Case No. 2300006/2018/V

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH by CVP**

BEFORE: **Employment Judge Truscott QC**
Mrs S Dengate
Ms N O'Hare

BETWEEN:

Ms A Gillespie **Claimant**

AND

Guy's and St Thomas' NHS Foundation Trust

Respondent

ON: 9, 10, 11, 12, 15 February 2021, submissions 12 March 2021 in chambers 8 April 2021

Appearances:

For the Claimant: **Mr M Jackson of Counsel**

For the Respondent: **Ms Y Genn of Counsel**

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable to do so.

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claim of unfair constructive dismissal brought under Part X of the Employment Rights Act 1996 is well founded.
2. The claim of sexual harassment contrary to section 26 of the Equality Act is not well founded and is dismissed.
3. The claim of failure to make reasonable adjustments contrary to section 20 of the Equality Act is not well founded and is dismissed.

4. A telephone case management hearing should be fixed to make arrangements for the remedy hearing.

REASONS

PRELIMINARY

1. The Claimant has bought a claim for constructive unfair dismissal relying on alleged breaches of the implied duty of mutual trust and confidence by the Respondent. She also claims disability discrimination and harassment.

2. The Claimant gave evidence on her own behalf and was represented by Mr M Jackson, Barrister. The Respondent was represented by Ms Y Genn Barrister, who led the evidence of Mr T Kargbo, Locality Nurse Manager, Ms M Jennings, who was, at the time, the Deputy Head of Nursing/Clinical Lead, Mr N Kasanga, who was at the time, seconded in the role of Deputy Head of Nursing, Ms Macro, Deputy Head of Nursing, Ms D Miller, who was at the time the Deputy Head of Nursing/Clinical Lead and Ms H Rapley who was Clinical Director, Integrated Local Services Directorate at the time.

3. There was one volume of documents to which reference will be made where necessary. The numbering in the judgment refers to the pages in the electronic bundle except where otherwise stated.

4. It was agreed that, due to shortage of time, the hearing would address liability only.

ISSUES

5. These were not agreed in full by the parties. The issues disputed by the Claimant are underlined.

    1. Was the Claimant dismissed?
        a. The Claimant only relies on constructive dismissal and the implied term of trust and confidence;
        b. <u>Did the Respondent, engage in conduct so fundamental as to breach the contract of employment?</u>
        c. Did the Respondent, without reasonable and proper cause, engage in conduct calculated, or likely to destroy or seriously undermine trust and confidence between employer and employee?
            i. The Claimant relies upon (in broad terms)
                1. Breaches of confidentiality by, or by the provision of health information to Anita Macro, Elinor Jamieson, Marina Jennings, Ms Spencer and Mr Stephens, Ted Kargbo and Ngoni Kasanga.
                2. Failure to conduct the following meetings at the Claimant's home address:
                    a. Stage 2 Grievance meeting on 25th January 2018;
                    b. Stage 3 Grievance meeting on 10th July 2018;

c. Sickness absence meetings on 23rd November 2018;
3. Failure to contact the Claimant regarding redeployment;
4. Failure to obtain an updated Occupational Health report before scheduling a final stage capability hearing;
5. Calling the Claimant angry and confrontational;
6. Making reference to "three men" being invited in to the Claimant's home;

d. If the Respondent did breach the implied term of trust and confidence, did the Claimant resign, at least in part, due to the breach of contract?
e. [R's alternative paragraph d.] If the Respondent did breach the implied term of trust and confidence, did the Claimant resign, in response to the breach of contract or for some other reason?
f. If the Claimant did resign, due to the breach of contract, had she affirmed any breach before doing do?
g. If, and only if, the Claimant was constructively dismissed as above, the Respondent asserts that the reason for her dismissal was for a reason related to capability;
    i. the Claimant does not accept this was the reason or principal reason;
h. If, and only if, the Claimant was constructively dismissed, and the Respondent's reason or principal reason was capability, did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee?

Failure to make reasonable adjustments

2. Was there a duty to make reasonable adjustments?
    a. It is conceded that the Claimant has a disability;
    b. The Claimant's case is that:
        i. the Respondent had a PCP of requiring the Claimant to be fit and well enough to perform her contractual duties;
        ii. that PCP placed the Claimant at a substantial disadvantage when compared with non-disabled employee.
    c. The Respondent does not accept that the matters relied on by the Claimant constitute a PCP
    d. Or if the requirement relied upon (which is not admitted) is found to be a PCP, that the claimant was placed at a substantial disadvantage when compared with employees who did not share her disability
3. If there was a duty to make reasonable adjustments, did the Respondent take such steps as it was reasonable to take to avoid the disadvantage (namely being unable to be fit and well enough to perform her contractual duties)?
    a. The Claimant asserts that the Respondent ought to have commenced the redeployment process and offered alternative roles as well as, or instead of, starting a final stage capability process.

Harassment

4. Did Mr Kasanga engage in unwanted conduct when including the following comments in a letter to the claimant?
    a. The Claimant relies upon the comment that "*In relation to the hearing, I understand that you have previously requested the meeting take place*

at your home. While not opposed to this, I am conscious that you would be inviting three men into your home, and frankly you sound quite angry and confrontational on the telephone and through your e-mails. I have a responsibility to you and all the participants and so would recommend that we either arrange transport, you telephone into the meeting or submit a statement in your absence."

5. Was that conduct relevant to sex?
6. If so, did that unwanted conduct, relevant to sex have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her taking into account:
    a. the Claimant's perception;
    b. the other circumstances of the case; and,
    c. whether it is reasonable for the conduct to have that effect.

FINDINGS of FACT

1. The Claimant was employed as a Community Staff Nurse with continuity of employment from 21 April 2008 [119]. She was responsible for nursing care delegated by the District Nurse Team Leader which included; first contact, care and referral, continuing care, rehabilitation, and providing public health, health protection and promotion programs in the community [110-114].

2. On 20 October 2015, she was issued with an Improvement Notice [215]. On 2 November 2015, she responded to the improvement notice and asked for more information about the process [217]. The Claimant was very aggrieved and upset at the action taken by the Respondent. She was absent on sick leave due to anxiety and stress from November 2015 until February 2016.

3. In May 2016, the Claimant was diagnosed with a serious medical condition and commenced a further period of sickness absence on 13 May 2016.

4. By a letter dated 22 December 2016, she was informed by Jayne King that her Improvement Notice has been removed [285].

5. The Claimant raised a formal grievance on 19 January 2017 regarding the lack of management support provided to her during her sickness absence and challenging the process around the improvement notice [213]. She sent several follow up text messages requesting a response to her letter. She did not receive one.

6. A stage 1 grievance hearing took place on 29 March 2017 [149 and 224-228]. The meeting was arranged to take place at her home although, in the event, at her request, it took place by phone.

7. By a letter dated 18 August 2017, the Claimant was sent the stage 1 grievance outcome [157-160] with 37 appendices. The grievance was upheld to the extent that it was accepted that more management support should have been provided to her between the periods of 3 November 2015 to 29 February 2016 and May to November 2016. The appendices contained all the statements taken as part of the investigation one of which was that of Ms Anita Macro dated 1 June 2017 which stated the Claimant's diagnosis and treatment plan [245]. When she saw this, the Claimant

emailed the Head of Occupational Health, Mr David Maslen-Jones with her concerns. He responded on 29 August 2017 [301] that "your health should not be discussed with anyone without your consent, a report would normally go to your manager who might share it with HR but would not discuss your condition directly, only how it affects your ability to do your job and whether you need any adjustments made…".

8. The Claimant wrote to Ms Miller appealing the outcome of her stage one grievance hearing [299]. She raised a number of issues with the outcome and process of the stage one grievance hearing.

9. On 11 September 2017, there was an informal meeting to discuss the grievance outcome and appeal to stage 2. The Claimant asked for the meeting to be at her home which is where it took place [316-317]. The note makes no mention of difficulties experienced by Ms Glynn-Jones, the Head of Nursing (District) and Ms Glenda Baillie at the meeting.

