EMPLOYMENT TRIBUNALS

Claimant: Ms T Amber

Respondent: West Yorkshire Fire and Rescue Service

Heard at Leeds **On:** 30 September 2024.
1 and 2 October 2024.
3, 4 and 11 October 2024 (in chambers).

Before: Employment Judge D N Jones
Ms J Hiser
Mr K Lannaman

REPRESENTATION:

Claimant: Mr A Allen KC
Respondent: Mr D Findlay, counsel

JUDGMENT

1. The respondent victimised the claimant:

    1.1 On 5 and 6 December 2022, by making a disproportionate threat to suspend the claimant's pay because she had not submitted a fit note and unfairly criticising her for not maintaining contact with her manager;

    1.2 On 21 December 2022, by sending an email to the therapist, Jennifer Lewis, in which the claimant was portrayed as an unreasonable complainant;

    1.3 By the unreasonable and unfair handling of the claimant's grievance against Mr McCarthy, the outcome of which was sent on 9 January 2023 and failing to make findings about all matters within it.

2. The claimant was a disabled person, and the respondent knew or could reasonably have been expected to know that, from 4 April 2022.

3. The claims for direct race discrimination, disability discrimination in the form of failing to make reasonable adjustments, harassment related to sex or of a sexual nature, constructive unfair dismissal and the remaining complaints of victimisation are dismissed.

REASONS

Introduction and issues

1. These are claims for constructive unfair dismissal, disability discrimination in the form of a breach of the duty to make reasonable adjustments, direct race discrimination, harassment related to sex and/or of a sexual nature and victimisation.

2. The parties agreed that it was possible for the Tribunal to consider these claims notwithstanding there is an earlier employment tribunal claim in respect of the same employment which is outstanding. Although that claim was initially struck out, that decision has been overturned on appeal and the case remitted.

3. The issues were identified at a preliminary hearing on 12 January 2024, by Employment Judge Maidment. With some amendments they are as follows:

Direct race discrimination

3.1 Did Joanne Hardcastle (HR Manager) insinuate that the claimant's problems were self-inflicted. (It is accepted on the evidence that she refused to move the claimant from Ms Davey's management to another team within the respondent).

3.2 If so, was that, and the refusal to move the claimant to another team, a detriment?

3.3 If so, was it less favourable treatment of the claimant because of the claimant's protected characteristic of race (her Asian ethnicity)?

Disability

3.4 Did the claimant have a mental impairment, namely anxiety and stress?

3.5 If so, did it have a substantial adverse effect on her ability to carry out day-to-day activities?

3.6 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.7 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

3.8 Were the effects of the impairment long-term? Did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur?

Breach of the duty to make adjustments

3.9 Did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date? The claimant asserts that the respondent was aware of her disability following the occupational health reports of 9 November 2020, 4 April 2022 and 20 June 2022 from Dr Neil Smith?

3.10 Did the respondent have a provision, criterion or practice (PCP) of requiring employees to keep in touch with their manager during their sickness absence?
3.11 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that, her stress and anxiety had been caused by her interaction with her manager, Ms Davey, and was exacerbated by the thought of having to have continued interaction with her?
3.12 Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage? (The claimant asserts that she repeatedly told the respondent about it).
3.13 What steps could have been taken to avoid the disadvantage? The claimant suggests moving the claimant to another manager; or not require the claimant to interact with Ms Davey - a means to enable her return to work as suggested by occupational health.
3.14 Was it reasonable for the respondent to have to take those steps and did it fail to do so?

Harassment related to sex/of a sexual nature

Did Mr McCarthy:

3.15 On 24 August 2022 inform the Claimant about details of his personal life such as the fact that his wife had run off with another man and that he was lonely; and that it was nice to be with somebody; and suggest that they meet for drinks away from work?
3.16 On 5 October 2022 invite the claimant to call him at any time including after working hours and at night; and speak to the claimant in a possessive way?
3.17 On 14 October 2022 telling the Claimant that no safeguards would be put in place for her but that the 'beauty of the situation' was that he would 'look after her'; and 'nobody would need to know anything'.
3.18 If so, was that unwanted conduct?
3.19 Did it relate to sex?
3.20 Alternatively, was it of a sexual nature?
3.21 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
3.22 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation

3.23 On 25 July 2022, did Joanne Hardcastle (HR Manager) insinuate that the claimant's problems were self-inflicted (the first detriment)? It is accepted she refused to move the claimant to management under a different team to Ms Davey, (the second detriment).
3.24 On 5-6 December 2022, did Mr Brandwood make a disproportionate threat to suspend the claimant's pay because she had not submitted a fit note; and unfairly criticise her for not maintaining contact with her line manager (whose conduct had caused the claimant to be off sick);
3.25 On 19 December 2022, did Mr Brandwood intimidate the claimant by contacting her to seek further details about the grievance that she had

raised which was in part about his behaviour; and threatening the claimant with a capability meeting in the new year;

3.26 On 21 December 2022 did Mr Brandwood send an unsolicited email directly to the claimant's therapist, Jennifer Lewis, without permission from the claimant, seeking to criticise the claimant and portray her as an unreasonable complainant.

3.27 On 9 January 2023 did Dave Walton (Deputy Chief Fire Officer) both in his unreasonable rejection of the Claimant's grievance against Mr McCarthy; failing to deal with all of the matters contained in the grievance; and in the manner in which he expressed himself seeking to blame the claimant for the actions of others?

3.28 By doing so, did it subject the claimant to any detriments?

3.29 If so, was it because the claimant did protected acts of:

3.29.1 the Claimant's first ET claim of 22 September 2021 in which she claimed race discrimination, victimisation and harassment;

3.29.2 The Claimant's grievances of 18 December 2022 alleging victimisation and sexual harassment.

<u>Constructive unfair dismissal</u>

3.30 Did the respondent fail to make reasonable adjustments or do the acts set out in respect of direct race discrimination, sexual harassment and victimisation?

3.31 Did those things (regardless of whether the acts complained of also amount to unlawful discrimination, harassment or victimisation) breach the implied term of trust and confidence?

3.31.1 Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

3.31.2 Did it have reasonable and proper cause for doing so?

3.32 Did the claimant resign in response to the breach?

3.33 Did the claimant affirm the contract before resigning?

3.34 If the claimant was dismissed, what was the reason or principal reason for the breach of contract?

3.35 Was it a potentially fair reason?

3.36 Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant?

Evidence

2 The Tribunal heard evidence from the claimant. The respondent called Mr Ian Brandwood, the Director of Human Resources until his retirement on 31 May 2024, Ms Alison Davey, Head of Corporate Services, Mr Martin McCarthy, Director of Corporate Services and Mr David Walton, Deputy Chief Fire Officer.

3 The parties produced a bundle of documents running to 1,034 pages.

Background/Facts

4 The respondent is a public authority with responsibility for fire and rescue in West Yorkshire.

5 The claimant commenced employment for the respondent on 31 October 2016 as an Information Governance Assistant. She dealt with requests for subject access under the data protection legislation and freedom of information.

6 The claimant is of Asian ethnicity and of Pakistani origin.

7 The claimant worked in the Corporate Services Department. Ms Alison Davey was the Head of Corporate Services. The claimant's former line manager was Mr Chris Gray who left on 21 November 2021. He reported to Ms Davey. Aleemah Mohmin was the Information Governance Administrator, but she had a different reporting line, through Beverley Croft Nicholson, to Ms Davey. The Department was based in the HQ of the respondent in Birkenshaw, Bradford.

8 On 22 September 2021 the claimant presented a claim to the Leeds Employment Tribunal (the first claim). It concerned claims of race discrimination, victimisation and harassment. On 14 March 2022 part of that claim was struck out and deposit orders made as a condition of pursuing the other complaints. They were struck out on 16 May 2022 because the claimant had not paid any of the deposits. An appeal against all strike out judgments was allowed by the Employment Appeal Tribunal on 14 August 2024.

9 On 22 March 2022 the claimant was taken absent from work, for work-related stress. She said it was because of being challenged by Ms Davey about undertaking a task for Mr Walton, but the respondent's counsel suggested it was a consequence of her reaction to the outcome of the Tribunal hearing in respect of the first claim. Nothing turns on the reason why. The absence continued for nine months until her employment ended in January 2023.

10 On 7 April 2022 Mr Brandwood held a meeting with the claimant and her union representative, Mr Bairstow. The purpose of the meeting was to agree a way forward in the light of what had happened in the employment tribunal proceedings and dissatisfaction with earlier investigations. In cross examination Mr Brandwood said that his recollection, albeit vague because it was 2½ years ago, was that he had said to the claimant that if she paid the deposits the respondent would vigorously defend the claim. The only record in the note which he later produced of the meeting, was that the claimant did not indicate whether she would continue with the claim but that she was informed that she would be treated fairly regardless. The claimant said that she requested a transfer to work with Gayle Seekins and that she, Ms Seekins, was supportive of the move. In advance of the meeting Mr Brandwood had telephoned Ms Seekins to discuss this, because the suggestion had been referred to in the occupational health report of 4 April 2022. Ms Seekins had informed Mr Brandwood that if that was management's decision, she would agree to it. Mr Brandwood's note recorded Ms Seekins was not as supportive as the claimant had inferred.

