutory rights

402. The Tribunal is not satisfied that the Claimant would shortly have been fairly dismissed from her employment anyway: **Puglia v C James and Sons 1996 ICR 301, EAT.** Ms Redfern's evidence is that the Respondent remained hopeful that the Claimant would return to work,

403. The Claimant has secured new employment which does not involve manual handling, whether she would have remained in a different, administrative role with the Respondent, perhaps part time, had there been consideration of adjustments, is not a matter explored in the evidence. However, there was no indication by the Respondent that it was moving toward terminating the Claimant's employment.

404. Because of the dismissal the Claimant has lost the protection of statutory rights that are dependent on her having remained in employment for the relevant qualifying period and the loss of her rights to statutory notice .

405. The Tribunal conclude that it is reasonable to make a global award of £500 under this head.

Basic Award

406. Basic award: the parties are in agreement that the basic award is £1,211.85 as set out in the Claimant's schedule of loss.

ACAS Uplift

407. The Claimant seeks an uplift in the schedule of loss under section 107A TULR(C)A 1992 of 10% on the basic award for the failure to provide a right of appeal.

408. By virtue of S.124A ERA, for the purposes of unfair dismissal compensation, any adjustment made in accordance with S.207A only applies to the compensatory award, it does not apply to the basic award.

409. In ***Lawless v Print Plus*** **(above)** Underhill P acknowledged that the relevant circumstances to be taken into account by tribunals when considering uplifts would vary from case to case but should always include the following
- whether the procedures were applied to some extent or were ignored altogether
- whether the failure to comply with the procedures was deliberate or inadvertent, and
- whether there were circumstances that mitigated the blameworthiness of the failure to comply.

410. The Tribunal has taken into account that the Respondent did respond to the Claimant, and did so initially in writing because this is how the Claimant requested her complaint to be address, but Ms Redfern then referred to the matter as closed without any right of appeal or meaningful investigation. It was only after the Claimant responded by resigning that Ms Redfern offered to arrange a meeting. Ms Redfern had access to legal support but did not avail herself of it. Ms Redfern's default is not alleged by her to be down to a failure to understand the Respondent's own grievance policy.

411. The Tribunal conclude that the failure to conduct a fair grievance process was deliberate. Ms Redfern was annoyed at the Claimant and was not prepared to conduct the grievance in a fair manner or in accordance with the Respondent's own procedural safeguards.

412. The Tribunal appreciate that Ms Redfern then made an offer of a meeting albeit after clearly advising the Claimant that her grievance was closed and after her resignation. However, the Tribunal take that into account in terms of mitigating circumstances.

413. There was a breach of paragraph 41 of the ACAS code. The right to an appeal is an important safeguard and the Tribunal consider that the failure to offer a right of appeal was unreasonable . No satisfactory explanation has been put forward by Ms

Redfern.

414. The Tribunal consider it appropriate to award a 10% uplift on the compensatory element of the award, namely the loss of statutory rights for the reasons advanced by the Claimant, namely the failure to offer an appeal.

415. With respect to the submission of the Respondent that the Claimant should suffer a deduction for failing to ask for an appeal, the Tribunal consider that given the circumstances, namely how categoric Ms Redfern was in her response that the matter was closed, the failure to refer to a right of appeal or provide the grievance policy, and the manner in which Ms Redfern made accusations of bullying against the Claimant, regardless of the Claimant being aware that she should be offered a right to an appeal, it was not unreasonable of her to not request an appeal. Further, the ACAS code places the onus on the employer to inform the employee that they can appeal if they are not content with the action taken, and the Respondent failed to do that.

416. The Tribunal conclude that even if there was a technical breach of the ACAS code by the Claimant, the failure by the Claimant was not unreasonable and no reduction should be made.

417. The Recoupment provisions do not apply to the basic award or award for loss of statutory rights.

Employment Judge Broughton

Date 7 December 2022