10. On 9 October 2017, Ms Miller spoke to the Claimant by telephone regarding a potential date for her stage two grievance meeting. She initially proposed that the meeting be held on 26 October 2017. The Claimant responded by email stating that she was unable to attend on this date due to an appointment. She requested that the meeting be rescheduled and that the meeting be held in her home.

11. On 11 October 2017, the Claimant sent a further email asking for a response, to which Ms Miller replied that she had received her email and would be in touch with her again soon [323]. Also, on 11 October 2017, the Claimant emailed Ms Glynn-Jones stating she felt Ms Miller had been unreasonable in the length of time it was taking her to arrange a meeting to resolve her stage 2 grievance. She stated that she had left telephone messages for her and she had not returned them. Ms Miller returned all of Ms Gillespie's calls within a few hours of receiving her messages. The Claimant also said that she was unhappy that Ms Miller had offered use of counselling services provided by the Trust and that she felt she had a preconceived opinion of her.

12. On 12 October 2017, Ms Miller responded to the Claimant, stating that she was sorry that she felt the way that she did and that they had discussed on the phone that Ms Miller would not be able to come back to her with an alternative date until the relevant people had returned from leave which was not until 20 October 2017. Ms Miller confirmed to the Claimant that she had escalated her concerns to HR and that she had no preconceived ideas and the offer of counselling was a standard offer that the Trust would provide to any member of staff who was undertaking a grievance procedure [325]

13. Mr T Kargbo started acting as the Claimant's line manager from 16 October 2017 until her resignation on 12 December 2018.

14. On 19 October 2017, the Claimant emailed Ms Miller to ask where in the grievance policy it states that counselling is offered to everyone going through a grievance [335]. The Claimant also said that she did not want Glenda Baillie at the meeting and therefore did not understand why she needed to wait for her to return from holiday to organise a date for the meeting. Ms Miller responded to the Claimant on 20 October 2017, however, the Claimant sent a reminder email on 23 October 2017

stating she had not received a response. Ms Miller replied on the same day, stating that she had just forwarded the email she had sent on Friday to her, hoping that she would receive it. The Claimant replied on the same day to advise the email had still not been received. Ms Miller copied the details from her original email into a new email, setting out the details of the stage 2 grievance meeting. In the email, she confirmed it was not compulsory for Ms Baillie to attend the hearing, and if this was something she did not want, this could be accommodated. However, Ms Miller informed the Claimant that this would mean Ms Baillie would be unable to provide answers to any questions to either herself or the Claimant and therefore it would be entirely based on the content of her statement. Ms Miller also confirmed that the offer of counselling was part of the Trust's standard template invitation letters used during formal processes, given how stressful the process may be. Additionally, she acknowledged that the Claimant had difficulty travelling and offered to organise a taxi for her to attend [332-333].

15. On 23 October 2017, the Claimant emailed Ms Miller stating she was unable to travel at the moment and that Ms Miller could travel to her home by taxi for the meeting [332]. The Claimant said that she would now like Glenda Baillie to attend the hearing so she could answer questions. She then stated that she felt there had been a 'non-existent' duty of care shown towards her and hoped she could resolve all points of her grievance before taking any further action.

16. On 26 October 2017, Ms Miller emailed the Claimant to provide an update, she stated that as she had now requested that Glenda Baillie attend the hearing, they would need to find a different date. She explained she was on annual leave the next day and was in meetings for the rest of the day so it would be early the next week before she would be able to provide her with some dates. She also confirmed that she would not be considering any new issues that were not part of the original grievance, but that she would like to understand why she remained dissatisfied and what resolution she was seeking [331]. On the same day, the Claimant responded, stating that she was not prepared to wait longer than one week for a date for the stage two hearing and that the Respondent had already breached its (grievance) policy due to the delay. On 27 October 2017, the Claimant sought an acknowledgment of her email. A colleague acknowledged the email on behalf of Ms Miller [330].

17. On 2 November 2017, Ms Miller contacted the Claimant inviting her to the stage 2 grievance meeting to take place on 16 November 2017. The Claimant responded on 6 November 2017, stating that she would like the meeting to take place at her home address [339]. On the same day, Ms Miller replied stating that she was unable to hold the meeting in her home. She said that she had tried to find a venue which was closer to her home and were still happy to offer her transport. She also acknowledged that travel may be difficult for her and therefore suggested that they could use tele-conferencing facilities if needed [338-339]. The Claimant responded stating that she would not want a tele-conference as she would not know who was listening [339]. Ms Miller responded to confirm it was not appropriate and was impracticable to hold a formal meeting at her home [337-338]. The Respondent said break rooms would be required but the Claimant had informed them that there was plenty of room in her house for breaks or facilities including a supermarket and café nearby. The Respondent instead offered either a telephone hearing or an alternative location in one of the Trust buildings [308]. Ms Miller had based her decision on a conversation with Ms Elinor Jamieson, Senior HR Advisor, when she sought advice on the issue

and advised against holding the meeting in the Claimant's home, due to the Claimant's conduct in a previous meeting which had taken place there (on 11 September 2017). The Claimant responded by saying that it was now time she took the matter higher and said "how dare you place any further stress on me.,," [337]. On 8 November 2017, Ms Miller acknowledged the Claimant's email and stated that she was sorry to hear she wished to escalate her grievance higher [336]. She also confirmed that she would continue with the stage 2 grievance investigation and would continue with the meeting as planned. The Claimant responded, stating that she considered that Ms Miller had not shown her any duty of care and had precluded her from being part of her own grievance. Ms Miller did not respond to these emails because of the accusatory tone used. On 13 November 2017, the Claimant emailed Ms Miller to ask if she would be attending the stage 2 meeting at her home on 16 November 2017 as her union representative had other members she needed to attend to. Ms Miller responded stating that in accordance with her previous email, she was unable to hold the meeting at her home. She confirmed that she could conduct a telephone conference if that was easier for her and reassured her that it would be confidential. She also confirmed her trade union representative could be present in the room with her [340].

18. Mr Kargbo arranged for an Occupational Health examination which took place on 11 December 2017 and was carried out by telephone.

19. On 15 January 2018, Ms Miller wrote to the Claimant, inviting her to a formal stage 2 grievance hearing to take place on 25 January 2018 [347-348].

20. Mr Kargbo received the OH report from Dr Hashtroudi dated 17 January 2018 [345] which indicated the Claimant was not fit to return to work but may be able to resume in three to six months' time with adjustments. The report also indicated she was not able to attend a meeting at the Trust but could be fit to meet at her home. He wrote to the Claimant on 17 January 2018 [351] to confirm that he had arranged a sickness advisory meeting on 1 February 2018 and he would be accompanied by Ms Jennings.

24. Ms Miller conducted the grievance hearing on 25 January 2018. She was accompanied by Ms Jamieson, and Ms Glenda Baillie was in attendance. The Claimant did not attend the meeting so Ms Miller decided to proceed. Ms Miller had responded to the Claimant's email on the day of the meeting to ask if she wanted to participate and postponed the meeting start so that she could dial in, however she did not respond to this prior to the hearing [355]. After the hearing, the Claimant requested a recording and Ms Jamison asked her for a memory stick for this [354-355]. Following the grievance hearing, Ms Miller considered all the evidence and reached a number of conclusions which are set out in the outcome letter dated 5 February 2018 [362]. She upheld the stage 2 appeal in relation to the management of her sickness absences from 3 November 2015-29 February 2016 and from May 2016-16 November 2016 and addressed the Improvement Notice and Ms King's handling of it [362-366]. She also advised the Claimant of her right of appeal.

25. On 1 February 2018, a long-term sickness absence meeting was held with Mr Kargbo and Ms Jennings. Although arranged to take place with the Claimant at her home, on the morning of the meeting the Claimant requested it by telephone instead. At the meeting, the December 2017 OH report was discussed. The Claimant agreed

with the OH advice that she was not yet fit for work. It was agreed she would be re-referred to OH to consider adjustments to assist her return in the near future [356-361]. In the discussion, it was confirmed the possible options were a return to work, redeployment, ill health retirement or an ill health hearing. She felt she would be able to return to work.

26. On 18 February 2018, the Claimant wrote to Ms Rapley wishing to appeal the outcome of her stage 2 grievance hearing [373-374]. She also said that she wished to raise a grievance against Anita Macro, Elinor Jamieson and Debbie Miller.