11 Mr Brandwood did not consider it was viable for the claimant to report to Ms Seekins who was responsible for ICT, a department which did not have knowledge of information governance. Because a new manager, Mr Shashi Sumputh, had been appointed to replace Mr Gray and was about to start, he told the claimant she would not need to contact Ms Davey on a day-to-day basis. The claimant raised concerns about Miss Mohmin, of whom she had made complaints including allegations of race discrimination which are part of the first employment tribunal claim. Mr Brandwood discussed the possibility of a move to a different department and the claimant suggested a position she had seen. That was at a higher level and Mr Brandwood could not authorise it. He said he would be happy to help look for other vacancies or opportunities in the organisation.

12 In respect of the note of the meeting, its existence first emerged in Mr Brandwood's cross examination. When Mr Allen queried why it had not been disclosed, Mr Brandwood said he had sent it to the legal officers preparing for the tribunal claim and so did not know why it was not in the bundle. It was produced overnight, and Mr Brandwood was questioned about it the following morning. The claimant was sceptical about its authenticity. Although there was an unsatisfactory history of disclosure in this case by the respondent, we were satisfied it was the record of the meeting. The manner in which Mr Brandwood volunteered its existence struck the tribunal as genuine. Mr Brandwood was the point of contact for collecting relevant documents for disclosure in this litigation and, had he wanted to conceal it, it is unlikely he would then raise its existence in evidence. It is of course possible that the legal team preparing the case were selective in what they chose to include in the disclosure, but we did not regard that as likely. If Mr Brandwood was going to concoct a new document to assist his case, it is unlikely this would have been what he created as it was not of any particular significance. It was not a word for word record of what had taken place but is all we have to rely upon, other than the recollections of Mr Brandwood and the claimant. We accept it as an authentic but incomplete note of what was said. At the end of the meeting the claimant said she should speak to her doctor about returning to work on the expiry of her current sicknote, 12 April 2022.

13 On 13 April 2022 the claimant sent a text to Ms Richardson, HR officer, to inform her that she was to obtain another doctor's note. Ms Richardson notified Mr Brandwood of this by email. Mr Brandwood replied to Ms Richardson and told her to remind the claimant, when she next spoke to her, that she should be communicating with Ms Davey as her line manager about her absence. Ms Richardson agreed to pass the message on.

14 On 25 April 2022 Mr Sumputh commenced employment with the respondent as the claimant's line manager.

15 On 25 July 2022 the claimant attended a meeting with Joanne Hardcastle and Debbie Richardson, human resources officers, at the fire station in Cleckheaton. She was accompanied by her union representative Mr Martyn Bairstow. The evidence before the tribunal in respect of this meeting, was of the claimant and a note of the meeting prepared by Ms Hardcastle or Miss Richardson, with suggested corrections to the notes which the claimant prepared shortly

afterwards. There is also an email from Ms Hardcastle to Mr Brandwood, the following day.

16 Upon that information we find that Ms Hardcastle stated there were two objectives. The first, to check on the claimant's welfare and health and the second, to consider the situation and discuss a way forward and a return to work in the near future. The claimant stated she felt unwell, and that the occupational health advisor had said he did not see her returning for at least two months. The claimant said she had been bullied by her colleagues and that the new line manager would be her third. She said she would need safeguards and protection. Ms Hardcastle said that the claimant had exhausted all internal and external procedures, being a reference to the first tribunal case. The claimant and her union representative pointed out that there was still an appeal of the tribunal proceedings pending. The most recent medical report, that of 20 June 2022, was not before Ms Hardcastle. The claimant had seen a draft and said it would be forwarded by the end of the week. She did not want to disclose the contents of the report in the meeting. The claimant said that she had been receiving support from her GP, was having counselling and had been taking medication. She did not find that the Employee Assistant Programme service helpful. She had been offered counselling over the phone but wanted it face to face. A welfare officer had been appointed by the respondent, but the claimant did not want to disclose who the person was.

17 They discussed what had happened in the workplace and that the claimant had felt bullied by numerous people. The claimant said she wished to return under a new management structure. Ms Hardcastle stated that this would not be possible. The claimant said that it was for Mr Brandwood to resolve what changes were needed for her to come back. They discussed a change of management which might involve Ms Seekins taking over Ms Davey's role as her second line manager, but it was rejected for the same reasons as discussed at the meeting on 7 April 2022 with Mr Brandwood.

18 The claimant suggested safeguards should be put in place to protect her from bullying. She was asked what these would look like, to which she replied *'you tell me".* They discussed other roles in the organisation. One was internal but the claimant had not been successful because she was unable to drive. The claimant said she wanted to return to her current role.

19 There was a discussion about team coaching, which had taken place the previous year, in August 2021. This followed a recommendation arising from a disciplinary investigation into allegations against the claimant of refusing to communicate with a colleague and provide necessary support to allow colleagues to carry out tasks effectively and efficiently. That matter was delayed because the claimant submitted grievances about Mr Gray and Ms Mohmin. The grievances were not upheld. The outcome of the disciplinary investigation into the claimant was that there was insufficient evidence to proceed but that there were relationship issues within the team which were not healthy. Similar observations with respect to the difficult relations in the team were recorded in the outcomes to the grievances. Both disciplinary and grievance outcomes recommended mediation between the claimant, Mr Gray and Ms Mohmin.

20 Ms Hardcastle asked the claimant if it was possible she was at fault and felt she bore any responsibility. Ms Hardcastle raised this matter four times in all. In addressing it, the claimant mentioned two previous incidents, one when she was required to take her shoes home and had been accused of making the office smell, with very strong racist overtones, and another when the manager Ms Nicholson required the claimant to dispose of an office umbrella and again accused the claimant of making the office smell. Ms Hardcastle queried whether it was the personal items that caused the smell and the claimant said it was the pipes. In an email to Mr Brandwood of 26 July 2022, Ms Hardcastle updated him on the meeting. She stated that the claimant insisted on raking over old ground again, the same things they had heard numerous times, that everyone was to blame apart form herself and she had asked her directly but the claimant took no responsibility for anything.

21 The proposal was the same as had been discussed at the meeting on 7 April. The way forward which Ms Hardcastle suggested was that a new line manager would present a fresh start, together with a new Director heading up the Department. The claimant was to have meetings with both to discuss her return. She would meet Mr McCarthy, the new Director, within a fortnight to talk through her stress risk assessment and to provide her occupational health report to Miss Hardcastle and Mr Brandwood. Ms Hardcastle suggested CBT may prove helpful and a query was to be made with the occupational health advisors as to whether that was possible.

22 On 24 August 2022 the claimant attended a meeting with Mr McCarthy at his office in Oakroyd Hall in the HQ. The meeting lasted about 1¼ hours. No one else was present. There are no notes of this meeting. There is some common ground between the claimant and Mr McCarthy as to what was said but dispute around the subject matter of the harassment complaint.

23 Mr McCarthy had recently received the claimant's stress risk assessment. They discussed adjustments and hybrid working. There is dispute as to whether the claimant had said she did not like to work from home and found it lonely or that she had said she did not mind working from home. Both agree Mr McCarthy had said his wife had left him for another man and working from home could be lonely.

24 The claimant said that Mr McCarthy told her only the chief fire officer, Mr Roberts, and she knew of his marital breakdown. Mr McCarthy denied that. He said he had told others about it at the respondent. The claimant said that Mr McCarthy had said she would not be considered a 'dirty name' within the organisation. The claimant says that this was a degrading and unwarranted comment and implied that Mr McCarthy meant the opposite. Mr McCarthy says that it is not a term he ever uses and, if it was said by him, it would have been a response to the claimant having said she was a 'dirty name' within the organisation. The claimant said Mr McCarthy told her they could meet for drinks and did not have to meet at work. This made her feel uncomfortable. According to Mr McCarthy, drinks were talked of in two contexts. Firstly, as an adjustment, if the claimant felt that the reasonable adjustments were not working and if she wanted a discussion his door was open and she should feel free to come for a coffee and discuss it.

Secondly, he hoped a line could be drawn under the past. To assist to build a positive relationship he proposed the team socialise out of work, going for a drink, a meal or tenpin bowling. At the end of the meeting, Mr McCarthy commented on the claimant's Mulberry handbag. He said that in the context of her saying she was going to meet up with some friends and go for some retail therapy and, noticing that she had a Mulberry handbag, he made a comment to the effect that his wife had one of those. The claimant's recollection is that he had asked what she was doing after the meeting and whether she was going to the Mulberry shop. She said he had said he had spent a considerable amount of money on handbags for his wife.

