EMPLOYMENT TRIBUNALS

Claimant: **Ms C Cattell**

Respondent: **Dr Rachael Sullivan t/a St Peter's Avenue Dental Practice**

Heard at: **Lincoln** **On:** **9 June 2017 for reading in; 12, 14, 15 June 16 & 17 August 2017 for hearing; and 18 August 2017 in chambers**

Before: **Employment Judge R Clark**
Mr P Jackson
Mr R Loynes

Representation

Claimant: **In person**
Respondent: **Mr C Bourne of Counsel**

JUDGMENT

The unanimous judgment of the Employment Tribunal is :-

1. The claim of unfair dismissal **succeeds.** Remedy to be determined if not agreed.

2. The claim of discrimination because of something arising in consequence of a disability **fails** and is dismissed.

3. The claim of failure to make reasonable adjustments **fails** and is dismissed.

4. The claim of harassment **fails** and is dismissed.

5. The claim of victimisation **fails** and is dismissed.

REASONS

1. Introduction

1.1. The Claimant brings claims of unfair dismissal and disability discrimination in a number of forms. All relate to the events leading up to her decision to resign from her employment effective on 21 July 2016.

2. Preliminary Issue

2.1. At an earlier Preliminary Hearing, the Claimant had been ordered to complete a "Scott" schedule setting out essential elements of her discrimination claim. She was told that this was to particularise the existing claim and not to bring new claims. Any new claims would need to be supported with a written application to amend. The Claimant complied with the preparation of various schedules and the Respondent duly replied to the further particularisation. In both cases the schedules stand as amended claim and response. That is, save for the schedule setting out claims of failures to make reasonable adjustments. The Claimant's ET1 does not intimate such a claim and does not identify the facts lying behind the claim now set out in the schedule. In its reply to that schedule, the Respondent addressed the substance of the claim but pointed out the Tribunal's requirement for a written application to amend.

2.2. On 2 April 2017 the Claimant emailed the Tribunal attaching two letters. One related to her Mackenzie friend, the other was her written application to amend to include the reasonable adjustment claim. The covering email referred only to the Mackenzie friend and, in error, this was the only attachment printed out. The Claimant's application was therefore not put before an Employment Judge and no determination was made. Fortunately, the application was copied to the Respondent.

2.3. The oversight was identified at the start of this hearing and the application renewed. It is in brief terms and seeks to amend the claim in the terms of the Scott schedule. The Respondent takes a fair and measured stance to the application. Strictly, they object to the amendment at this late stage but accept that they are fully aware of the Claimant's case, have attended ready to meet it and cannot point to any disadvantage if the claim were to proceed on that basis. We considered the application against the established tests for amendments and applying relevance, reason, justice, and fairness. Noting we were at the start of the final hearing but that the parties were ready to proceed, we balanced the competing prejudice between the parties and resolved to permit the amendment as drawn.

3. Issues

3.1. At the outset, we discussed and agreed the issues in the case with the parties. In respect of the claim of unfair dismissal they are:-

a. Whether the Claimant has shown the Respondent had committed a fundamental, repudiatory breach of contract.

b. If so, whether the Claimant affirmed that breach.
c. If not, whether the Claimant resigned in response to that breach.
d. If there was a dismissal, whether the Respondent has established a potentially fair reason for dismissal (SOSR is advanced).
e. If so, whether dismissal for that reason was reasonable in the circumstances.
f. If the dismissal was unfair, whether the Claimant's conduct caused or contributed to her dismissal and whether the Claimant's employment would have terminated fairly at some point in any event.

3.2. Turning to disability discrimination, in respect each of the 9 allegations [68-75], it was agreed that the Claimant had completed the wrong schedule and that the circumstances of her allegations were properly claims of unfavourable treatment because of something arising in consequence of her disability. The issues are:-

a. Whether the Respondent treated the Claimant in the way alleged.
b. Whether that treatment occurred within the period of 3 months before the claim was presented and if not,
    i. Whether it formed part of treatment extending over a period, the end of which was within 3 months of the presentation of the claim, or
    ii. Whether it is just and equitable to extend time.
c. Whether that treatment amounts to unfavourable treatment and whether it occurred because of something arising in consequence of the disability.
d. If so, whether the Respondent knew or could have reasonably known that the Claimant had the disability.

3.3. In respect of each of the 5 allegations of failure to make reasonable adjustments [76-77], the issues are:-

a. Whether the Respondent applied the particular PCP.
b. Whether the PCP put the Claimant at a substantial disadvantage.
c. Whether the Respondent knew, or could have reasonable known, that the Claimant was disabled and was likely to be placed at the said disadvantage.
d. Whether the adjustment contended for was reasonable to make in the circumstances to avoid the disadvantage.
e. Whether the failure to make the adjustment occurred within the period of 3 months before claim was presented and, if not:-
    i. Whether the failure to make the adjustment formed part of treatment extending over a period, the end of which was within 3 months of the presentation of the claim, or
    ii. Whether it is just and equitable to extend time.

3.4. In respect of each of the 7 allegations of harassment [78-81], the issues are:-
a. Whether the Claimant was subject to unwanted conduct related to a protected characteristic (her disability)
b. If so, whether it had the proscribed purpose or effect as set out in s.26(1)(b) of the 2010 Act.
c. Whether the conduct occurred within the period of 3 months before claim was presented and, if not:-

i. Whether the conduct formed part of conduct extending over a period, the end of which was within 3 months of the presentation of the claim, or
ii. Whether it is just and equitable to extend time.