27. On 6 March 2018, Ms Rapley emailed the Claimant thanking her for reverting to her and explained that she is an experienced chairperson and she approached all of these appeals and hearings with no agenda and no favouritism [379-380]. She noted that as the Claimant had raised concerns regarding confidentiality previously, so she would consult with her should she need to speak to anybody outside the immediate appeal process. The Claimant asked for an update on 14 March 2018. Ms Rapley replied on 15 March 2018 stating that she was on annual leave and would be returning the following week and would be in touch to discuss her initial emailed grievance [380].

28. On 6 April 2018, Ms Miller responded to the grievance appeal [390].

29. On 4 May, the Claimant was invited to a stage 3 grievance appeal meeting scheduled for 29 May 2019 [440].

30. On 17 May 2018, the Claimant emailed Ms Rapley asking that, as she was the chair of the hearing and was not responsible for investigating her grievance, who would be undertaking the investigation. Ms Rapley replied stating Ms Miller had submitted the management response and would be in attendance at the hearing [445]. She confirmed that the Claimant would be able to ask her questions at the hearing and so would she.

31. On 21 May 2018, the Claimant emailed to request that any meeting which was necessary to consider her grievance be held at her home due to her present circumstances and the level of stress involved, and stated this was in line with Occupational Health advice [449].

32. On 7 June 2018, upon the advice of Ms Julie-Anne Gilmore, Senior HR Advisor, Ms Rapley requested a copy of the Occupational Health report she was referring to so she could consider the reasons why she would want the hearing at home. She did not receive a response so she sent a reminder on 12 June 2018 [455]. She sent a separate email confirming a hearing on Tuesday 10 July 2018, with the venue to be agreed. On the same day, the Claimant replied, stating that her Occupational Health report and confidential health matters had already been breached without her consent and that given this, she thought Ms Rapley would have clearly been aware of her disability and the reasons she had requested a home meeting. She also confirmed that she did not give permission to Ms Rapley to know any more of her private health matters.

33. The Claimant attended OH on 18 June 2018 by telephone. The outcome of that meeting, issued on 12 July, was that she was not medically fit to return to her

substantive post [500] but that she could work in a role that did not require walking or standing for more than 2-3 minutes or regular manual handling. It was also reported that the Claimant could not physically attend a meeting but could do so by phone.

34. On 19 June 2018, Ms Rapley emailed the Claimant with an alternative hearing date. The Claimant replied on 19 June 2018, stating that she should have been fully aware that she could not travel at the moment and therefore the dates were 'irrelevant and invalid' [459]. She then reiterated that she was available for any date so long as the meeting was at her home. Ms Rapley replied on 20 June 2018 [459-460] to confirm that she had not declined her request for a hearing at her home but was simply enquiring if she was available on that date so she could discuss arrangements with colleagues [459-460]. On the same day, the Claimant responded stating she did not need any further stress from her or her colleagues regarding her grievance [461]. She also alleged that Ms Rapley had 'persistently harassed' her for information that she was already in receipt of. Additionally, the Claimant alleged it was quite clear that Ms Rapley had stated that she would not accommodate her request to have the grievance meeting at her home.

35. On 29 June 2018, Ms Rapley confirmed to the Claimant that she respected her wishes to no longer be part of the appeal process but that she would be continuing with the hearing on 10 July 2018 in her absence [468]. On the same day, the Claimant sent an email, alleging she had been excluded from her grievance and no reasonable adjustments (i.e. the meeting taking place at her home) had been made for her to take part in her grievance. Ms Rapley responded stating that she had chosen not to take part in the hearing. On 2 July 2018 and 3 July 2018 [469 and 472], the Claimant sent emails again stating that Ms Rapley had not offered her the opportunity to hold the grievance meeting at her home, that she had been 'continually excluded' from her grievance and that she had lost all confidence in her and said that Ms Rapley should continue with her plan to conduct the grievance hearing in her absence. Ms Rapley confirmed that she had not denied her the hearing to take place in her home and that she asked her to confirm a convenient date for the hearing, before discussing what would be required, in order for a home meeting to take place.

21. On 4 July 2018, Mr Kargbo emailed Ms Jennings to state that the Claimant had requested her next sickness advisory meeting to take place at her home instead of the telephone interview which had originally been planned [477- 475]. Mr Kargbo asked for her recommendation on the preferred option in hosting the meeting. Ms Jennings replied to Mr Kargbo and the Claimant that she would recommend that the meeting is conducted by telephone. Alternatively, she confirmed they could hold the meeting at a Trust site and arrange transportation for the Claimant if required [476].

22. On 5 July 2018, the Claimant emailed Ms Jennings and Mr Kargbo to state that she had requested this meeting at her home as it was a very different meeting to an Occupational Health meeting that was held over the phone. She stated that Ms Jennings was in receipt of her Occupational Health report and that the recommendation was that reasonable adjustments needed to be made [475]. The Claimant also wrote that she had stated on numerous occasions that she was unable to travel at the time and therefore asked whether they were refusing to hold the meeting in her home as requested. On the same day, Ms Jennings responded to the Claimant explaining that reasonable adjustments would be considered, however, in

the Claimant's case, allowing the meeting to take place by telephone or offering transport both to and from the meeting, so that she did not have to travel by public transport (something which she explicitly stated she could not do) would be considered a reasonable adjustment in the circumstances. Ms Jennings said that she understood that the Claimant attended medical appointments and asked if she had transport arranged for those and whether the Respondent could offer something similar. She also confirmed that she did not feel it would be appropriate to attend a home visit, particularly as the Claimant had stated that she felt discussions had been misinterpreted by Ms Jennings and others in the HR team.

23. On 6 July 2018, the Claimant contacted Ms Jennings to ask that other 'than the influence of your colleagues" what her reasons were for not allowing the meeting to take place at her home [479]. Ms Jennings responded [478] stating that the decision not to attend a home visit was because the Claimant had alleged that she had breached her confidentiality and the Equality Act, both of which she considered were unfounded.

24. Ms Rapley conducted the grievance appeal hearing with Ms Julie-Ann Gilmore, Senior HR Advisor, on 10 July 2018 in the Claimant's absence [485 – 489]. Ms Rapley emailed the Claimant on 17 July 2018 [508] to confirm that she was finalising the letter following the hearing and requested whether she would like a copy of the letter by email or post. On 24 July 2018, the Claimant emailed seeking the outcome of her grievance, stating that Ms Rapley had had her email address since she started the investigation in February 2018. Ms Rapley responded, stating she had asked if the Claimant would like a copy by email previously and that she had not responded to her. She also confirmed that she had not started any investigation, as she had chaired the final hearing. Ms Rapley confirmed that once she had confirmed she wished to receive a copy by email, she would send it to the claimant [508]. The Claimant replied the same day asking Ms Rapley to provide her with the outcome of her grievance and alleged she had 'chosen' not to include her [509]. Ms Rapley responded to confirm the information she had used to conduct her appeal [510].

25. The stage 3 grievance outcome letter dated 17 July 2018 upheld the Claimant's grievance in relation to the complaint about Ms Macro's breach of the Claimant's confidentiality. The complaint about delays during the grievance process was also upheld [504]. The complaints that Ms Jamieson and Ms Miller had disregarded the Equality Act and that they had breached the Claimant's confidentiality were not upheld. She confirmed that the Claimant had no further right of appeal and this concluded the internal process.

26. On 11 July 2018, the Claimant emailed Mr Kargbo copying in Ms Jennings, to ask why the request for her meeting to be held at her home was refused [493-494]. Ms Jennings responded stating that she had previously confirmed why she did not feel it appropriate to attend a home visit in previous correspondence. She reiterated that a telephone consultation or transport to the meeting had been offered and these would be reasonable adjustments to facilitate the meeting. She asked the Claimant to confirm to Mr Kargbo whether she would be attending. She did not respond.