25 In her witness statement the claimant stated she felt that Mr McCarthy had turned the meeting into "*some kind of sexualised freakshow"*. It was degrading, humiliating and offensive and he had exploited the situation given his position of power. She says she felt uncomfortable in the meeting, she did not think a man would have been spoken to in the same circumstances and she was placed in a vulnerable position and taken advantage of. In the hearing she described Mr McCarthy as a sexual predator.

26 Mr McCarthy stated that the claimant was upset during the meeting and he sought to empathise with her and build trust. That is why he claims he referred to his personal marital circumstances and offered to be available to assist by phone call or have a coffee, if he were free. After the meeting Mr Bairstow contacted Mr McCarthy, the following day, and told him the claimant was in a very positive frame of mind and was now looking forward to returning to work. The claimant's welfare officer also thanked Mr McCarthy for his efforts in the afternoon, when he came into his office.

27 Faced with two contrasting recollections of the meeting, with no contemporaneous note or record of any type from either side, we had the recollections of the two witnesses of what had been said. Other circumstantial evidence, such as subsequent emails, threw some light on what probably had happened.

28 The claimant's initial reaction to the meeting had been favourable, as reflected in the comments of her union representative and welfare officer the following day. We did not have the benefit of Mr Bairstow to confirm if he had said this, but accept it is not likely to be something Mr McCarthy has invented, as it would have been relatively easy to contest, had Mr Bairstow been called.

29 The claimant sent two emails on 14 and 17 October 2022 to Mr McCarthy in which she criticised him. She had mentioned only one inappropriate comment of this type in her email of 17 October 2022, his reference to "the beauty of the situation", in his phone call on 14 October. We consider this below. She did not comment on any alleged inappropriate sexual conduct at the meeting of 24 August 2022 until she submitted grievances on 18 December 2022. That is surprising and some other reference or allusion to improper comments might have been expected. Against that, the claimant makes the valid point that there was an imbalance of power such that one might not expect an employee to raise matters which might hinder their return and harm their future employment

prospects. However, by mid-October, in her emails, the claimant was blunt in pointing out the failings of Mr McCarthy, Mr Brandwood and Mr Sumputh. That is not a criticism of her. There were significant shortcomings by them in the handling of the claimant's return which they ought to have addressed. But with respect to the meeting of 24 August, the claimant's silence on Mr McCarthy's alleged inappropriate sexual misconduct is significant. In cross examination the claimant said that she had discussed the events with her mother, some time later and her mother had said that Mr McCarthy's comments had been inappropriate.

30 Where there is a conflict, we prefer the evidence of Mr McCarthy. It is probable the claimant was the first person to suggest she was regarded as a 'dirty name'. The history of grievances and disciplinary investigations within this small department and her concerns she was bullied by the others, reflected her feeling of how her colleagues perceived her. We do not find Mr McCarthy said only Mr Roberts and the claimant knew of his marriage breakdown. Mr McCarthy's explanation about drinks and the context in which the handbag was discussed had sufficient detail and context to make it plausible. We emphasise that these findings are based on the very limited material we have and can only be on what is probable.

31 On 22 September 2022 the claimant sent an email to Mr McCarthy informing him that she was to have her first cognitive behavioural therapy (CBT) session on 27 September and that it might be useful to have a short catch up by telephone. A telephone discussion was proposed and took place on 5 October 2022. Mr McCarthy could not recall it in his evidence, until his memory was jogged in cross examination when his attention was drawn to the email trail. In her grievance, the claimant said that Mr McCarthy had said she could call him at night. She said he started to force her to accept a return date, was concerned about her sick pay which was to reduce, and wanted her to return as soon as possible. The claimant said she found this possessive. She was fearful because she did not want to lose her job. Mr McCarthy said he had not told the claimant she could call him at any time. He had not contacted her outside work hours. The claimant had emailed Mr McCarthy in the evening, to arrange the meeting. Mr McCarthy replied the next morning and suggested the claimant speak to Mr Sumputh about adjustments. We find it unlikely that Mr McCarthy invited the claimant to call him at any time of night or day.

32 On 11 October 2022 the claimant sent a 5-day fit to work note to Mr McCarthy, as requested. She emailed him in the evening and enclosed a letter from her therapist which suggested at least four more sessions over four weeks, but if she had to return earlier than that, a phased return with adjustments should be facilitated. She referred to an agreement with Mr Brandwood that if and when Ms Mohmin returned to work from maternity leave, she need have no concerns and her contact with Ms Davey would be limited.

33 On 12 October 2022 the claimant emailed Mr McCarthy about her Teams meeting with Sashi Sumpath that day. He had informed the claimant that she, Ms Mohmin and he, Mr Sumpath, would be working in the same office together and he was unaware of any issues. She expressed her surprise that Mr Sumpath did not know of the circumstances of her return including the assurance from Mr

Brandwood that she need have no issues with respect to Ms Mohmin's return. She was concerned about how Mr Sumpath could manage her return if he did not know of the situation. She asked Mr McCarthy if they could speak that day. She received no call.

34 On 13 October 2022, Mr McCarthy sent an email to the claimant with the proposed phased return, commencing with a two-day week, without commenting upon her email in which she said Mr Sumputh knew nothing about adjustments with respect to her colleagues.

35 On 14 October 2022 the claimant and Mr McCarthy had a further conversation by telephone. There is inconsistency in the claimant's account about this call, insofar as in her witness statement she said she had called Mr McCarthy but in the email which followed, she said he had called her. In her witness statement, the claimant stated that in response to her comment there would be no safeguards, he stated that the beauty of the situation was that he could look after her and nobody would need to know anything. She found this to be sinister, implying she should interact with him and that he would personally look after her. In her email of 17 October 2022, the claimant referred to his "the beauty of the situation" comment, which she felt was extremely inappropriate and unhelpful. We find it likely he did speak of "the beauty of the situation". The email does not state "nobody would need to know anything", but this is mentioned for the first time in the grievance, two months later, when the claimant was recalling the events in a different light. We do not find these further comments were made.

36 After the telephone call on 14 October 2022, the claimant sent an email to Mr McCarthy on that date and stated that throughout telephone and face-to-face conversations with him he had led her to believe some safeguards would be put in place to protect her mental health. Different office space was an example. She referred to assurances Mr Brandwood had given. She said she had felt pressured to return by Mr McCarthy following a conversation the previous week but felt sure there would be safeguards. This hope was dashed when she spoke to Mr Sumpath, who knew nothing about her situation. She stated that as Mr McCarthy had now stated nothing would be actioned, she felt unable to return.

37 The same day Mr McCarthy took advice from Mr Brandwood about a reply. Mr Brandwood provided a detailed draft in response which Mr McCarthy adopted as his own and sent to the claimant on 14 October 2022. He stated that he had not been with the respondent when her complaints of bullying were investigated, but the outcome was there was no evidence to identify bullying and so it was difficult for him to understand what protections the claimant felt were needed. He said there was a requirement for the claimant to work constructively with the rest of her team. As they were working in a hybrid manner, contact with staff who created an issue would be minimised. He said he expected all colleagues to work together professionally and to show mutual respect. He thought the working arrangement he had described would address the criteria of minimising contact in accordance with her wishes. He stated that the claimant should produce an authorised fit to work note but the situation could not continue indefinitely, and they needed to consider when her return was likely.

38 On 17 October 2022 the claimant replied by email, summarising the shortcomings in his approach. This is the communication we have already referred to.

39 On the 21 October 2020, the claimant submitted a further letter from her therapist. Ms Lewis stated that due to the nature of the trauma experienced, returning to work prematurely would exacerbate the claimant's symptoms of anxiety. She stated she required time for the therapy to take effect with the aim of reducing her symptoms.

40 The claimant applied for two jobs. One was with the NHS as Senior Planning Support Officer and the other with the West Yorkshire police. On 15 November 2022 she was successful in her application to the NHS, subject to pre-employment checks. Mr Brandwood provided references. She was also successful with her application to the West Yorkshire police.

41 On 16 November 2022 the NHS wrote to Mr Brandwood to say the claimant had been successful and asked for a reference. Mr Brandwood emailed the claimant, congratulated her and asked when she was to start. She replied on 22 November 2022 to say she was awaiting a start date. He chased her for an update on 5 December 2022. On 6 December 2022 the claimant stated they were awaiting a DBS check and for her to forward her qualifications before offering a start date.

42 On 5 December 2022, Mr Brandwood sent the claimant an email stating that her fit note was due on 28 November 2022, but had not been received and that this was not the first time she had submitted a fit note late. He advised that, in the absence of any extenuating circumstances, unless the certificate was received by close of business on Thursday, 8 December her pay would be suspended. The claimant responded to point out that she had sent the note on 29 November to Employee Resources and had contacted them on the morning of 28th, to say she had not received the note yet but would submit it later in the day. She said that Ms Richardson had contacted her in the past to state the fit note had been received and she asked for confirmation that was correct. Mr Brandwood replied. Having checked, he stated the note had not been received. He reminded the claimant that it was her responsibility to submit the fit note in a timely fashion to ensure payment. The claimant had submitted her fit notes as she had stated. The initial email chain suggests Mr Brandwood was misinformed about this. Employee Resources confirmed receipt of the latest fit note. On 6 December 2022 Mr Brandwood wrote to the claimant to confirm it had been received and that the earlier notes had also been received. He stated he suspected the difficulties arose because she chose not to contact her line manager, so no one had any idea whether she returning to work until the fit note arrived.