3.5. In respect of each of the 11 allegations of victimisation [82-85], the issues are:-

a. Whether the grievance letter of 21 January 2016 was a protected act for the purpose of s.27(2) of the 2010 Act.
b. If so, whether the Respondent subjected the Claimant to the alleged detriments.
c. If so, in each case whether it can properly be described as a detriment.
d. If so, whether the treatment was because of the protected act.
e. Whether the conduct occurred within the period of 3 months before the claim was presented and, if not:-
i. Whether the conduct formed part of conduct extending over a period, the end of which was within 3 months of the presentation of the claim, or
ii. Whether it is just and equitable to extend time.

3.6. The parties confirmed there were no other claims. It was agreed that the hearing would deal with liability only.

4. **Evidence**

4.1. We received a bundle running to 528 pages and considered those pages we were referred to. In support of her own case we heard from the Claimant and Mr and Mrs Hind, her previous employer and the then practice manager. We received a character witness statement from Mrs Fiona Parkinson. The Respondent indicated that there were no questions for this witness and her evidence was taken as read.

4.2. For the Respondent we heard from Dr Sullivan and Mr Vivian, the practice Manager. All witnesses provided written statements which they adopted on oath and on which they were questioned. We invited closing submissions from both parties. Mr Bourne spoke to his written submissions. The Claimant was disinclined to make any submissions. She was encouraged to address us, particularly on areas of disputed fact and how the subsequent findings informed the issues we had to resolve. She declined.

5. **The Facts**

5.1. It is not the role of the Tribunal to resolve each and every last dispute of fact arising between the parties but to focus on those facts necessary to determine the issues and to set them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

Background

5.2. The Respondent is a dentist running her own practice known as St Peter's Avenue Dental Practice. She is a sole trader. It is a small business employing 8 members of staff. Although she is now the employer, she and the Claimant had

worked together for a number of years before then. The Respondent bought the business from her previous principal, Mr Hind in 2014 after a period of around 10 years working along side him as an associate. All the employees transferred to her under TUPE. Save for subsequent pay rises, we find the Respondent did not make any material changes to any aspects of the employment relationships and simply adopted whatever had been in place under Mr Hind. We find she has next to no experience of managing staff or being an employer. Other than Mr Kushner, an associate dentist recruited in June 2015, and Mr Vivian, the practice manager, the staff are all female. The business operates from an old building, probably a converted Victorian residential property. There are surgeries and facilities on two floors and two staircases between them. One is a wide original staircase with a hand rail and shallow treads. The other is a steep spiral staircase within a narrow stair well surrounded by walls close on three sides.

5.3. We find the position of associate in this context is not that of an employee. It is a self-employed sole practitioner that operates within the structure of the practice. An associate pays a proportion of their own fee income to the principal in return for the facilities provided by the practice including reception and dental nursing support. Save in emergencies or on clinical referral, the associate and the principal keep their own list of patients.

5.4. The Claimant is a dental nurse. She was employed from 23 January 2007. She had no prior experience in this sector and obtained the employment through an acquaintance with Mr Hind. She worked part time, afternoons. The nature of the work rota was such that the Claimant would from time to time also work on reception which necessarily included using the telephone. She has no experience of undergoing a disciplinary process and no experience of handling the criticisms that this employer would, in due course, put to her. She was competent in her duties, including reception and had received a positive appraisal from the respondent in 2015.

Disability

5.5. The Claimant was diagnosed with an acoustic neuroma in 2013 and it is in respect of the consequences of that impairment that the disability claims are based. Prior to this hearing, the Respondent had made a limited concession that the Claimant is disabled for the purposes of meeting the definition in the Equality Act 2010. At this hearing, however, the position now requires further qualification and findings as both parties now seek to circumscribe the effects of the impairment differently.

5.6. The Respondent's concession was based on some initial, limited disclosure made before the full disclosure order was complied with, in particular a letter dated 12 March 14 [396]. That letter confirmed the presence of an inter-cranial lesion, a presumed acoustic neuroma, the consequences of which were described as right sided hearing loss almost certainly directly related to her presumed acoustic neuroma and which was both permanent and may be progressive. In making its concession, the Respondent must have made assumptions about the nature and degree of the hearing loss on the Claimant's ability to carry out normal day to day activities as the letter is otherwise silent on that point. Whilst not resiling from the concession, Mr Bourne submits that had he seen the full medical records, and had he appreciated then that the letter was written for the purpose of an insurance claim, he would not have advised the Respondent to make the

concession. He invites us to consider the full picture provided by the medical evidence from which he says the only conclusion is that the Claimant faced no substantial disadvantages from her disability at all, whether in or out of the workplace.

5.7. For her part, the Claimant says that the effects of the impairment go further than hearing loss and include clumsiness, visual vertigo, tinnitus and balance issues. Consequently, whilst we accept the Respondent's concession and find that the Claimant is disabled for the purpose of the Equality Act 2010, in order to properly determine the discrimination claims properly we must still determine the boundaries and extent of the disability and its effects which may go further than the Respondent's concession or may be narrower than the Claimant's case.