27. On receipt of the Occupational Health report on 12 July 2018, Ms Jennings contacted the Claimant to ask if she was available for them to speak to her [502]. She

responded that she did not know there was a booked meeting [501]. Ms Jennings confirmed it was the rescheduled sickness advisory meeting [501]. Mr Kargbo attempted to call the Claimant on 18 July 2018 and emailed her indicating he wanted to discuss holding a telephone meeting [513]. The Claimant returned the call on 30 July 2018 to say she was upset that he had highlighted the words 'telephone contact' in his email. He explained that it was not his intention to cause upset but to emphasise the proposed method of discussion with her. This was confirmed in an email of the same date [513]. He also followed this up with some suggested dates for the discussion [515]. The Claimant did not respond other than to refer to the content of the call [515].

28. Mr Kargbo sent the Claimant a letter on 2 August 2018 inviting her to a meeting by telephone on 23 August 2018 to discuss her sickness absence [516-517]. He said that the meeting would proceed in her absence, as she had indicated she was not attending any meetings. The Claimant responded by email on 2 August 2018 [519] objecting to this. The Claimant made no further contact. Because Ms Jennings was absent on sick leave on 23 August 2018, the meeting was rearranged for 29 August 2018.

29. At the meeting, Mr Kargbo and Ms Jennings reviewed the most recent Occupational Health advice which indicated that the Claimant was not fit for her substantive role as community staff nurse. Thereafter Mr Kargbo sent her a letter after the meeting summarising what had been discussed and the potential options [530-533]. He explained that Occupational Health had recommended that she was redeployed into a sedentary role which perhaps was closer to her home. He explained that as the Claimant had not attended this meeting, it meant that he was unable to discuss redeployment with her. He explained it would be useful to discuss redeployment with her and also have further input from Occupational Health on what roles and duties she was able to do. He also confirmed that, as Occupational Health had indicated that she was not fit for her substantive role, and there was no indication she would be fit within a reasonable timeframe, that it would be necessary to consider termination of her contract on the grounds of ill health capability. He confirmed that a hearing would be organised for a later date and that she would receive written confirmation of that hearing. He explained that they could commence a search for a suitable alternative role for her. He asked the Claimant to let him know if she wished to engage in a redeployment search and then he would be able to discuss which roles were suitable together with support from Occupational Health. He explained that in order to try and identify a suitable role, the Claimant would need to complete the forms enclosed within the letter to commence the process. The process of searching for an alternative post was set out. He also explained that she may wish to consider ill health retirement and could seek further information from Occupational Health about this.

30. Mr Kargbo did not receive a response to his letter. He decided to refer the matter to a hearing in line with the Trust's sickness absence procedure, to consider termination of the Claimant's employment due to the fact there was no clear timeframe in which she would be able to return to her substantive role and she had not given any indication that she wished to consider redeployment. He prepared a management case and related documents [577-582].

31. The Claimant says that she completed and returned the redeployment forms

and her sister had posted the forms for her. The majority of the Tribunal does not accept this evidence.

32. On 31 October, the sickness review process was referred to Mr Kasanga who had had no prior involvement with the Claimant. On 6 November 2018, he was provided with a copy of the management case and documents [577- 628]

33. On 9 November 2018, Mr Kasanga wrote to the Claimant inviting her to a formal sickness hearing in line with the Trust's sickness absence procedure [575-576]. He informed her that the purpose of this hearing would be to consider the termination of her contract on the grounds of ill-health capability, as a result of her long term sickness absence which had commenced on 13 May 2016. He enclosed a copy of the management case. He also informed her that the outcome of the hearing may be her dismissal. He also offered her transport to the meeting or for the meeting to be held by telephone. The hearing did not proceed on that day as the Claimant did not attend.

36. On 12 November 2018, the Claimant emailed Ms Jennings and Mr Kargbo to ask who had given permission to 'share her diagnosis' with Mr Kasanga and to ask who he was [629]. Ms Jennings responded stating that, as stated in the sickness advisory outcome letter, her management case would need to be handed over to a senior manager to consider the case and an ill health hearing would be arranged. She confirmed that Mr Kasanga would be the chair of this hearing [633].

34. On 14 November 2018, the Claimant responded to the management case by stating that her dates of employment were incorrect. Ms Jennings replied stating that as this was Mr Kargbo's management case, she had copied him in so this could be amended and clarified prior to the hearing [631]. The Claimant also reiterated she considered that Ms Jennings had breached her confidentiality. Ms Jennings did not respond. The Claimant also emailed Mr Kasanga requesting that the meeting be held at her home [634]. In another email on the same date, she stated she felt there had been a breach of her confidentiality in that he had gained access to her private information [634]. In a further email, she said that in relation to job search, no-one had been in contact with her for 3 months [638]. He responded to her to confirm that the invitation to the meeting had considered that her condition required reasonable adjustments and the letter offered her the option of either a telephone hearing or for the Respondent to provide her with transport to the venue which was the advice from Occupational Health at the time. He also suggested she could provide a written statement in advance of the meeting scheduled for 23 November 2018 [640]. He also explained that, he would discourage her from sending emails raising issues regarding the facts of her case as he would not respond to such emails given this would be dealt with in the hearing [640]. In a further email on the same date, the Claimant repeats that in relation to job search, no-one had been in contact with her for 3 months [640]. The Claimant responded the same day stating that his tone within his email proved the lack of support that she had allegedly received from the Respondent [641]. She sent another email asking where in the sickness advisory letter it was stated her case would be handed to a senior manager [640]. Mr Kasanga confirmed that he was nominated to chair her meeting, hence why he already had access to all the documents relevant to the meeting [642]. The Claimant again replied referring to the lack of contact for 3 months [643].

35. On 16 November 2018, Mr Kasanga wrote to the Claimant to confirm that he would be supported by a different member of HR given the previously intended staff member was now unavailable [659- 660]. He confirmed that all other arrangements remained as intimated in his letter of 13 November 2018. He also requested that the Claimant confirm whether she would be attending the meeting. On 21 November 2018, he wrote to her stating he had not heard back from her regarding whether she intended to attend the meeting on Friday 23 November 2018 [661-662]. He asked her to confirm by 12pm on Thursday 22 November and also to inform him whether she required transport so she was able to attend. He also confirmed, that if she wished, she could provide a telephone number instead to arrange a telephone meeting.

36. On 22nd November, the Claimant emailed [663] setting out her position which included pointing out that the Respondent had failed to obtain an up to date OH report and that Mr Kargbo and Miss Jennings had no contact with her since August 2016 2018 about redeployment and that she had received no job vacancies or support. [663].

37. The sickness absence hearing was due to take place at 10:00am on 23 November 2018. The Claimant was not present so Mr Kasanga contacted her by telephone at 10:27am. He introduced himself to the Claimant and went on to introduce Robert Stevens of HR. She asked why he had not responded to her emails of 14 November 2018 and her text about his credentials. He replied that these were matters he wished to pick up at the hearing. As he was attempting to explain Mr Stevens' role in the meeting, the Claimant interrupted him with a sharp tone of voice to state that he did not have permission to call her on a private number and also accused him of recording the meeting without her consent. This was not the case. She said she did not want to discuss anything now and hung up. After the conversation, Mr Kasanga discussed the way forward with Robert Stevens and decided to seek an up to date Occupational Health report. He also considered that the hearing should be rearranged but, after the telephone call, he was very reluctant for this to be held in her home. He decided it remained reasonable to arrange transport for her, hold the meeting by telephone or allow her to submit a written statement [665-666].

38. Mr Kasanga wrote to the Claimant on 27 November 2018 thanking her for pointing out she had not seen Occupational Health for some time. He additionally noted that she had previously requested the meeting to take place at her home. He explained that whilst he was not opposed to this, he was conscious that she would be inviting three men into her home and, given the angry and confrontational tone she had conveyed in both verbal and written communications, he did not feel comfortable with this. He explained that he had a responsibility to both the Claimant and all the participants in the hearing and so would recommend that the Respondent either arrange transport for her, or conduct a telephone meeting. He also gave the option of submitting a written statement in her absence, should she be unable to attend the meeting. He proposed, given the delay of obtaining the Occupational Health report, the hearing would be held during the week beginning 17 December 2018 [667-668]. He did not address the other points raised in the Claimant's letter including the lack of contact and redeployment.