43 On 18 December 2022 the claimant submitted two grievances to Mr Roberts and Mr Walton about the alleged sexual harassment by Mr McCarthy and harassment and victimisation by Mr Brandwood by way of his correspondence concerning the fit to work notes and threats to suspend her pay, being treated with contempt in any personal contact with him, placing her in a dangerous environment which caused damage to her mental health and his response to her confronting Mr

McCarthy's behaviour. In her evidence, the claimant said this had been a threat to dismiss her on the spot. She said this is what Mr Brandwood had said to her union representative Mr Bairstow, on or about 17 October 2022, but this level of detail is not included in the written grievance. Nor was there any documentation or record of Mr Bairstow to that effect.

44 Later that day, the claimant sent Mr Brandwood an email to inform him that she had submitted a formal grievance against him and did not feel it appropriate to respond to matters in his earlier correspondence. She then formally requested all details of a meeting between him and Martyn Bairstow following her email of 17 October 2022. Mr Brandwood replied on 19 December 2022. He asked her to set out the grounds for her grievance. He stated that he did not recall any meeting with Mr Bairstow, just an occasional telephone conversation. He stated that her absence still had to be managed and that given she had informed him she had been offered a new job, it was not unreasonable to enquire about the progress of that. He stated that the matter had to be resolved sooner rather than later and that a capability meeting would be convened early in the new year if there was no resolution to the matter.

45 On 19 December 2022 the claimant wrote and requested contact be made directly with her and not Mr Bairstow as he was not involved as her representative. In evidence the claimant said she had not fallen out with Mr Bairstow but she wanted direct communication. Mr Findlay put, in cross-examination, that if Mr Bairstow was the person who told her something deeply disturbing and inflammatory and she had not asked him to write it down, it would raise a natural implication she had fallen out with him. She said she had not fallen out with him, she did not know the relevance of the question and did not have to find a reason for why she went directly to Mr Brandwood.

46 On the 20 December 2022 Mr Walton sent an email to Mr Brandwood setting out his proposals for dealing with the grievances against Mr Brandwood and Mr McCarthy. He proposed no meetings between the various parties. He stated he would not meet the claimant personally, deciding on the outcome on written submissions of the claimant and interviews with Mr McCarthy and Mr Brandwood. He said, if necessary, he would check any further issues that required clarification. Mr Brandwood made two inconsequential proposals to the draft and it was then sent by Mr Walton to the claimant.

47 On 21 December 2022 Mr Brandwood sent an email to the claimant's therapist, Ms Lewis. He wrote that attempts to facilitate a return to work had not been successful and observed that she had suggested reasonable adjustments, without specifying what. He stated, "*as I am sure you are aware, [the claimant] has made numerous complaints about several members of staff. All these complaints have been fully investigated. Regrettably, [the claimant] does not accept the outcome of those investigation. Given this context, I wondered if you may be able to make any suggestions as to what any reasonable adjustments may constitute? There is a requirement for [the claimant] to work constructively with the rest of her team. Would for instance, hybrid working constitute such reasonable adjustment?*"

48 On 9 January 2023, Mr Walton wrote to the claimant with the outcome of her grievance with respect to Mr McCarthy. He stated that he had not undertaken a physical meeting between the various parties (although had met with Mr McCarthy). He did not uphold the grievance. He stated it was his firm belief that Mr McCarthy's interactions had been with the sole intent of trying to make progress with a return to work. He said the allegations the claimant had made "*themed around [Mr McCarthy] attempting to build a rapport with you to make progress in your return to work as I have previously recorded. It is unfortunate that you feel this way about those interactions, but I am satisfied having spoken to [Mr McCarthy] that his intent was solely to display empathy with you, and to facilitate discussion between new in a non-threatening and comfortable environment given your misgivings about the workplace at FS HQ"*.

49 On 15 January 2023 the claimant resigned with immediate effect. She communicated this in an email dated 15 January 2023 to Mr Walton.

50 On 16 January 2023, the claimant commenced her new job with the NHS.

51 On 26 January 2023 Mr Walton sent the claimant his written decision in respect of the grievance against Mr Brandwood. These were not upheld.

52 On 23 March 2023 the claimant started work with the West Yorkshire police.

The Law

Unlawful acts of discrimination

53 By section 39(2) of the Equality Act 2010 (EqA):
An employer (A) must not discriminate against an employee of A's (B)—
(c) by dismissing B; or
(d) by subjecting B to any [other] detriment.

54 In **Ministry of Defence v Jeremiah [1980] QB 87**, the Court of Appeal held that a detriment would exist if a reasonable worker would or might take the view that the treatment was in all the circumstances to his disadvantage. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** the House of Lords held that an unjustified sense of grievance would not amount to a detriment.

55 By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

Definitions of discrimination

56 Direct discrimination is defined in section 13 of the EqA: *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

57 By section 23 of the EqA, *on a comparison of cases for the purpose of section 13, there must be no material difference between the circumstances relating to each case* and *the circumstances relating to a case for the purpose of section 13 shall include a person's abilities if the protected characteristic is disability.*

Disability

58 Section 6 of the Equality Act 2010 defines disability as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to undertake normal day-to-day activities. By section 212(1) of the EqA substantial means more than trivial or minor.

59 Paragraph 2 of Schedule 1 to the Act defines "long-term effect". An impairment will have been long-term if it lasted for at least 12 months or was likely to last for at least 12 months or was likely to last for the rest of the life of the person affected. In **SCA Packaging Limited v Boyle [2009] UKHL 37** the House of Lords held that likely, in this context, meant 'could well happen'.

60 By paragraph 2(2) of Schedule 1 of the EqA, if an impairment has ceased to have a substantial adverse effect on a person's ability to undertake normal day to day activities it is to be treated as continuing to have that effect if it is likely to recur.

61 Paragraph 5 of Schedule 1 provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect.

62 Guidance on the definition of disability has been issued by the Secretary of State pursuant to section 6(5) of the EqA.

The duty to make adjustments

63 Section 20 of the EqA provides:

> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

64 By paragraph 2 of Schedule 8 of the EqA, "*A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is*

likely to be placed at the disadvantage referred to in the first, second or third requirement".

65 Direct discrimination is defined in section 13 of the EqA, a *person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourable than A treats or would treat others.*

66 By section 23 of the EqA, o*n a comparison of cases for the purpose of section 13, there must be no material difference between the circumstances relating to each case* and *the circumstances relating to a case for the purpose of section 13 shall include a person's abilities if the protected characteristic is disability.*

Harassment

56 By Section 26(1) of the EqA 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.

57 By section 26(2) of the EqA, A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

58 By section 26(3), 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.

Protected characteristics

59 By section 4 of the EqA, sex and race are protected characteristics. In section 9 of the EqA race is defined as colour, nationality and ethnic or national origins.

Victimisation

60 By section 27(1) of the Equality Act 2010 (EqA), a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act.

61 By Section 27(2) of the EqA each of the following is a protected act – (a) bringing proceedings under this Act (b) giving evidence or information in connection with this Act (c) doing any other thing for the purposes of or in connection with this

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

62 In **Nagajaran v London Transport [1999] ICR 877** the House of Lords held that in a victimisation or direct discrimination claim the essential question was why the employer had acted in a particular way and that the reason may be a subconscious one. Lord Nicholls pointed out that most people will not admit to acting in a discriminatory way and are often unaware they are doing so.

Burden of proof

63 Section 136(1) of the EqA concerns the burden of proof: *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.* Section 136(2) provides that does not apply if A shows that A did not contravene that provision.

64 In **Laing v Manchester City Council and another [2006] ICR 1519**, the Employment Appeal Tribunal stated that if a tribunal was satisfied on the evidence that the respondent had provided a reason which, on a balance of probabilities, had eliminated any discriminatory cause, it was not necessary for the tribunal to trouble about whether the burden of proof had shifted in the first instance. In **Hewage v Grampian Health Board [2012] ICR 1054,** as later endorsed in **Efobi v Royal Mail Group Limited [2021] UKSC 33,** the Supreme Court stated that it was important not to make too much of the role of the burden of proof provisions: "*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*", per Lord Hope in **Hewage**.

Time Limits

65 By section 123(1) of the EqA proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.

66 By section 123(2) of the EqA conduct extending over a period is to be treated as done at the end of the period. In **Commissioner of Police for the Metropolis v Hendricks (2003) ICR 503**, the Court of Appeal held that an act extending over a period was distinct from the succession of unconnected isolated specific acts that could constitute a state of affairs and was not restricted to a rule, policy or practice as identified in the earlier case law.