5.8. In resolving this issue, we have considered the various sources of relevant evidence. They are the medical records, the GP's occupational health advice, such as it was, the history and evolution of the Claimant's complaints and her contemporary evidence of symptoms and effects. In respect of the latter source, we give that greater weight than we did to the descriptions advanced during the course of the present litigation which we found at times to be confused as to whether there were symptoms or not, whether she was fit for work or not and whether adjustments should be made or not. We have also considered the wider context of the manifestation and extent of her symptoms.

5.9. Turning to the history, the Claimant experienced transient episodes in 2012. A referral was made to explore whether she had suffered a TIA which was ruled out. It was those explorations, however, which identified the right sided acoustic neuroma. In June 2013, a consultant reported she had no complaints to make other than hearing loss and also tinnitus which she had by then had for around 15 years. There is no suggestion that the neuroma and the tinnitus are clinically linked, indeed Dr Sandhu refers to the tinnitus as having become more intrusive since she "*found out"* about the neuroma, a comment we find suggests the symptom to be coincidental to the impairment. During various GP and other referrals, the Claimant has confirmed that there were no visual, speech or limb symptoms. She was reviewed in October 2013 when she described there being no symptoms apart from the long standing tinnitus. In December 2013, a review confirmed the presence of tinnitus and slight hearing impairment but noted that the intermittent episodes of headache and visual disturbance were migrainous in origin.

5.10. As to the hearing loss, we are satisfied the evidence shows this is an effect caused by the impairment although it is right sided only, the left hearing being normal. The severity of hearing loss is described variously as "mild" or "slight". The clinical plan in respect of the hearing included a referral to an audiologist for the purpose of a trial of a hearing aid. The audiologist noted in January 2016 that it was principally for help with tinnitus which the Claimant "*mainly notices at night, she manages okay during the day with it*". Alternatives were discussed which the Claimant felt "*would be more benefit to her than the hearing aid*" although in the review with her consultant Mr Gunasekeran, the same day, a trial of the hearing aid was recommended and the Claimant agreed to it. Although it is not of the greatest of assistance to us, the Respondent obtained a medical report from the Claimant's GP during the course of considering the Claimant's return to work which resulted in a statement that the Claimant was fit for work. However, attached to it were two specialist ENT reports one dated 25 January 2016 [341]

and the other 4 March 2016 [340], the former recommended the Claimant undergo a trial of a hearing aid in the right ear.

5.11. Throughout the specialists' reports that we have seen, a repeated theme is that the Claimant is asymptomatic apart from the tinnitus and, significantly, there are no problems during the day. The Claimant has reported to her various clinical advisers that she has no problem with balance or visual disturbances, moreover, she had been positively advised to seek medical help immediately if she did experience this. We find that if those symptoms had presented, she would have done as advised and we would see it in the medical notes. The only time this was clinically explored was as part of an audiology assessment when the Claimant scored at a level that the clinician described as "*not significant for visual vertigo*". Overall, we are not satisfied that the effects beyond hearing loss and tinnitus are made out. As to the tinnitus, this is particularly long standing and precedes the acoustic neuroma by around 15 years. The Claimant says she does not know how long she had had the neuroma before it was diagnosed and that this could be the cause of the tinnitus. She may or may not be correct but we are not satisfied that the evidence before us allows us to reach that conclusion. Whilst we are satisfied she does have tinnitus and that this manifests at night which can affect her sleep, we are not satisfied that the evidence of its effect on the claimant has established that this satisfies the definition of disability either alone or, taken together with the neuroma, cumulative with the mild hearing loss. We find that the Claimant has however satisfied us, on balance, that her impairment satisfies the definition of disability insofar as the mild, right sided hearing loss causes a permanent adverse effect on her binaural hearing. This is permanent and we are prepared to accept that this has a substantial adverse effect on her ability to carry out normal day to day activities although, without the Respondent's concession, the evidence of the actual effects on day to day activities as they were at the relevant time is very much on the cusp of the threshold. Nevertheless, the condition had been described as progressive in all likelihood and we infer from that that the right sided hearing loss is likely to deteriorate further over time in the future.

5.12. It may seem unusual to have such a disparity in the symptoms and effects as we have found them and that advanced by the Claimant. We find there is a reason for this and that is because of her own research into the condition. We find it perfectly understandable that, notwithstanding the benign and stable nature of the tumour, the Claimant became extremely anxious about the diagnosis and began to undertake a great deal of research into the potential symptoms such a condition could give rise to. We find this a perfectly natural response to the diagnosis. However, we find the value of this research became outweighed by the negative effects the additional anxiety was causing. In June 2015, her GP records chronic anxiety, mainly stemming from the diagnosis. By November, however, this mental and emotional effect was recorded as being influenced by the fact she read "*lots of stories online about awful symptoms people coping with … and makes her more upset and anxious but wants to be well informed*". The clinical plan at that stage was an agreement that "*she will try not to read horror stories online and try to concentrate on the thousands of people who don't write on these sites as they cope well*."

Early Chronology

5.13. Turning to the relevant chronology, during her first 7 or 8 years, the Claimant worked predominantly for Mr Hind. We find that his clinical practices were different to hers, him being much older than her the differences were products of their respective qualification era. The relevance of that difference is that the Claimant had developed her clinical practice as a dental nurse not only with someone she regarded as a friend, but drawing on his clinical and personal style and approach. On the occasions she worked with the Respondent, the clinical practice was different. We find this to be the reason for what became a professional tension between them.