39. The Claimant emailed Ms Rapley, Ms Jennings and Mr Kargbo on 27 November [669]. She referred to receiving the letter from Mr Kasanga and challenged

the statement that she had been angry and confrontational in the telephone exchange and requested the recording of the call. She complained of sex discrimination by Mr Kasanga in relation to his comments about inviting 3 men into her home. She also restated that no-one had contacted her in 3 months regarding the redeployment process.

40. On 7 December 2018, Mr Kasanga emailed the Claimant a letter dated 6 December inviting her to a re-arranged sickness absence hearing, to take place on 21 December 2018 [671-672]. He asked her to confirm her attendance by 5pm on Wednesday 18 December 2018. He also asked that should she be too unwell to attend, she should provide a letter from her GP confirming so. He stated that he did genuinely want to hear any concerns that the Claimant had with the process to date and wished to make the meeting as stress free as possible and that it was important that he explored her concerns before making any decision. He noted in the letter that she had an Occupational Health appointment booked for 17 December 2018. By a letter dated 7 December, the Claimant was invited to attend OH on 7 January 2019.

41. On 10 December 2018, Mr Kargbo wrote to her to confirm he would be processing an annual leave request. He also asked why a scheduled Occupational Health appointment had been moved to 7 January 2019 [680]. The Claimant did not respond to this.

42. On 12 December 2018, the Claimant tendered a letter of resignation to Ms Jennings [681-683] giving the following reasons:

> Continued breach of confidentiality regarding sensitive health information
> Refusal to hold meetings at her home
> No contact or support regarding redeployment since August 2018
> Formal sickness meeting arranged for 23rd November with people she did not know and informed her emails would go unanswered
> Formal sickness absence hearing convened on 23rd November despite request for it to be at home and before up to date OH report received
> Mr Kasanga's unannounced call on 23rd November 2018
> Receipt of letter on 27th November 218 entitled 'second hearing date'.

43. Mr Kargbo responded by email on 14 December 2018 [685]. In his response, he expressed his sadness that she had chosen to resign at this time. He offered her the chance to consider her options before he was to accept her resignation. He made her aware of the available outcomes of the ill health capability hearing which was due to be conducted by Mr Kasanga. These included whether she wished to apply for ill-health retirement with the support of Occupational Health, exploring redeployment options or termination of her contract of the grounds of ill health capability should those not be viable. He also explained to the Claimant that, should she be dismissed following any ill health capability hearing, or if the Respondent was to explore redeployment during her notice, she would receive paid notice during that time, providing she was able to provide medical certificates. He requested the Claimant let him know by 19 November 2018 whether she wished to reconsider her decision and explore the alternative options.

44. On 18 December 2018, the Claimant emailed Mr Kargbo to state that she wished her resignation to be accepted [686]. Mr Kargbo wrote to her on 27 December

2018 to confirm that he had processed her resignation and that he had completed the payroll termination effective from the 12 December 2018, as requested by her [687]. He also confirmed to her that he had requested she was to be paid for accrued annual leave in her final payroll.

SUBMISSIONS

45. The Tribunal heard oral submissions from both parties and received written submissions from each. These are not repeated here but were greatly appreciated by the Tribunal.

LAW

46. An employee is dismissed by her employer if the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct (section 95(1)(c) of the Employment Rights Act 1996 (ERA 1996)).

47. The existence of an implied term of trust and confidence was confirmed in **Malik v. Bank of Credit and Commerce International SA** [1997] ICR 606 HL. The term was held to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

48. In **Kaur v. Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 CA, the Court of Appeal listed five questions to ask in order to determine whether an employee was constructively dismissed:

> What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
> Has he or she affirmed the contract since that act?
> If not, was that act (or omission) by itself a repudiatory breach of contract?
> If not, was it nevertheless a part (applying the approach explained in Waltham Forest v Omilaju [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
> If so, did the employee resign in response (or partly in response) to that breach?

49. There is no breach simply because an employee subjectively feels that a breach has occurred no matter how genuinely this view is held. If on an objective view there has been no breach then the employee's claim will fail (**London Borough of Waltham Forest v Omilaju** [2005] ICR 481). The test of whether there has been a repudiatory breach of contract is an objective one, see **Leeds Dental Team Ltd v. Rose** [2014] ICR 94 EAT.

50. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v. Sharp** [1978] ICR 221 CA, the employee “must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will

lose his right to treat himself as discharged". An employee may continue to perform the employment contract under protest for a period without necessarily being taken to have affirmed the contract. There comes a point, however, when delay will indicate affirmation.

51. To establish constructive dismissal, an employee must be able to show that they resigned in response to the relevant breach. In **Nottinghamshire County Council v. Meikle** [2004] IRLR 703 CA, the Court of Appeal held that the resignation must be in response to the employer's repudiation. It need not be the sole reason, but it must have "played a part" in their leaving.

52. In respect of 'last straw' cases, in **Waltham Forest v. Omilaju** [2005] ICR 481 CA, the Court of Appeal gave the following guidance:

> The final straw must contribute something to the breach, although what it adds might be relatively insignificant, it must not be utterly trivial.
>
> The act does not have to be of the same character as earlier acts complained of.
>
> It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it is likely to be so.
>
> An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

53. If a constructive dismissal is established, the issues of reason for dismissal and reasonableness of dismissal arise. The law in relation to these areas is not set out here.

Reasonable adjustments

70. The duty to make reasonable adjustments is found in section 20 of the Equality Act 2010:

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

71. The PCP being complained of must be one which the alleged discriminator 'applies or would apply equally' to persons who do not have the protected characteristic in question. As Baroness Hale stated in **Rutherford v. Secretary of State for Trade and Industry** [2006] ICR 785 SC, 'It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and disadvantaged groups.'

72. In **Royal Bank of Scotland v. Ashton** [2011] ICR 632 EAT, the Employment Appeal Tribunal held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to

the making or failure to make a reasonable adjustment. This case was considered by the Court of Appeal in **Griffiths v. Secretary of State for Work and Pensions** [2016] IRLR 216 on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

73. In **British Airways plc v. Starmer** [2005] IRLR 862 EAT, the term 'PCP' was held to be broad enough to encompass a discretionary management decision which applied only to the claimant. Conversely, in the disability discrimination case of **Nottingham City Transport Ltd v. Harvey** [2013] EqLR 4 EAT, Langstaff P held that the manner in which a disciplinary procedure was applied to an employee did not amount to a PCP, because a 'practice connotes something which occurs more than on a one-off occasion and … has an element of repetition about it.' Any apparent conflict between these two cases was resolved by the Court of Appeal in **Ishola v. Transport for London** [2020] ICR 1204 CA. The Court said that although a one-off decision or act could amount to a practice, it was not necessarily one; all three words (provision, criterion and practice) carried the connotation of a state of affairs indicating how a similar case would be treated if it occurred again and the PCP in **Starmer** was readily understandable as a decision that would have been applied in future to similarly situated employees.

74. With reasonable adjustments, there must be a prospect that the adjustment(s) will work (**Leeds Teaching Hospital NHS Trust v Foster** EAT/0552/10). In **South Staffordshire and Shropshire Healthcare NHS Trust v Billingsley** EAT/0341/15 Mitting J said:

> [17] Thus, the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show that the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under s 15(1) of the *2010 Act*. [We understood this to be a reference to section 20].
>
> [18] It is in the end a question of judgment and evaluation for the Tribunal, taking in to account a range of factors, including but not limited to the chance. A simple example may suffice to illustrate the point. If a measure proposed by an employee as a reasonable adjustment stands a very small chance of avoiding the unfavourable treatment arising out of her disability to which she would otherwise be subjected, but it was beyond the financial capacity of her employers to provide it so a Tribunal would be entitled to conclude that it was not a reasonable adjustment. Indeed, on those facts it would be difficult to justify a conclusion that it was a reasonable adjustment. In the case of a large organisation by contrast, where a proposed adjustment would readily be implemented without imposing an unreasonable administrative or financial burden on the employer then the obligation to take it may arise notwithstanding that the chance of avoiding unfavourable treatment was very far from a certainty.