Unfair constructive dismissal

67 By section 94 of the ERA an employee has the right not to be unfairly dismissed.

68 A dismissal is defined by section 95 of the ERA and includes the employee terminating the contract under which he is employed (with or without notice) in

circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct, section 95(1)(c). This is known as a constructive dismissal.

69 In order for there to be a constructive dismissal, the employee must have resigned because his employer has committed a fundamental breach of contract and he must not have otherwise affirmed the contract, for example by delaying his resignation and thereby evincing an intention to continue to be bound by the terms of the contract, see ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*** and ***Buckland v Bournemouth University [2010] IRLR 445***. The term is not to be equated to a duty to act reasonably. In respect of what is required in the nature of the breach, it is whether the employer, in breaching the contract, showed an intention, objectively judged, to abandon and altogether to refuse to perform the contract, see ***Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420*** and ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***.

70 There is an implied term in a contract of employment that neither party shall, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties, see ***Malik v BCCI SA (in liquidation) [1998] AC 20***.

71 Such a breach may be because of one act of conduct or a series of acts or incidents, some of them may be trivial, which cumulatively amount to a repudiatory breach, see ***Lewis v Motorworld Garages Ltd [1986] ICR 157***. If a series of acts, the last event must add something to the series in some way although, of itself, it may be reasonable, see ***Omilaju v London Borough of Waltham Forest [2004] ICR 157*** and ***Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1***.

Analysis and Conclusions

Disability

72 The claimant was referred to occupational health services, initially on 2 March 2020, when she was diagnosed as having stress at work. On 9 November 2020 she was diagnosed with anxiety and stress, lack of sleep and decreased appetite.

73 On 30 March 2022 the claimant provided a two-week fit to work note certifying that she could not work because of work-related stress. A further fit to work note was issued to extend that absence for the same reason up until 23 December 2022. On that date a further fit to work note was issued for a period of four weeks with the reason certifying her inability to work as stress-related anxiety and low mood.

74 On 4 April 2022 an occupational health report which was sent to Mr Brandwood described an underlying medical condition of stress and anxiety for which the claimant was receiving medication from her GP. It was said to affect her ability to attend work and to discharge her role at the present and in the future, particularly when the stress was bad. The claimant felt there were interpersonal relationship problems at work within her team which were causing the stress. She told Dr Smith, consultant in occupational medicine, that she was requesting to move

areas and to move manager. She said she had requested to be managed by Gayle Seekins, in ICT and more training for her role.

75 On 20 June 2022 Dr Smith sent a further report. It stated the claimant was suffering from anxiety and low mood for which the claimant was receiving treatment. She was advised to see her GP again about additional treatment. Dr Smith could not say when she would be fit to return to work and that she could not even manage modified duties at that time. He stated that in the past Mr Barnes, the former Director of Human Resources, has suggested that Gayle Seekins be substituted as the claimant's manager. The claimant subsequently corrected that as an error and informed Mr Brandwood. Dr Smith recorded that the claimant had said that once she was well enough, she would be able to return to work regardless of the management structure. He recommended a phased return when she was fit.

76 On 11 October 2022 Ms Jenny Lewis, cognitive behavioural psychotherapist, wrote a letter "to whom it may concern" stating that the claimant herself referred with symptoms of Post-traumatic Stress Disorder (PTSD) and she was offered Cognitive Behavioural Therapy (CBT). She had undertaken three sessions. She was reported as having said there were particular individuals at the workplace who triggered the symptoms of PTSD. Ms Lewis noted that ongoing triggers of trauma can impede any progress in therapy. The claimant had told her she was to return to work but was worried about the continued impact the situation work was having on her mental health. She suggested that the managers of the respondent discussed reasonable adjustments with her to ensure she felt safe to be able to engage fully in her role.

77 On 21 October 2022 in a further letter, Ms Lewis stated that the claimant was engaging in a trauma focused therapy following several traumatic incidents she had experienced at work. She said that due to the nature of the trauma experience, returning to work prematurely would exacerbate her symptoms of anxiety. She stated she required time for the therapy to take effect with the aim of reducing her symptoms.

78 The position adopted by the respondent is that whilst it does not concede disability, for all practical purposes it treated the claimant as if she were disabled and assumed it would need to make adjustments from her absence in March 2022. The Tribunal must make a finding.

79 There was a mental impairment in the form of stress and anxiety which is first referred to in occupational health reports in March and November 2020. That same condition caused the claimant to be off sick in March 2022. Dr Smith described it as an underlying condition for which the claimant was receiving medication.

80 By then, the effects on her ability to undertake day to day activities because of the condition were long term. They were likely to recur, given the history of the condition and its impact on the claimant, that she could not work. Not being able to work is a day-to-day activity which is substantial, that is more than trivial. The claimant was assisted with medication without which the symptoms can be inferred to have been far worse. The claimant was disabled no later than 7 April 2022, at her meeting with Mr Brandwood.

81 The respondent's managers knew, or ought reasonably to have known, the claimant was a disabled person then. Dr Smith informed him of his opinion that she was on 4 April 2022. Given he was a consultant in occupational medicine his view should have carried some weight.

Direct race discrimination

82 It is accepted that Ms Hardcastle ruled out a move from the management structure on 22 July 2022. Mr Brandwood had made this decision and communicated it to Ms Hardcastle. It was for the reasons he had explained in evidence, namely that for the claimant to do her job effectively, she could not be removed from the department or the ultimate line management of Ms Davey.

83 The first question is whether this would be a detriment. In the light of the concerns the claimant had expressed and that she had anxiety issues, we are satisfied a reasonable worker could form the view it would be to their disadvantage in those circumstances.

84 Mr Brandwood seemed to have taken the stance that because the investigations into Mr Gray's grievance in 2018 and 2019 had not found any evidence of bullying by Ms Gray, this had been addressed. That encompassed the claimant's concerns, to his mind, because she had been interviewed and her criticisms of Ms Davey had been considered then. The problem with that, is the claimant had never raised a grievance against Ms Davey. She had raised complaints about Mr Gray and Ms Mohmin which had been investigated and not found to be established. There had been no investigation following allegations about Ms Davey, a number of which arise in the first tribunal claim. These were not a carbon copy of the matters she had mentioned in the investigation of Mr Gray's grievance. There may have been an overlap, but they certainly extended beyond the time of that enquiry. Mr Brandwood seemed to adopt a mindset that the matter had been resolved once and for all, as is reflected in his email to Mr McCarthy, which he then adopted for his response to the claimant on 14 October 2022 and his email to Ms Lewis on 19 December 2022. It may or may not have been the case that there was no merit in the latest concerns about Ms Davey which the claimant had been expressing, but we cannot see the material from which Mr Brandwood felt able to assert such a confident conclusion.

85 There was mention of Ms Seekins taking over managerial responsibility, but we accept this was not realistic, given she had no knowledge of information governance and was responsible for ICT. The claimant did not adopt a consistent position about whether she should not have been in a management line of Ms Davey and this seemed to have vacillated. In her witness statement, at paragraph 105, the claimant stated that the reasonable adjustment she had requested was to be moved from under Alison Davey and/or into another team within the respondent organisation to have space to work without fear of being bullied. She stated she wanted to have access to other individuals as a form of support and a point of contact, to limit her interactions with Ms Davey. In her correspondence with Dr Smith with respect to changes the claimant required to his report she had stated she was not stating she would be unlikely to be able to return to work without a change in

her management structure although a change would help resolve issues but it was not a precondition.

86 In her observations on the notes of the meeting of 22 July 2022 which she made shortly afterwards, she recorded she had never stated she would only return under a new management structure, a proposal she stated had been originally made by Mr Barnes. She stated also that it was Mr Barnes, not her, who proposed Ms Seekins to be her manager. This is also what the claimant had written to Dr Smith in a correction to his draft report, when he had suggested that the claimant proposed Ms Seekins. She informed him it had been Mr Barnes and she had notes from the meeting to confirm this. Contradicting that, in an email dated 10 August 2022 to Mr Brandwood, the claimant stated that she had mistaken the initials MB for Mr Barnes when in fact it should have been Martyn Bairstow, her union representative, who had proposed Ms Seekins. This contradiction illustrates a difficulty in this case of making findings, when the history covers a significant time period and the views which were expressed, and by whom, is sometimes far from clear.

87 The claimant says that the refusal to remove Ms Davey from her line of management by Ms Hardcastle was less favourable treatment of her because of her race. In support of this she says two white colleagues, Mr Gray her direct line manager and Kim Schofield, had changes to their manager by removal of Ms Davey in 2019 and 2014 respectively. Mr Allen accepts that these were not statutory comparators, by which he meant they did not fall within the definition of comparators in section 23 of the EqA whereby there must be no material difference in circumstances, but he drew reliance on them as evidential comparators.