5.14. We find the Claimant did not have a particularly positive view of the Respondent. In the course of the evidence before us she pointed to various criticisms that Dr Sullivan made of her work practices. We did not find the thrust of these to be materially different to the criticisms Mr Hind had himself made of her. This included "flapping" or "failing to plan lists" and her deficiencies in the technical aspects of clinical products. The significance to us of those findings provide a benchmark as to how we should interpret the more recent complaints as the Claimant would repeatedly insist that Mr Hind's approach was neither unfair nor discriminatory. We find the working relationship with Mr Hind had been comfortable to the Claimant. She underwent annual appraisals with Mr Hind which at times disclose the sense of tension she had when working with the Respondent.

5.15. The Claimant's comparative opinions of Mr Hind and the Respondent is first seen in the context of the TUPE transfer. We were invited to find the Respondent failed in her obligations to the staff, particularly in respect of the rates that staff were paid. This criticism vanished on analysis. We have seen a written TUPE notice and information to staff which informed them of the transfer and identified that the transferor was not intending to make changes. We find any difference in pay that existed between the dental nurses after the transfer was only that which the Respondent had inherited from Mr Hind. Again, the Claimant and Mr Hind were absolutely sure that there had not been any discrimination or unfair practice during the time before the Respondent took over.

5.16. There was also a suggestion that the Respondent had failed in her duty of care to the Claimant in not exploring her disability at the point of the transfer. We find that the Respondent first learned of the diagnosis of the neuroma around mid 2013 but at that stage was not aware of any effects it had. However, we do not find this to be an omission but arose as a result of discussions that took place with Mrs Hind on her buying the practice. She had informed the Respondent that the claimant's neuroma was benign and did not affect the Claimant at work. Over and above that explicit statement, the Respondent could draw on her own experiences of the absence of any apparent affects in the workplace, any requests for changes or other issues being raised by the Claimant which might reasonably have been disability related. We find the absence of any explicit references or obvious issues meant she was entitled to draw the conclusion she did. We find that throughout the period from the initial diagnosis, the Claimant worked without any apparent manifestation of the issues now said to be related to her disability and did not raise any issues with the employer as are now raised before us. Matters which have become allegations in this claim have taken on a significance that was not present at the time. For example, the alleged disadvantage in using the telephone was neither raised at the time nor ever apparent from her working practice. We find the one incident referred to where the Claimant asked Mr Vivian

to take over a call with a patient was related to the issues being raised in the call, not the Claimant's ability to hear the patient.

5.17. A theme repeated in the case before us was that there was a lack of emotional support to the Claimant from the Respondent. It was difficult to identify what this consisted of and what it was that had happened previously under Mr Hind but which did not continue under Dr Sullivan. On balance, we find this related to pastoral or empathetic responses which, we suspect, arose more out of the friendship between both Mr and Mrs Hind and the Claimant than their relationship as employer and employee. As to how this criticism plays out against the Respondent, we find the nature of the working relationship was such that the same level of interaction simply did not exist. However, that is not to say that there was no support to the Claimant in response to her impairment. We find the Respondent did not know of the hearing loss until it came to light in the context of a review of the fire alarm procedure. The practice had for some time used bells and whistles to raise the alarm in response to emergency fire drills. The Claimant raised the fact that she sometimes did not hear them. We find this influenced the Respondent to install a new Chubb system. One knock-on effect of the new system was an audible door entry chime which was of a tone that the Claimant said affected her. Again, the Respondent had it altered. We are satisfied that within the limitations of this small and inexperienced employer, it was an employer that was prepared to respond positively to the need to make adjustments where it could and when they arose.

Mr Kushner

5.18. After Mr Hind's retirement, the practice needed to recruit another dentist into the associate position that Dr Sullivan had herself occupied whilst working under Mr Hind. This proved difficult. Eventually, Mr Kushner was recruited from South Africa where he had practised for some years, running his own practice. There was a dispute of fact as to when he started. We find he started at the practice in or around June 2015. Upon his arrival there was a plan of sorts to help him integrate into the UK culture, particularly in respect of expectations of clinical dental practice. For an initial period, two nurses were assigned to work with him in order to provide consistency and embed the expected clinical practices for NHS and private patients. The Claimant was not one of those two nurses assigned to work with him at first and there was a period of a few months when she did not work his surgery. The change in rotas meant from this time she would routinely work one of her shifts on reception duties. She did, however, undertake one shift during his first week in the practice out of necessity. After this initial shift, the two were not rostered to work together. We do not find as a fact that that during that isolated session there was a discussion between the Claimant and him about her disability or that he insisted that she did not work with him again. In due course, she would in fact work with him. We do find that there was some initial communication difficulty for all the nursing staff due to his South African accent but the Claimant was neither singled out nor did she raise it in those terms. Likewise, we find it more likely than not that Mr Kushner's interaction with patients was equally difficult and whether it was due to his accent or his cultural background, there were growing tensions across the board about how his practice was managed. We do find that the Claimant did not have a very high regard for Mr Kushner's clinical practice and aired her opinion that she would not let him work on her teeth. However, as to the two of them not working together during his initial period, we find on balance the reason was as a result of the initial plan to

give him consistent nursing support and not as a complaint by him about the Claimant. We have not seen any contemporaneous complaint and it is in any event common ground that whatever the tensions that existed, it was "put to rest", to use the Claimant's words, soon afterwards.