Harassment

75. Under section 26(1), harassment occurs when a person engages in unwanted conduct which is related to a relevant protected characteristic and which has the purpose or the effect of:

> violating the worker's dignity; or
> creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

76. Unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

77. In **Betsi Cadwaladr University Health Board v. Hughes** EAT/0179/13 (Langstaff P) the EAT considered the recent cases in relation to harassment under section 26 Equality Act and said as follows:

> [10] Next, it was pointed out by Elias LJ in the case of *Grant v HM Land Registry* [2011] IRLR 748, that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said "tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."
>
> [11] Exactly the same point was made by Underhill P in *Richmond Pharmacology* at para 22:
>
> ". . . not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."
>
> [12] We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

78. In relation to the word "environment" in section 26, in **Weeks v. Newham College of Further Education** EAT/0630/11, the Employment Appeal Tribunal said: "…*it must be remembered that the word is "environment". An environment is a state of affairs".* Words spoken must be seen in context and that context includes other words spoken and the general run of affairs within the particular workplace.

DISCUSSION and DECISION

The evidence

79. The Tribunal found that the evidence given by the Claimant was at times unreliable and self serving. On several occasions, the Tribunal had to ask the Claimant to answer questions as asked rather than simply trying to promote her own case.

80. The Claimant denied that the origin of her continuing grievance [213] was the issue of the Improvement Notice in October 2015 although she admitted to being very upset. She reacted aggressively to it and the issue dominated her early correspondence with the Respondent and affected her attitude towards the Respondent for the remainder of her employment. At the meeting in March 2017 [224], notwithstanding the reference to receipt of the letter on Christmas Eve [285], the real weight of the complaint is about the Improvement Notice. This can be seen from the detail of the discussion on 11 September 2017 at the meeting held at the Claimant's home to discuss the stage 1 grievance outcome [316]. The Claimant blamed her union representative for 'doing all the talking'. The Tribunal did not accept the attribution of blame to the union representative in this or the other instances it was made. The Claimant said in evidence that the grievance investigation undertaken by Ms Baillie was not thorough. In the light of the grievance outcome and the 37 appendices, this is not correct. The Claimant remained discontented because her view about the Improvement Notice was not upheld as can be seen from the appeal letter [298].

81. The Tribunal found the evidence provided by Mr Kargbo and Mr Kasanga, the managers, credible and reliable. The Tribunal was less impressed with the evidence provided by the HR witnesses in support of the managers and deal with that evidence where it arises.

82. In relation to breach of the implied term, reliance is placed by the Claimant on:
Breaches of confidentiality in relation to her personal health information by Anita Macro, Ellinor Jamieson, Marina Jennings. Ms Spencer, Mr Stephens, Ted Kargbo and Ngoni Kasanga
Failure to conduct meetings at her home namely
Stage 2 grievance meeting on 25 January 2018
Stage 3 grievance meeting on 10 July 2018
Sickness absence meeting on 23 November 2018
Failure to contact the claimant regarding redeployment
Failure to obtain updated occupational health report before scheduling a final stage capability hearing
Calling the claimant angry and confrontational
Making reference to 'three men' being invited to the Claimant's home

It is claimed that the Claimant resigned at least in part due to the alleged breach of contract.

Breaches of confidentiality

83. The Claimant did not wish to disclose the detail of her diagnosis but never said why. She embarked on generalised complaints about confidentiality without ever stating exactly what concerned her. There was a responsibility on the Claimant to be open with the Respondent. She did not wish to have details of her diagnosis in the hands of more employees than was necessary but it was necessary for the line managers and their advisers to have that information. The Claimant contended late in

her evidence that there is no such thing as confidentiality in the NHS, yet at no stage identified who outside of the management team and HR support in respect of the sickness absence process had sight of her OH reports or in relation to the team engaged in dealing with her grievance who else was in possession of the stage 1 grievance report that contained the Anita Macro statement, or anyone who otherwise had details of her medical condition who should not properly be aware of her health concerns because of dealing with her sickness review. The letter sent by Ms Baillie [149] highlights that the process is confidential.

84. Ms Macro reported to Ms Baillie details of what she knew about the Claimant's medical condition during the course of the stage 1 grievance investigation. That information came to the Claimant's attention on or around 1 August 2017 [157 and appendix 17 to the report].

85. Ms Miller had seen the stage 1 grievance report. Given that she was charged with hearing the appeal, it was inevitable that she would do so in the context of a confidential grievance process.

86. Ms Rapley was adamant that the first knowledge that she had of the Claimant's medical condition was through reading the bundle for the Tribunal hearing; that no details had been divulged during her consideration of the grievance at stage 3. This seemed remarkable in a context where she upheld the Claimant's appeal but did not seem to know why.

87. Ms Jennings believed that consent had been requested at the stage when Mr Kargbo was first involved. The Claimant complains about Mr Kargbo having information about her health condition although the evidence was that he was the only person who she gave permission to receive her OH report. The initial consent to Mr Kargbo was probably sufficient for disclosure of the diagnosis throughout the proceedings. Ms Spencer and Mr Stephens were also involved in the ongoing processes.

88. The breach of confidentiality to Ms Jamieson is a reference to her apparent knowledge of the Claimant having an appointment with OH. It is not suggested that Ms Jamieson knew anything about the detail of what was discussed with OH or anything about the Claimant's medical condition. The evidence points to the source of information about the Claimant's appointment with OH coming from the Claimant although the Claimant denied this [375-377].

89. The evidence about confidentiality and consent is put into further context when the Claimant said she was principally concerned with who was aware of her medical condition and had she been asked, she would have given consent to share since she agreed that having knowledge of her sensitive medical information would have assisted the sickness process.

90. The Tribunal did not accept that failure to obtain specific consent on each occasion establishes a breach of the implied term of trust and confidence whether by itself or cumulatively. Nor did the Tribunal accept that there was a breach of confidentiality by the individuals who were involves in the processes which were taking

place which by itself or cumulatively established a breach of the implied term of trust and confidence.

Meetings at the Claimant's home address

91. The Tribunal accepts the evidence of Mr Kargbo, Ms Jennings and Mr Kasanga as to the behaviour of the Claimant. It is accepted that the accusations about the Claimant's conduct during the September 2017 meeting appear nowhere in any correspondence to her. In relation to the telephone meeting on 1 February 2018, Ms Jennings did not note adverse behaviour in her minutes of the meeting. Mr Kargbo also did not state in the outcome letter from that meeting any indication that the meeting had gone other than smoothly [371]. The Tribunal was concerned that the Claimant was not told directly that her behaviour was causing the Respondent problems. It might have been that such a communication might have triggered even worse behaviour but the responsibility was with the Respondent to be open with the Claimant.

92. Ms Miller was unwilling to meet at the Claimant's home because of information provided to her in relation to the September meeting. The Tribunal considered that it was incumbent on her to tell the Claimant the reason for her unwillingness but her failure to do so was not a breach of an implied term of her contract given that the more recent OH report of June 2018 said that she was not able to attend a meeting physically but could attend by telephone [500].

93. The circumstances in relation to the sickness absence meeting due to be held on 23 November 2018 do not constitute unreasonableness on the part of Mr Kasanga still less any breach of contract. He was initially open to hold a meeting at the Claimant's home. He was then subsequently aware of the concerns held by Mr Kargbo and Ms Jennings. He had first received advice from Ms Spencer then he had the phone call on 23 November at which point he said it was clear what the concerns were.

94. He described his 'duty to both the Claimant and to his managers Mr Kargbo and Ms Jennings'. Moreover, he was open in offering the Claimant the opportunity to air all of her concerns at a meeting with him. When considering the number and tenor or emails from the Claimant over the course of 14 November it is not considered that Mr Kasanga's decision was unfair or unreasonable still less in breach of a term of the Claimant's contract.

95. It is not accepted that failure to hold meetings at the Claimant's home address establishes a breach of the implied term of trust and confidence whether by itself or cumulatively.

Failure to obtain updated OH report before scheduling the final meeting

96. The Claimant correctly pointed out that the Respondent required an up to date OH report. When the Claimant raised this issue with Mr Kasanga in her email of 22 November 2018, he acknowledged that an updated report was needed, sought to arrange a date for the Claimant to be seen by OH and re-scheduled a further meeting for 21 December 2018. The rescheduled OHS appointment meant that the OH report

would not have been available for the meeting. The outcome of the meeting was not pre-determined.