88 Their circumstances were different in material respects. Mr Gray had been directly line-managed by Ms Davey and so his dealings with her were continuous, in contrast to the claimant for whom Ms Davey was the second line manager and so their contact was more intermittent. Mr Gray was moved temporarily to a workplace nearer his home, the Huddersfield fire station, but he returned to HQ to work with Ms Davey in November 2021. He had raised a grievance against Ms Davey, whereas the claimant had not.

89 The details in respect of Ms Schofield's circumstances are more scanty, no doubt because they relate to events in 2014. Allegations and cross allegations of bullying had been made by Ms Schofield and Ms Davey. Ms Schofield moved to a different team, to a new job with the respondent.

90 We did not find these comparisons were of assistance to the allegation that the claimant had been treated less favourable because of her race. Because the claimant was directly managed by a new member of staff, Mr Sumputh, the opportunities to create a buffer between the claimant and Ms Davey would in all likelihood have reduced or alleviated the concerns and it appears the claimant would have agreed with some such safeguard rather than a removal of her management entirely from Ms Davey. There were sound business reasons to retain the claimant in that team and maintaining Ms Davey's responsibility for her, for the reasons Mr Brandwood gave. In these circumstances Ms Hardcastle's decision about this was not an act of direct race discrimination. The burden of proof under section 136 had

not shifted and, even if it had we accept the decision was untainted by discriminatory factors.

91 Mr Allen invited us to draw inferences which would support the view that there were facts from which we could decide the reason for not moving Ms Davey was because of race, from the unsatisfactory history of disclosure by the respondent in the case. In addition to the unusual introduction of the note of 7 April 2022, a significant number of documents were disclosed following a subject access request. These could and should have been disclosed following correspondence between the representatives in preparation for the hearing, which concerned shortcomings in the disclosure. Some of those documents related to advice given by Mr Brandwood to Mr McCarthy and Mr Walton which had significance. In evidence Mr Brandwood posed the view that they would be covered by litigation privilege, but that had not prevented their disclosure as personal data and Mr Findlay did not seek to suggest they had been regarded as privileged. Unsatisfactory though the disclosure was, it does not give support for the discrimination claim for which we have accepted the reason advanced by the respondent.

92 The other inference we were asked to draw was from the absence of evidence adduced by the respondent from Ms Hardcastle, the alleged discriminator. She still works for the respondent, but a decision had been taken not to call her. The absence of an important witness can often be a good reason to draw such an inference. This point was advanced by the respondent in a different context given the absence of Mr Bairstow, the claimant's union representative. In ***Efobi v Royal Mail Group Limited [2021] ICR 1263*** the Supreme Court upheld the decision of a Tribunal which had declined to draw an adverse inference because of the failure of the respondent to call the decision-makers. Lord Leggatt said, *"I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances.*" The findings of fact which we were able to make about this meeting on the evidence before us was sufficient to resolve the issues which the direct race discrimination raised. We decline to draw the inference Mr Allen invites.

93 The other feature of 25 July 2022 meeting related to an insinuation the claimant's problems were self-inflicted. The context of this, as we have found, is set out in paragraphs 19 and 20 above. At the time the claimant made the alterations she proposed to the note of the meeting she did not record that there was an insinuation that her problems were self-inflicted. She wanted it recording that she had been asked 4 times whether, given her grievance had been against several people whether it was possible she was at fault and bore any responsibility. She had then given examples.

94 The background to this is important. The claimant had raised grievances or other complaints about all the members of her team; her line manager, Mr Gray, Ms Mohmin, Ms Mohmin's manager, Ms Nicholson and her own second line manager Ms Davey. This is unusual in a workplace. That is not to say each of these

complaints was not well-founded, but some had been rejected during formal grievances. Attempting to facilitate a return, Ms Hardcastle discussed the team coaching, which had the objective of improving or repairing relations the previous year, but it had not, apparently, succeeded. With that history, a conversation which queried whether anything the claimant had done might have contributed to the dysfunction of the team was entirely understandable. An attempt to view events from another perspective, with an aspect of self-reflection, may have broken an impasse. We do not consider this can fairly be characterised as insinuating the claimant's problems were self-inflicted.

95 There is no comparator whose circumstances suggest this line of discussion was motivated by racial considerations. We do not find that there were facts from which we could decide, in the absence of any other explanation, that the remarks were because of the protected characteristic of race.

Breach of the duty to make adjustments

96 We have found that it would not have been reasonable to remove the claimant from Ms Davey's second line of management, but there are a number of features about the management of the claimant's return which were far from satisfactory. We agree with the suggestion of Mr Allen that the appropriate adjustments were not binary and that some other safeguards could have been introduced to reassure the clamant. Setting some guidance as to when it would be necessary, perhaps in limited circumstances, for Ms Davey to have to deal with the claimant directly, rather than through her line manger Mr Sumpath, was an obvious and straightforward measure. But Mr Sumputh was not informed of the claimant's concerns about Ms Davey or Ms Mohmin by Mr McCarthy or Mr Brandwood, notwithstanding the details the claimant had included about this in her stress risk-assessment. Understandably, this left the claimant feeling no-one was taking her requests seriously. To make matters worse, Mr McCarthy's email of 14 October 2022 in response, which had been drafted by Mr Brandwood, was insensitive and inappropriate. He stated that the claimant had to work constructively with the rest of her team. The inevitable implication of this, in a reply to the claimant's legitimate concern, was that the claimant had not been working constructively with others. Mr McCarthy stated that he did not understand what protections the claimant needed because all complaints had been investigated and no evidence of bullying had been identified. In fact, the claimant's complaints about Ms Davey had not been investigated. Moreover, the risk assessment and the letters from the therapist, Ms Lewis, made clear that some adjustments were required. Mr Allen is right to say the duty is a positive one, to take measures in the workplace with respect to accommodating a person with a disability which go above and beyond what would have been done for another employee. A bald statement that no bullying had been identified failed to grapple with the perceptions of the claimant as a person with anxiety about Ms Davey. Whether that could reasonably have been addressed and overcome went beyond simply asking whether the perception of bullying was objectively correct.

97 This response led to the claimant seeking other employment elsewhere. At this time the claimant decided she could no longer stay and would leave. We reject her evidence that she gave her notice three months later, at the eleventh hour, on 15

January 2023, because she was hoping she might have been able to stay. She had resolved to leave in late October. This is clear from a note of the therapy session dated 25 October 2022, in which the claimant informed Ms Lewis that she had decided to leave her current employment due to the stress and lack of support.

98 The criticisms we have made of the handling of the claimant's return in the Autumn of 2022, however, are not a focus on the claim for breach of the duty to make adjustments which has been brought and as it is pleaded. The PCP is requiring the claimant to keep in touch with her manager during her sickness absence. The substantial disadvantage is said to be the stress and anxiety was exacerbated by the thought of having to have continued interaction with Ms Davey.

99 From 25 April 2022, Mr Sumputh was the claimant's manager. Keeping in touch with him did not place the claimant at a disadvantage. Mr Brandwood had specifically informed the claimant that her new line manager was about to start, at the meeting on 7 April 2022. She would have known that it would no longer be to Ms Davey she would have to report her sickness absence, but to Mr Sumputh. The complaint can only relate to events prior to his appointment, when Ms Davey temporarily held the line management position after Mr Davey had left. There is no record of the claimant being instructed to keep in touch with Ms Davey at the meeting on 7 April 2022. We infer the requirement to communicate with Ms Davey as her line manager was conveyed by HR, following Mr Brandwood's email to that effect on 13 April 2022. It is only that limited period between 13 April 2022 and 25 April 2022 which could relate to this PCP.

100 The occupational health report of 4 April 2022 stated that the claimant had stress and anxiety for which she was receiving medication. It was affecting her ability to attend work and undertake her role then and, in the future, particularly when her stress was bad. The claimant had said it was interpersonal relationship problems within her team which had caused her stress. Dr Smith stated the claimant had asked to move areas and to move manager. It raised the request of the claimant to be managed by Ms Seekins in ICT. The report, somewhat inconsistently, stated the claimant had consented to it being provided only to Mr Brandwood, but the declaration in bold, stated to be agreed in the presence of the claimant, stated it could be sent to and seen by the line manager and other senior managers. The subsequent report of 6 June 2022 made no reference to any requirement to keep in contact with Ms Davey about her sickness absence having created a problem. The claimant does not say this was an issue for her at this time, in her witness statement.

101 In the absence of evidence on the narrow point we do not find the claimant was placed at a substantial disadvantage by the PCP for this fortnight. Nor are we satisfied Mr Brandwood knew, or ought reasonably to have known, that the PCP of requiring the claimant to keep in touch with her manager during her sickness absence prior to 25 April 2022 would have placed her at a substantial disadvantage. The claimant had not suggested to him then, or in any of the other written communications we have seen, that contacting Ms Davey about her sickness absence was a problem. There is email correspondence throughout this period. Indeed, her subsequent suggestion that lesser adjustments would have sufficed, imply a complete embargo on all communications between the two was not necessary. The claimant's risk assessment was completed in January 2022 and

then updated in August 2022. It is not clear which parts were written on which occasion. However, the essence of the complaints is that Ms Davey would bully the claimant at work or use others to do so. There is no evidence in the witness statement or elsewhere that keeping in touch, for example by email, would have been a problem. The discussion about being moved to Ms Seekins was in the context of a return to work, not an interim position whilst she was still of sick.