5.19. The Claimant suggests as a result of her views of Mr Kushner, the Respondent became hypercritical of her. That is said to be during the second half of 2015. We are unable to accept this was the case. In the first instance, the Claimant was inconsistent in the chronology of when and why she asserted that the Respondent's attitude towards her changed to hypercritical, sometimes relying on this period, sometimes as a result of the grievance she would in due course submit in January 2016. There was also an inconsistency in her case when seeking to contrast the criticisms that would in fact be raised of her during the spring of 2016 with the assertion that the Respondent "*had never raised any criticism of her previously*". We found the Claimant's evidence to have been infected with a reconstruction of events viewed through the type of lense that is ground only after the working relationship had soured.

The Claimant's Grievance

5.20. We deal with the catalyst for the Respondent's concerns further below but we do not find there was any change in attitude during 2015. In fact, despite the background of tensions in their professional working practices, 2015 marked something of a high point. We find the Claimant was working well, was particularly empathetic with patients and appeared to be particularly focused on developing her skills. We find Dr Sullivan had supported the Claimant to undertake a radiography course during 2015. She had engaged with that study in a particularly studious manner and was awarded an "A" grade in her final examination in September 2015. Whilst we accept the two were never going to have the type of relationship that the Claimant had had with Mr Hind, we find that in late 2015, the relationship was as good as it ever could be. That would deteriorate rapidly during 2016.

5.21. We find the Claimant's success in her radiography qualification led her to seek an increase in pay. This was more than simply recognition of her qualification, but arose out of her sense that another nurse was paid more than her. The Claimant's personal view was that this qualification made her the second most qualified dental nurse in the practice. We find Collen was the highest paid nurse, a state of affairs that had arisen during Mr Hind's time as employer and something we accept the Respondent did regard as an anomaly but one that she felt she was stuck with for some time to come. There had already been a general pay rise for all staff during 2015 and the Respondent was trying to gradually reduce the disparity relative to Collen's pay over time but the Claimant was of the view that a percentage pay rise was not fair to her. Her logic was that the effect of a percentage increase depended on the base pay being increased. We find she raised the issue of her pay with the Respondent in or around December 2015. We do not find that this discussion raised issues of holidays and other terms although these all stem from the Claimant's same general sense of unfairness. We find the response from the Respondent was positive and that a further pay rise was given as a result of the Claimant's exam success which would take effect in January 2016. Colleen had failed her radiography exam.

5.22. That pay rise, however, did not go far enough to quell the Claimant's own sense of dissatisfaction with her lot compared to some of the other staff, Colleen in particular. She felt that there were other differences between the staff in what they got and how they were treated. On 21 January 2016, the Claimant submitted a written grievance. As this is said to be a protected act, it is necessary to set it out in full.

> ***"Dear Rachel,***
> ***I am writing this letter in relation to the grievance I feel, in relation to the terms and conditions of my employment. I consider I am being treated unfairly and not equally as I should be, making me feel discriminated against. Example as follows: –***
>
> ***1 Pay***
> ***I am on less money than some of my colleagues, who are less qualified than myself. I am the second most qualified nurse at the practice.***
>
> ***2 Holiday entitlement***
> ***I get four weeks holidays a year and others seem to be entitled to 8–9 weeks a year for the same hours per week worked 16. However I work four days a week opposed to their 2. Our holidays are worked out on days worked not hours worked.***
>
> ***3 Holidays***
> ***Rules are being broken with regards to holidays which sets precedent for others to abuse the system and making it harder for others to book holidays.***
>
> ***4 Working week***
> ***I stated in the past to my colleagues, well before Colleen left for maternity leave that I would like to work the opposite two days to colleen on return from maternity leave. Unfortunately due to my naivety it was requested by someone else. These hours should be offered to all members of staff at that time.***
>
> ***I would like it known that I would like the same opportunities as other members of staff and would like to work two full days a week i.e. preferably Tuesday/Wednesday.***
>
> ***I have worked at the practice 9yrs on Saturday and I enjoy working at this practice. I am passionate about my work, our patients at the continued success of the practice. I believe I go above and beyond what is expected and I have always been willing to go the extra mile, I am definitely a team player.***
>
> ***For eight of those nine years I have worked at the practice I have been the only member of staff that has had to come to all staff meetings and training in my own time, this is something that I don't think my colleagues appreciate.***
>
> ***However the situation I find myself in at this time makes me feel undervalued compared to my colleagues.***
>
> ***I hope these matters can be resolved."***

5.23. The Claimant accepted that when she attended meetings outside her normal working hours she was paid for it. She also accepted that the issues in respect of holiday entitlement, taking holidays and working week were not in any way by reference to any discrimination. However, she insisted that the complaint about pay was a discriminatory act although could not satisfactorily explain how. Moreover, she accepted that Dr Sullivan would not "*have any idea*" the pay issue was done by reference to unlawful discrimination under the Equality Act. This sits against the background that the pay rates were inherited from Mr Hind's time as employer during which time the Claimant asserted there was no discrimination.

5.24. We find the initial response to the grievance was to acknowledge it in a text to the Claimant. Whilst that seems an informal means of communication, in this small employer we find this method of communication was normal and worked both ways for staff and employer. The text sets out an initial response largely dismissing the points although the Respondent undertakes to investigate the pay issue further. It also expresses concern about the sharing of confidential pay rates between staff in respect of which, we do not find there to be a contractual term of confidentiality.