97. It is not accepted that failure to obtain an updated OH Report before scheduling the final hearing established a breach of the implied term of trust and confidence whether by itself or cumulatively.

Was the Claimant angry and confrontational

98. The Tribunal did not accept the Claimant's denials that she was angry and confrontational. There are many email references which fit that description. It is because of this that Mr Kasanga refused to engage in a further slew of emails but instead offered to have all issues aired and considered at the hearing. The Claimant's claim that she was stressed and upset because he refused to engage in further email correspondence is unreasonable. The Tribunal finds that the Claimant remained not just unwilling to engage in discussion with Mr Kasanga on 23 November but was extremely unpleasant to him and did not allow him to say anything of substance.

99. Although much criticism was made of both Mr Kargbo and Ms Jennings about their describing in oral evidence the tenor of the meeting with the Claimant by phone on 1 February 2018, the Tribunal reviewed the numbers of angry and accusatory emails/communications from the Claimant to her managers, none of which is criticised or her conduct cautioned as well it might have been but instead a precautionary approach was taken to how to manage a meeting with a staff member who on any objective level, was an angry individual. As Mr Kasanga pointed out after receiving what he described as 'a tirade' of messages from the Claimant and becoming aware about Mr Kargbo and Ms Jennings' concern about attending the Claimant's home, in his letter of 14 November 2018, he said he would not respond to serial emailing but would wait to deal with all of the Claimant's concerns at the forthcoming meeting and subsequently in his letter of 27th November 2018 that he would not conduct a meeting at the Claimant's home. In any event, his stances cannot be held to constitute breach of the implied term of trust and confidence.

100. The Tribunal finds that the Claimant was angry and confrontational with Mr Kargbo and Ms Jennings, her tone is clear from December 2017 exchanges [292]. There is reference to the difficult nature of the conversation and emails that followed, in the management case presented to Mr Kasanga [577, 580]. There are further difficult exchanges showing belligerence and threats which again the Claimant blamed on her union representative [335]. The Tribunal considered the exchange of emails culminating in "how dare you" [335-337]. The Tribunal asked a question about the emails timed at 15.02 and 15.42 and the Claimant's response that she took advice from her union representative on the content and tone and again [336] where the Claimant maintained she was able to take advice between 08.44 and 09.34 and that she was advised to write in that manner. The Tribunal considered this unlikely.

101. Contrary to the Claimant's evidence, the Tribunal finds that although it may be overstating it to say she was in the habit of sending 'horrible texts', from the legible examples available [292] and the evidence of Mr Kasanga, he received a number of challenging messages by texts [630].

102. It was not a breach of the implied term of trust and confidence for the Respondent to view the Claimant as angry and confrontational.

Three men

103. The Claimant alleges that Mr Kasanga's letter dated 27 November 2019 [667], in particular the comment that she would be inviting three men into her home, was offensive and degrading. The three man were employees of the Respondent none of whom the Claimant had met before. Mr Kasanga said his primary concern was for the safety of both the Claimant and his colleagues. His evidence that he would have done the same irrespective of the sex of the participants was accepted by the Tribunal. The reaction of the Claimant is difficult to understand. She said "The fact he referred to inviting "three men" into my home I felt was extremely discriminatory and sexual harassment. What did the gender of meeting attendees have anything to do with anything? How was the gender of the attendees anything to do with a sickness meeting in my home?"

104. She identified this as the final straw but only on 12 December 2018, with immediate effect but this was no basis for resigning.

105. The Tribunal concluded that viewed objectively, there was no breach of the implied term of trust and confidence either individually or cumulatively.

Failure to contact the Claimant regarding redeployment

106. The Respondent's redeployment policy was available to the Tribunal from the disciplinary case [598-599]. The Tribunal was also given an outline of the process the Respondent would follow in evidence:

1. There is a meeting where it is discussed that the employee's job role is no longer suitable for them due to their health (this may be a sickness advisory meeting or a formal ill health capability hearing), redeployment is considered as an option, usually alongside Occupational Health advice recommending this and what adjustments are needed. The employee's Line Manager issues a Redeployment Registration Form to the employee at the meeting or with the outcome letter of the meeting. The employee is asked to return this form back to the Local Employment Coordinator.

2. Once the Registration Form is received from the employee, the Local Employment Coordinator emails the employee a link to complete a detailed, generic Trust application form, so the employee can provide details of their education and training, employment history and a supporting statement showing their skills and knowledge.

3. Once the application form is completed and submitted by the employee, this is used by the Local Employment Coordinator and the Trust's Recruitment Team to match the employee to potentially suitable vacant posts. A potentially suitable role would be considered to be at the same band, or a lower band (without pay protection) if the employee is in agreement to this, and would be either a permanent contract or fixed term

contract of a year or more. An employee and role are matched based on the core, essential criteria for a role.

4. When a matched role is found, details of the employee and anyone else on the Redeployment Register who is potentially suitable for the role are sent to the Recruiting Manager as priority candidates, who should be seen ahead of other applicants. In most cases employees on the Redeployment Register are matched before an advert is posted and so the advert is held back.

5. Recruiting Managers feedback to the Local Employment Coordinator and Recruitment Team. If they agree that the employee appears to be suitable for the role, an informal interview/meeting is arranged between the Recruiting Manager and employee to discuss the suitability of the role. If there are more suitable redeployment candidates than vacant posts, a competitive interview process is held between those candidates. If the Recruiting Manager does not agree that the employee meets the core, essential criteria, then that manager provides feedback as to the reasons for that.

6. After the meeting and/or interview, the Recruiting Manager makes a decision as to whether the role is suitable for the redeployment candidate. If it is agreed that it is a suitable role, the redeployment candidate is offered the role on a trial basis initially, which is usually for 4 weeks. Necessary pre-employment checks are taken after the conditional offer, including Occupational Health clearance.

7. If, after the interview/meeting, it is decided that the role is not suitable for the employee, the Recruiting Manager provides feedback based on the essential criteria.

8. Employees can also feedback at any stage, should they feel that the role is not suitable and provide reasons why, which would be considered by their current Line Manager.

9. At the end of a trial period, if everyone is still in agreement that the role is suitable, the employee is transferred into the role. If the trial is unsuccessful, the employee is placed back on the Redeployment Register. If the employee has already been given notice to terminate their employment, they will remain on the Redeployment Register for the remainder of their notice period.

10. Throughout the process employees going through redeployment are also offered careers advice and guidance by the Local Employment Coordinator, such as job searching, application/CV writing and interview techniques.

11. If the Claimant's completed redeployment form had been received by the Trust or if she had attended the formal ill health capability hearing and confirmed that she was interested in redeployment at that meeting and thereafter completed the relevant form, redeployment would have been

> explored for her. It would have also been necessary to obtain Occupational Health guidance to ascertain whether she was able to undertake the role in light of her health.

107. The Tribunal concluded that the redeployment policy itself was not contractual however the Respondent is obliged to address the issue at the appropriate time.

108. The history of the Claimant's sickness absence management indicates a number of unimpressive actions or inaction on the Respondent's part. Although there were other matters, such as a letter not being responded to for 13 months, the problems began in earnest with the nearly 21 month delay between the Claimant's absence beginning on 13 May 2016 and the first meeting to consider that absence on 1 February 2018.

109. The meeting of 29 August 2018 was when the issue of redeployment should have been discussed in depth. The Claimant did not attend and it appears that the Respondent lost sight of its obligations. The letter of 29 August refers to redeployment as one option and attached a registration form but the full details of what the redeployment process entailed was not set out to the Claimant in writing in the way it was for the Tribunal.

110. The majority of the Tribunal does not accept the Claimant's evidence that she sent back the redeployment forms. In evidence, the Claimant said that her sister posted them. The Tribunal noted that no return address or email was provided by Mr Kargbo or Ms Jennings [498A]. The Claimant must have had to identify the address and made no complaint about having to do so. This is uncharacteristic. These were important forms and some form of postal receipt could have been obtained. She said that she telephoned the named contact on the form but only got an answerphone on which she left no message, this also seems uncharacteristic and again there was no complaint. If she had returned the forms, she was uncharacteristically quiet about the Respondent's pace of processing of them.