102 For these reasons we do not find the breach of the duty, as pleaded, established.

Harassment related to sex, of a sexual nature

24 August 2022

103 Our findings about what Mr McCarthy said are set out above. We are not satisfied at the time they were unwanted. The claimant's response to the meeting was initially a positive one, as subsequently relayed by her union representative and welfare officer.

104 That is not the end of the matter. What was said, and the proper construction to put upon it, may become apparent at a later time, on reflection. But that involves an interpretation of what had actually happened, in retrospect. We are not satisfied that the claimant's evidence about what was said is what actually happened. Her recollection may have been affected by a number of influences such as her mother's comments, the passage of time or her changed opinion of Mr McCarthy who did not follow through with his assurances, ultimately confronting the claimant by suggesting she needed to be constructive, and he did not understand what protection she needed. For whatever reason, we did not regard her evidence about what had been said as reliable and prefer the evidence of Mr McCarthy.

105 The remarks were not related to sex. They included reference to Mr McCarthy's marital relationship but that was not about gender. The context was that, having recently become single, he felt lonely and so did not enjoy working from home. Nor were the comments of a sexual nature. The discussion about his wife's shopping habits and having a Mulberry handbag fell into a similar category. Raising his personal situation in this type of meeting was unnecessary, and probably unwise, but reflected his attempt to demonstrate some sort of empathy. Given the very different circumstances of these two employees, they were never likely to resonate with the claimant. This was a clumsy attempt to gain the claimant's confidence, but it was not conduct either related to sex or of a sexual nature.

106 The other comments we have found were made about the team going out for a drink, the response to the claimant saying she was regarded as a dirty name and the offer that the claimant could discuss matters if the adjustments were not working over a coffee, took the allegation no further. They were not related to sex or of a sexual nature.

5 October 2022

107 Mr MCarthy encouraged the claimant to return to work in circumstances in which she was reluctant to do so. He raised the issue of sick pay which would have added to the pressure to return. We do not consider the discussion could properly be described as possessive and we do not find the offer to call night or day was made. The conduct may have been unwanted, in that the claimant felt pressurised to return to work, but it was not related to sex or of a sexual nature.

14 October 2022

108 Mr McCarthy referred to the beauty of the situation. We find this was an attempt to provide reassurance; that being on site he was available to assist should an issue arise. This rang hollow to the claimant. Mr McCarthy had not informed Mr Sumputh about the claimant's worries and concerns and nor had Mr Brandwood passed on to Mr Sumputh his commitment to safeguarding the claimant when Ms Mohin returned. Mr McCarthy did not seem to appreciate that the claimant's anxiety could trigger difficulties at work, which others without her disability might not share. He took the view that his backing, as a senior member of staff, was all the claimant would have needed as a springboard to rejoining the team; but in the very same phone call he gave every impression of reneging on his previous agreement to provide safeguards. The remark was clearly unwanted.

109 Mr McCarthy failed to deal with this situation adequately in the ways we have set out in paragraph 96 above. His ill-conceived attempt to provide support in the form of his reassurance about the beauty of the situation was misguided, but not related to sex or of a sexual nature on our findings.

Victimisation

On 25 July 2022: Ms Hardcastle refusing to move the claimant to another team and insinuation the claimant was to blame.

110 The protected act was the bringing of the first claim on 22 September 2021. Ms Hardcastle knew about this. It was raised in the meeting.

111 The refusal to move the claimant to a different team was a detriment. It was one means of alleviating the claimant's concerns about Ms Davey.

112 We find that the protected act was not the reason Ms Hardcastle refused this. It was because the decision had been made by Mr Brandwood. There were sound business reasons for that if the claimant was to remain in the same job. The respondent would have been happy to redeploy the claimant had a suitable vacancy arisen.

113 The insinuation the claimant was to blame is an inaccurate characterisation of events as we have found them to have occurred. Ms Hardcastle had asked directly if the claimant had any responsibility for what happened; but this was in the context of a working environment in which the claimant had criticised every one of her immediate colleagues and was an attempt to move things forward beyond the major disagreements which had boiled over in the previous years. The HR officer was seeking to invite a measure of introspection which might have been useful. The

claimant's note after the meeting does not indicate otherwise, but she wished that part of the discussion to be more comprehensively noted, including her responses. We do not find that is a detriment. A reasonable worker would not regard it as a disadvantage.

5 – 6 December 2022: Threatening the claimant for not submitting a fit note. Unfairly criticising the claimant for not contacting her line manager (whose conduct had caused the clamant to be off sick).

114 We are critical of Mr Brandwood for the advice he gave to Mr McCarthy, failing to brief Mr Sumputh about the claimant's situation and wrongly asserting all her complaints, which included those of Ms Davey, had been investigated and not been upheld. We infer he had become frustrated with the claimant and regarded her as unreasonable and unprepared to return to work.

115 He had in mind the first set of proceedings when he formed the view the claimant was being difficult and challenging. He referred to these when he met her on 7 April 2022 and said they would be vigorously defended if the claimant paid the deposits.

116 Mr Brandwood genuinely believed the claimant had not submitted a fit note, in December 2022. He was wrong. He had been misled by others. By initiating correspondence about this, he was not influenced by the protected act.

117 However, the tone of the conversation, in raising the issue of continuing entitlement to sick pay and the failure to keep in touch with her manager (which would have been Mr Sumputh not Ms Davey as alleged) was unduly insensitive and inconsiderate. A reasonable worker would have regarded this as a disadvantage. It was borne out of frustration with the claimant. We do not consider he would have been as heavy handed with a worker in such circumstances who had not brought discrimination proceedings against the respondent. Instead of unreservedly accepting he had made a mistake about the production of fit notes, he grudgingly blamed the claimant for not keeping in touch with her manager.

118 It is not necessary for the protected act to be the sole, or even principal reason, for the detrimental treatment. It suffices if it is a material influential factor. Nor need the person be aware of the influence: it may be subconscious. Mr Brandwood had raised the Tribunal proceedings at his meeting with the claimant on 7 Aril 2022 and said they would be vigorously defended and that demonstrated a viewpoint. Those proceedings included criticisms of Ms Davey, ones which Mr Brandwood apparently passed off as without any foundation, given he said on a number of occasions, inaccurately, that all allegations of bullying had not been upheld following investigation. These features raise a compelling implication that part of the frustration which led him to express himself in the way he had, raising the potential for stopping sick pay and criticising the claimant for not keeping in touch with her manager, was because she had challenged her employer by taking them to the Tribunal. We draw that conclusion.

119 This was an act of victimisation.

19 December 2022: Intimidating the claimant by asking further details of her grievance and threatening her with a capability meeting in the new year.

120 A further protected act, on 18 December 2022, was the allegation of sexual harassment in the grievance about Mr McCarthy.

121 The claimant sent an email to Mr Brandwood on 18 December 2022 to say that she had raised a formal grievance against him and Mr McCarthy and so she did not consider it appropriate to respond to any matters in his previous emails. She then formally requested all details of the meeting between him and Mr Bairstow. She asked for the correspondence in which he had instructed the claimant to keep in touch with a manager about her sickness absence.

122 Mr Brandwood replied, asked for the grounds of her grievance, said he did not recall any meetings with Mr Bairstow, only telephone calls, and stated the fact she had submitted a grievance did not change the fact her absence had to be managed, she had told him some weeks ago she had another job and it was not unreasonable to know the progress with that. He added that the matter had to be resolved sooner or later and, to that end, a capability meeting would be convened in the new year if there was no resolution.

123 The communication from the claimant invited a response because she asked for details of his meetings with her union representative and other correspondence. Mr Brandwood could not, responsibly, have not replied. The claimant had invited continuing dialogue and was seeking to set the parameters for it. That included the question as to when she was to start her new job, for which Mr Brandwood had provided a reference. It is not entirely surprising the question about what the grievance was about was asked. The suitability or desirability of further contact between the two of them could then have been considered, in the light of what Mr Brandwood had been criticised for in the grievance, without a unilateral decision of the claimant about what was or was not appropriate correspondence. There are no facts from which we could decide, in the absence of any other explanation, that the request for the details of his grievance was because of the protected acts, even if this were a detriment.

124 Nor do we find the reference to the potential for capability proceedings had anything to do with the protected acts. The claimant's absence required management under the respondent's policies and there was nothing to indicate a meeting of this type would not be the next step. By this time Mr Brandwood knew the claimant had another job. She had told him this in an email on 6 December 2022. He needed to ensure the information governance department was properly staffed and she had not been forthcoming about when she was likely to leave. His reference to such a meeting was merely part of the process.