5.25. The Claimant responded by text, disagreeing with some of the initial response and asking to speak. We find there was a discussion with the Claimant about her grievance soon after. It was an informal discussion which happened when an opportunity presented itself during the working day. It was not an arranged meeting, not conducted with any sense of procedure and no correspondence followed. During that meeting we find the Respondent dismissed the points raised by the Claimant as being factually incorrect. We have already referred to the Respondent's naivety as an employer. There is no grievance procedure and the Respondent did not know to consider the Claimant's concerns in that context. We find the Claimant felt strongly about the injustice and the Respondent's response which denied the basis on which she felt that injustice rested, only served to add fuel to her sense of grievance. The working relationship was now deteriorating from its relative high a few months earlier. We find the Respondent's response to this meeting was to make a record on her smart phone in which she recorded brief bullet points of what was said [207]. We find the discussions did not raise any issue of disability.

5.26. There was no further repeat of the grievance issue for a number of weeks. We find during this time the Claimant continued working her normal part time hours including the sessions with the Respondent herself. We find the Claimant's view that the pay rates were unfair affected her working relationship with those other nurses whom she felt were being paid more than her without good reason.

Deterioration in Relations

5.27. On Friday 4 March 2016 the Claimant had sent a text the Respondent to see if they could meet at the practice over the weekend. The Respondent replied that she was not at the practice and the meeting did not take place. Tuesday 8 March 2016 was the Claimant's next day working with the Respondent. We find there were a series of incidents that session where the Claimant said or did things inappropriately, or at least out of character, sometimes in front of patients causing the Respondent to issue an apology. The behaviour included arguing back to the Respondent's requests, stomping around the surgery including on the wooden staircase and slamming doors, aggressively stamping the instrument bags during the autoclave procedures which others could notice. The Respondent attempted to engage with the Claimant as it seems there may have been other issues in the Claimant's life which may have been the cause of this behaviour, including splitting up with her partner. The Respondent offered her the afternoon off. The Claimant's response was curt and abrupt. The Respondent again noted the day's events.

5.28. Similar behaviour was noted the following day.

5.29. On 10 March the Respondent was now routinely recording her thoughts about the working day with the Claimant. There were errors made by the claimant and it is clear that the relationship was such that the Claimant was disengaging from normal interaction and the Respondent was deliberately avoiding making an issue out of the events.

5.30. On 18 March 2016 matters come to a head when the Claimant and Respondent were able to hold another informal meeting on the Claimant's day off. The Claimant had been wanting to speak with the Respondent again about her grievance. We find the Respondent knew she wanted this meeting and can't have been looking forward to it as she characterised it in terms of "bite the bullet get on with it". The grievance was raised and the Respondent repeated her position on the issues of pay and holiday that she had previously expressed. We suspect prompted by the Claimant's assertion of her skills and qualifications that justified more pay, the Respondent stated how she was not happy with her recent working practices, that she had been slamming things in the surgery, slamming doors, banging into things including a radiator that had been knocked off its bracket. We find two points significant about this exchange. First, we find that the accusation of slamming doors and banging things down did not prompt a response from the claimant in respect of any disability but, instead, to a reference to bringing up 4 boys and always rushing. Secondly, that the Claimant herself suggested that *"maybe she should find another job"* which the Respondent rejected saying she just wanted her to change her ways. In the evidence before us, the Claimant asserted that she did not stomp up and down yet her pleaded case is that her being noisy is related to her disability. We preferred the Respondent's evidence of these incidents. The Claimant had never previously displayed this sort of behaviour and we find it to be a conscious manifestation of her sense of dissatisfaction with her employment.

5.31. The Respondent's belief about the radiator being knocked off its bracket arose from her own observations of the Claimant rushing around the surgery together with some recollection amongst other staff of one day hearing a loud bang upstairs which prompted them to ask the Claimant if she was alright. In this case, our focus is principally as to the Respondent's belief which then informs the reason why she raised it with the Claimant, rather than whether the Claimant did in fact knock into the radiator. To the extent we need to make a finding, we are far from satisfied that there is necessarily any link between what the staff may have heard and what was later to be noticed about the radiator when it was observed to be not sitting squarely on its brackets. We are unable to find that it was knocked by the Claimant as there seems to be an equally plausible reason for it arising from the fact that some plumbing work had been undertaken not long before. Equally, the Claimant's evidence was far from consistent ranging from it being knocked as a result of her disability, not knocking it at all, catching it while carrying something or stumbling, like anyone could do, and dropping a box of syringes which hit it.

5.32. The Claimant's next working day was Tuesday 22 March 2016. The Respondent recorded how the Claimant was now "tip-toeing" around the surgery and placing things down slowly and without making any noise whatsoever as if a sarcastic response to the Respondent's previous requests. We find this to have been a deliberate response to the Respondent's criticism of her recent behaviour.

5.33. On 23 March 2016, Mr Vivian encountered Colleen at work in a distressed and tearful state. His enquiries established that she was distressed by the fact the Claimant had been contacting her out of work about work which was causing her stress and upset and she did not want to get involved. The Respondent attributed the Claimant's behaviour to be the reason why morale at the practice had changed for the worse and held a belief that many of the staff were unhappy with the Claimant. She resolved she needed to do something. She felt that she could not informally approach the Claimant due to resent events and decided to suspend the Claimant.