111. The Tribunal has made findings about the return posting of the forms but this does not absolve the Respondent of its responsibility to the Claimant. In relation to the Redeployment Form, Ms Jennings asserted in her supplementary statement para 3 that:

> "Mr Kargbo sent a Redeployment Registration Form to Ms Gillespie for her to complete if she was interested in exploring redeployment…however the Trust did not receive a completed copy of the form back from Ms Gillespie or, as far as I am aware, any other communication from her to suggest that she was interested in redeployment."

Ms Jennings repeats this at [5] saying

> "I confirm that the form was not received by the Trust and at no point during her employment did Ms Gillespie inform us that she had returned the form, neither did she inform us that she was interested in exploring redeployment."

112. This did not even generate the most cursory investigation by Ms Jennings to check processes, to ask the Local Employment Co-Ordinator whether the form had been received, to ascertain what the post logging process might be or even to find out

what steps would have followed once the form was received. In addition, there is no process for alerting the Local Employment coordinator that the Claimant may be joining a list of redeployment searchees and the only evidence we had was Ms Jennings saying she may have verbally advised Ms Harrod but she could not recall a conversation. Mr Kargbo under cross examination accepted that after sending her the letter with the registration form, he had not followed this up with the Claimant to check that she had received the letter and form or to check whether she had returned it to Ms Harrold.

113. Ms Jennings was sent an email on 22 November 2018 specifically raising a lack of contact about redeployment and alleging it was a breach of both the Sickness and Absence Policy and the Equality Act 2010 [663]. Mr Kargbo stated at para 16 of his witness statement "I did not feel it appropriate to press Ms Gillespie for a response to my letter regarding redeployment as I did not wish to undermine the ongoing capability process."

114. The Respondent went straight to scheduling what it anticipated would be a final capability meeting but Mr Kasanga was certain that he would have addressed the issue of redeployment at the meeting. This may be so but the responsibility arose at a much earlier stage. The Respondent had received three emails on 14 November 2018 in which the Claimant said that she had not been contacted about redeployment. Her comments were simply ignored.

115. Had she not resigned and had attended the meeting and if the Respondent had fulfilled its obligation of reasonable adjustment by discussing and addressing redeployment, it is likely that the Respondent would have had to extend her absence management process to allow a 3 month period of a redeployment search and there is no evidence to suggest this had even occurred to the Respondent after the Claimant raised concerns that there had been no contact with her. The process was not managed by HR seamlessly and in cross examination Ms Jennings recognised should have done more. The Claimant fell between two HR functions, that of Ms Jennings and the redeployment officer (Rachel Harrod). Mr Kargbo's paragraph 16 quoted above seems to suggest looking at redeployment would get in the way of the capability process, whereas it was actually at the heart of the process.

116. The Tribunal considered that the Respondent did fail to contact the Claimant about redeployment when it was the most immediate issue to be addressed. The Respondent should not have been proceeding to a capability hearing at which the Claimant might have been dismissed. The Respondent was prompted by the Claimant to address redeployment but ignored the issue entirely. This failure by the Respondent constitutes a breach of the implied term of trust and confidence.

Harassment

117. There was no breach of contract. This issue is dealt with separately below.

Did C resign at least in part due to the breach of contract?

118. The Claimant said that she had no choice but to resign "due to the continued and constructive actions of the Respondent which were having a continual adverse

affect on my health both physically and psychologically, I was forced to take my NHS pension early which resulted in a loss of 25% of my lump sum, and a loss of 25% of my monthly pension (pg 643). At the time I was forced to take my pension early, I was less than four months away from my 55th birthday. If I had been employed in the NHS until 10th April 2019 I would have received my full pension and my full lump sum had I chosen to retire at the age of 55." One of the reasons set out by the Claimant in her resignation letter was the failure of the Respondent to contact her about redeployment. Indeed, her point 3 in her resignation letter was ignored

119. The reason for dismissal was capability. The dismissal fell outside the band of reasonable responses for the same reasons that there was a constructive dismissal. The Respondent failed to apply its redeployment procedure to the Claimant. The dismissal was unfair.

Sexual harassment

120. This claim arises from the letter sent by Mr Kasanga to the Claimant on 27 November 2018 [667]. The Tribunal did not find that Mr Kasanga's reference to the three men who would be attending the Claimant's property to conduct the sickness review hearing as infringing her dignity and constituting sexual harassment. Mr Kasanga as the senior manager charged with decision making, Mr Kargbo who was the Claimant's line manager and Mr Stephens who was charged with providing HR support were the individuals concerned. Despite the Claimant's assertion that she did not know what Mr Kasanga was 'implying' by this reference, she knew the purpose of the visit and the men involved even if she had had fewer dealings with Mr Stephens. The Tribunal did not accept that given the context of the words used by Mr Kasanga in his letter of 27 November 2018 that those words could be given the interpretation that the Claimant invited the Tribunal to make.

121. Mr Kasanga's evidence was, contrary to any assertion that he was infringing the Claimant's dignity, that he was concerned, as he would have been for a man in the same position as the Claimant. His comments also closely ally with his concerns about the Claimant's conduct and his "responsibility to you [the Claimant] and all of the participants…" [667]. The Employment Tribunal was perplexed by the Claimant's reaction and her failure to respond to Mr Kasanga by email. She could easily have said that she had no problems with him, Mr Kargbo and Mr Stevens attending, if that was her genuine view. In fact, she sent her angry response [669] to Ms Rapley who was not engaged with the sickness process and to Ms Jennings and not to Mr Kasanga. The Claimant's description [669] of being harassed and bullied on a call described by Mr Kasanga in his evidence as one where he barely got a word in and then had the phone put down on him is not accepted by the Tribunal.

122. The Claimant has not shown that the conduct had the purpose of violating her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment. The Tribunal proceeded on the basis that Mr Kasanga's letter was unwanted conduct but it was not relevant to sex. Even if it was and the Claimant felt that the Prohibited Effect had been achieved, it was not reasonable for the Claimant to have so felt. In doing so, the Tribunal considered section 26(4)(a)-(c).

123. In relation to perception, the Tribunal heard that the Claimant considered the reference to be some sexually offensive reference to 'what she might do to the men or what they might do to her'. Quite how the words are to be construed in that way is not understood, but that was her perception. Whether that should be relied upon must be questioned in light of the number of other areas of unreliability in the Claimant's evidence.

124. The 'circumstances' according to the EHRC Employment Code paragraph 7.18(b) can include health, mental health and cultural norms but also the environment in which the claimed harassment takes place. This included the ongoing concerns about home visits, the ongoing capability procedure and the personnel involved. In short, the Claimant ought properly to have appreciated that those men being referred to were those engaged with her sickness capability process, and although she refuses to accept this, the belligerent way in which she dealt with managers.

125. Whether it was reasonable for the conduct to have the effect claimed by the Claimant is an objective test. The Tribunal find that the conduct did not have the effect contended for. To the extent that any offence was caused, having heard the evidence of Mr Kasanga, the Tribunal find that any offence caused was unintentional. It is hard to criticise his evidence in cross-examination that as his genuine perception was that the Claimant was angry and aggressive and he felt a need to explain that perception, the words he used to communicate that were appropriate

Failure to make reasonable adjustments.

126. The PCP proposed by the Claimant would apply to any employee. The redeployment policy would apply to, among others, disabled employees. The ordinary practice in cases such as that of the Claimant would have been to apply the redeployment policy. In this the Respondent failed for the reasons set out earlier. There was no discernible practice of not so doing which adversely affected disabled employees. The situation came about because of the individual circumstances of this case. The Tribunal applied **Nottingham City Transport Ltd v. Harvey** that the manner in which a disciplinary procedure was applied to an employee did not amount to a PCP, accordingly a contravention of section 20 did not occur.

127. All of the claims are dismissed except that of constructive unfair dismissal in respect of which the Tribunal finds that the Claimant was unfairly dismissed. A telephone case management hearing should be fixed to make arrangements for a remedy hearing.

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Employment Judge Truscott QC

Date 22 April 2021