125 This complaint of victimisation fails.

21 December 2022: Mr Brandwood sending an unsolicited email directly to the claimant's therapist, Jennifer Lewis, without permission from the claimant and portraying her as an unreasonable complainant.

126 We reject the suggestion Mr Brandwood needed the claimant's permission to contact her therapist. The letters which Ms Lewis had sent "*to whom it may concern*" carried the implication that the information and advice she was imparting could be explained if that would assist. A query in clarification would fall into that category. Doubtless any response Ms Lewis might have suggested would have required the claimant's approval, but that would have been a matter between the claimant and Ms Lewis.

127 However, this request did not follow shortly upon Ms Lewis's advice but was sent two months later. By that time Mr Brandwood knew that the claimant had obtained another job, and it was really a question of when, not if, she was going to leave. We infer he had formed the impression that the claimant was being obstructive in not disclosing when her new job was to start, or likely to start. We find that was a well-founded impression. The claimant gave notice a matter of hours before starting her new job. Whatever unfairness she had felt about how she had been treated, this was not a responsible way to give notice and had a smack of vindictiveness about it.

128 The erroneous reference by Mr Brandwood to all matters having been fully investigated, and his comment *"regrettably [the claimant] does not accept the outcome of these investigations"* in his email to Ms Lewis was to portray the claimant negatively. That was a detriment. We do not consider Mr Brandwood was genuinely seeking to take steps to make adjustments at this time. He had no explanation for why the email was sent at this time.

129 For the reasons we gave in paragraph 119, we find the bringing of the first set of proceedings had influenced his thinking and led him to send in this email and portray the claimant in an unfavourable light.

<u>9 January 2023. Dave Walton unreasonably rejecting the claimant's grievance against Mr McCarthy, failing to deal with all matters contained in the grievance, expressing himself in a way which sought to blame the claimant for the actions of others.</u>

130 The procedure Mr Walton adopted, not to have a meeting with the claimant, did not follow the ACAS Code of Practice nor the respondent's own grievance procedure. Both required a meeting at which the complainant could be accompanied by a union representative or work colleague. During such a meeting the complainant should be given the full opportunity to explain their complaint.

131 In cross examination, Mr Walton's explanation for not adopting these standard procedures was that the claimant had made it clear she had mental health concerns. He agreed that he had not taken advice from the occupational health advisors about that and that it would have been better if he had. In fact, the person he had sought advice from was Mr Brandwood.

132 As Head of Human Resources, one might have expected Mr Brandwood to advise the proposed course was inappropriate and the standard procedure should have been followed. Mr Brandwood approved the procedure. He was conflicted in doing so, as it was also a procedure he approved in the same communication for the

grievance against himself. He should immediately have refused to give advice and passed it to a colleague.

133 The fact he was contacted in this way about the procedure was only revealed when the documents were disclosed to the claimant in a subject access request. They had not been disclosed in this litigation. Mr Brandwood had the responsibility of providing relevant documentation to the respondent's lawyers for disclosure in this case. The failure to disclose this material was a departure from what is to be expected. We have concluded it was initially withheld by Mr Brandwood because it revealed his inappropriate involvement in the two grievances and reflected badly on the respondent.

134 Mr Walton said that he had taken notes of the meeting he held with Mr McCarthy when he spoke to him about the allegations. He could not explain why these notes had not been disclosed.

135 In respect of this allegation, there is merit in the submission of Mr Allen that we should draw adverse inferences about the above failures to disclose the relevant documentation.

136 The grievance the claimant submitted created professional and reputational risks for Mr McCarthy and the respondent respectively. A Director faced a finding he had sexually harassed a much more junior member of staff. The impression portrayed, by the curtailing of the procedure in which only the person accused and not the complainant is afforded a face-to-face interview, to the subsequent failure to disclose relevant material is of an organisation seeking to shut down those risks.

137 That impression is not corrected by the failure of Mr Walton to make any specific findings about what Mr McCarthy was said to have done. He took a broad-brush approach. The outcome letter spoke of a "series of allegations" "themed around [Mr McCarthy] attempting to build a rapport with you to make progress in your return to work" and Mr Walton's view it was "unfortunate that you feel this way about those interactions". This superficiality demonstrates a failure to engage seriously with the subject matter of the complaint.

138 We draw the conclusion that this was because of the nature of the complaint and the potential damage to which we have referred. That was an of an act of victimisation because the complaint was a protected act. We uphold the pleaded detriments that Mr Walton unreasonably rejected the grievance and failed to deal with all matters in it. The fact that we have made findings which did not uphold the sexual harassment complaint ourselves does not assist the respondent. It is not that he rejected the grievance that is at the heart of this determent but the way he went about it was unreasonable and unfair.

139 We do not extend that finding to the alleged detriment of blaming the claimant for the actions of others. The outcome letter referred to an on-going series of issues between the claimant and the organisation. That was in the introductory paragraph but stated no more than what we have accepted.

<u>Constructive unfair dismissal</u>

140 We have found that the respondent victimised the claimant on 3 occasions, on 5 – 6 December 2022, 21 December 2022 and the handling of the grievance after 18 December 2022, being communicated on 9 January 2023. These matters of themselves would be sufficient to be acts which were likely to destroy or seriously undermine the claimant's trust and confidence in the respondent and were without reasonable and proper cause.

141 However, they do not form the basis for a constructive dismissal, because we have found that they were not the reasons for which the claimant that resigned. That decision had been taken in late October and was sealed when the claimant was offered alternative employment in November 2022. We have rejected the claimant's evidence that she wanted to stay and would have done so if the respondent had taken corrective measures right up until her departure on 15 January 2023. There were deep rooted problems with the workplace. The claimant's trust in the respondent had irretrievably broken down in October 2022, when Mr McCarthy ceased to present as a supportive figure and adopted the line of Mr Brandwood that the claimant would not accept the outcome of investigations and had to work constructively with others.

142 The claimant must establish that the breach of the implied term for the reasons expressed in the list of issues, which has been agreed by the legal representatives, was the reason for her resignation. The fact that fundamental breaches occurred after the resignation cannot be the reason for it.

143 There are no allegations of discrimination which have been upheld prior to the claimant's decision to leave. The list of issues extends the potential for the breach being the subject matter of the discrimination allegations even if they were not found to be discriminatory.

144 The Tribunal has been critical of the management of the claimant's sickness and proposals for a return in October 2022 by Mr McCarthy and Mr Brandwood. The case advanced on behalf of the claimant during the hearing encompassed these events as if they were part of the breach of the duty to make adjustments. For the reasons we have given, that is not permissible. That might have been an area in which their actions could be alleged to have broken trust and confidence, but those features were not the subject matter of the discrimination complaints. The reasonable adjustments claim foundered on the PCP of reporting to Ms Davey during sickness. This did not extend to different PCP's which might have applied in the Autumn of 2022. There was no breach of the implied term in respect of the subject matter of the discrimination complaints prior to the claimant's decision to resign, on the pleaded case. Mr McCarthy's poorly judged attempts to be empathetic were not of a sufficient quality to destroy or seriously undermine the relationship of trust and confidence between the parties.

145 We should add that even had we found there to have been a constructive dismissal because of the mishandling of matters to which we have referred, we do not consider there would have been any realistic chance of the claimant staying in the employment of the respondent. Relationships with all the claimant's colleagues had run into difficulties and attempts to bridge the differences had been attempted but failed. Although Mr Gray had left, there remained entrenched animosity with the

other colleagues which had built up over a number of years. Whatever safeguards had been introduced, we are not satisfied the claimant had any prospect of remaining.

Aggravated damages

146 In the authority of **The Metropolitan Police Commissioner v Shaw**, the Employment Appeal Tribunal held aggravated should be included in an overall award which encompassed injury to feelings, recognising these are not to punish the respondent but to compensate for any aggravated injury to feelings, specifically by reference to any motive behind the act and the manner in which it was committed, and any subsequent conduct by the perpetrator.

147 We have found there was a failure to conduct a proper disclosure exercise and agree with Mr Allen that the respondent has persistently refused, unreasonably, to concede the issue of disability. This has affected the claimant in ways she has described in her statement.

148 We remind ourselves that an award of aggravated damages is not to punish a party for how it has conducted itself. By taking the stance it has, the respondent has put obstacles in the claimant's path. That seems to chime with a mindset revealed at an earlier stage, when Mr Brandwood said the respondent would vigorously defend proceedings, albeit in that instance in respect of the first Tribunal claim. We find this has added to the claimant's sense of upset and frustration and enhanced any injury she had.

149 This conduct falls into the third category for which aggravated damages may be awarded, namely subsequent conduct of the perpetrator. It is not appropriate to put any quantification on this head of loss, before we assess all remedy aspects in this case.

Unanimous decision

150 All members of the Tribunal agreed on these findings and conclusions.

Employment Judge D N Jones

Date: 31 October 2024

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/