Suspension and Disciplinary Investigation

5.34. On 23 March 2017 the Respondent wrote to the Claimant suspending her from work for 1 week [217]. The letter referred to the Claimant's "behaviour this week to your colleagues". It noted the discussion the two had had the previous week during which reference is made to the Claimant's personal problems over a long period of time. It asserts how the Claimant's "*personal attitudes and behaviours are reflecting negatively on our practice*". This letter required the Claimant to provide a written response stating the sort of communications she has been having with colleagues out of business hours. The letter of suspension was handed to the Claimant in the car park as she arrived at the practice for work.

5.35. The Claimant did respond on 24 March in terms which seemed to us to address the letter of suspension [219]. We find its contents significant in two particular respects. Firstly, it draws attention to the absence of a written reply to her grievance January grievance from which we draw support for the suspicion that the claimant's conduct in the workplace was in response to that. Secondly, it does not raise disability as having any bearing on the allegations of her behaviour in the workplace. It concludes with an apology for any unintended upset caused to colleagues and an assurance that the Claimant would make every effort to make sure it didn't happen again.

5.36. The Respondent took the view that this response did not provide a satisfactory response. The Respondent wrote again on 30 March 2016, suspending the Claimant further until 11 April and set out specific points the Claimant was to comment on. One aspect was a concern the employer had that the claimant's neuroma may be having an effect on her that she was not herself aware of. Within this letter, the Respondent provided a response to the January grievance. The Respondent's naivety as an employer is seen further in this letter. Although the purpose at this stage is said to be to suspend the Claimant, and any investigation is clearly ongoing as the Claimant has not yet responded in a manner to the Respondent's satisfaction, the letter nevertheless ends with a settled disciplinary conclusion expressed as drawing up in the future a list of personal recommendations as to changes in the Claimant's conduct "*which will constitute a final written warning. I am not simply giving you a written warning – to reduce your colleagues to tears and silence is simply intolerable in a small workplace such as ours"*

5.37. That reference to silence may be the fact that, by then, Colleen had indicated that she did not want to put any complaint in writing. In fact she said on the day that Mr Vivian first spoke to her that she didn't want to get involved and refused to provide the text messages the Claimant had sent her. Subsequent investigations with other staff resulted in next to nothing being reduced to writing.

Sarah Burnett recalled in one email discussions with the Claimant about pay and terms [320] and expressed her own opinions of the Claimant. So far as any further investigation results can be discerned against that background, Colleen's issues about being contacted by the Claimant seems to have narrowed to focus on the timing and duration of that contact, rather than the content or subject of discussion. We have seen three short text messages sent early one evening in which the Claimant seeks Colleen's view on allegations she faced about her conduct and how it was said to be affecting the other staff. It is not an extensive exchange and does not immediately suggest to us obvious misconduct.

5.38. The Claimant responded in writing again on 8 April 2016. We find these exchanges were by now neither resolving the issues the employer had nor improving the already strained relations. The only matter that appeared to have settled, if not with the Claimant's desired outcome, was the January grievance in respect of which the Claimant thanked the Respondent for concluding her grievance in writing. Within her letter, the Claimant addresses her health and whether this could be responsible for having any effect on her behaviour. Other than stating how this has caused her upset worry and stress and leaves her with a feeling of uncertainty with regards to her future, she states she is unable to comment. She points to a lack of support and appreciation of her situation which we find is a reference to her perception of the emotional support she felt she experienced under Mr Hind and not in respect of any issues in the performance of her duties. In fact, she explicitly states how she is fully fit to perform her contractual role.

5.39. The delivery of the letter was preceded by a text in which the parties agreed to meet after the contents had been digested. That meeting took place at the end of the day on 8 April. We are unable to give it the formality of an investigatory meeting as the Respondent suggests although it clearly served the purpose of exploring further the parties respective positions on the issues of relations between colleagues and as between Claimant and Respondent. Whatever the purpose of the meeting, it seems not to have been successful. The notes made by the Respondent [248-250] give a clear insight into the fraught relations and particularly how the Respondent viewed the Claimant. The Respondent felt the Claimant's contribution to the meeting was prepared. The Claimant accused the Respondent of not being a good boss. The meeting concluded with a statement by the Respondent that she couldn't work with the Claimant again and that it was time to discuss how many weeks' pay she was going to get after she had dismissed her. The Claimant said she would get her solicitor to discuss it with the Respondent.

5.40. On 9 April 16 the Claimant sought clarification as to whether she had been dismissed, was still suspended or was to return to work on 11th as previously advised. Despite the Respondent's own notes being apparently clear, we find the actual exchange must have been somewhat ambiguous. The response from the Respondent came by text saying "No, I have not dismissed you yet".

5.41. The Respondent set out its concerns over the recent chronology in full in a lengthy letter of 10 April 2016. At 25 pages, to describe it as a letter makes it sound oppressively long however, when viewed as a disciplinary investigation report containing notes of meetings and other previous correspondence, it is not so long. However, we take the view it is not an investigation report in the sense that would usually be understood, even for small employers like this. In this case

it is the fruits of a naive employer trying to put to the employee the matters that are causing her concern. It is the Claimant that describes it as a "detailed investigatory report" in her Scott schedule from which we draw the conclusion that that is how the parties viewed it. However, naïve it may be, in evidence the Claimant accepted that this letter gave her everything she needed to know to understand what it was that the Respondent was concerned about with her behaviour.

5.42. The letter is split into 10 sections. The Claimant asserted it was defamatory or discriminatory. During cross examination the Claimant was taken to each page of the letter and invited to identify where it was defamatory or discriminatory. She was unable to. However, what this letter does do is to conclude, at section 10, with the heading "Proposal for dismissal". When one turns to that section in includes a statement that the Respondent has lost faith in the Claimant's ability to preserve confidential information and to speak truthfully. It extrapolates that to a concern that she might be at risk of committing serious professional misconduct in the future. In words that we find cannot be misinterpreted, it states "*I feel there is no realistic alternative to dismissing you from your duties, as I believe you are no longer fit to carry them out*." However, rather than dismiss her, it invites the Claimant to consider whether "*this would not be a good moment to bow out? Why fight dismissal? Could you not accept full responsibility for what has happened and resign?*" The parting question is "*Will you resign or do I have to take you along the path of dismissal proceedings*"

The Disciplinary Process

5.43. The Claimant's response to the investigation letter came on 14 April 2016 [256]. She repeated her position. Within that, the issues of whether she accepted there was any inappropriate behaviour, or even any change in behaviour was put in terms of (a) there was not but (b) it is possible that her personality may have changed. Understandably, the effect of the Respondent's invitation to consider resigning is such that the Claimant by this point stated how she regarded employment relationship as at an end. She wrote "*I consider that by your actions you have completely breached your duties as an employer and destroyed the employment relationship and in turn have also discriminated against me*".

5.44. By letter dated 15 April 2016, the Respondent invited the Claimant to a disciplinary hearing [258]. The naivety seen in the earlier correspondence is no longer present and this letter sets out the necessary information expected of a disciplinary invite letter, including the right to be accompanied. It is clear that the Respondent had, by now, obtained some professional advice. On 20 April 2016, and apparently out of blue bearing in mind where matters had by then got to, the Claimant sought confirmation of the outcome of her grievance as she was considering appealing [260]. It seems to us clear that the Claimant had also by this time been obtaining her own professional advice. The Respondent replied the following day [261] referring to verbal discussions at the time and referring to her response in the letter of 10 April.

5.45. A disciplinary hearing took place on 22 April 2016. The Claimant attended alone. The Respondent indicated that the meeting would be recorded. The Claimant also covertly recorded the meeting. We were taken to the various transcripts. We did not find the differences between them to be significant and the Respondent was content to rely on the Claimant's transcript. In fact, if anything,

when we were later invited to listen to extracts of the exchanges, it seemed to us that the Claimant was not always correct in her contention as to some of the disputed words said. We found nothing turned on this dispute.

5.46. As to the meeting itself, we found there to be an expansion of the disciplinary charges that were being put to the Claimant compared to the original suspension letter. They became framed in terms of dishonesty in her earlier responses, intimidation of colleagues, encouraging others to divulge confidential information and failure to report damage to property. We were satisfied that the Claimant's participation in the meeting was focused only on listening to what the Respondent had to say against a background of what was by then a settled decision to resign. We are satisfied, as the Respondent suspected, that the Claimant's comments were largely based on a prepared position and advice, that whilst discrimination had previously been alluded to, it was now advanced in detail as the reason behind various aspects of the allegations of inappropriate conduct. We are satisfied that when advancing statements such as "*do I have to point out my balance issues*" the Claimant was in fact advancing a state of affairs that had not previously been put to the Respondent, nor would it have been something that the Respondent could reasonably have had in its mind from past exchanges or mere observations. Likewise, hearing loss is advanced as a possible reason for being loud in her movements. The Respondent observed that the Claimant had never said it was much of an issue, yet suddenly it had become an issue. The absence of formal investigation or written complaint from the Claimant's work colleagues was explored in this meeting.

5.47. It is clear to us that at this meeting the Claimant had already formed an intention to resign and pursue the claim for constructive dismissal. Indeed, she says as much. However, in view of the possibility emerging of a link between the Claimant's health and her conduct, the outcome of the meeting was in fact to pause any disciplinary action and the Respondent then embarked on exploring the potential effects of the Claimant's condition on her work.

5.48. As we have mentioned, we were invited to listen to parts of the disciplinary hearing. Initially we understood this to be to resolve disputes of accuracy in the transcripts which would not have been a good use of Tribunal time unless the wording was critical. However, it became clear the purpose was in fact to gauge the tone and demeanour of the parties during the meeting. After listening to various extracts we determined without hesitation that the Claimant was very much in the driving seat throughout this and, indeed, the other meetings similarly recorded. Whilst we accept the whole situation was obviously a cause of stress for the Claimant, we do not accept at all that the meeting itself was in any way intimidatory towards the Claimant. If anything, it appeared to us that it was the Respondent who was struggling and on the back foot throughout.

5.49. As a result of the change of direction, the Respondent sought the Claimant's consent to approach her GP for a medical report. Whilst this new direction may have been something the Claimant had not anticipated happening and notwithstanding her previous stated intention of resigning, the Claimant gave her consent. There was some delay to that being processed. The Claimant gave consent on 13 May 2016 [332]. On 17 May Mr Vivian wrote to the Claimants GP. He set out 15 questions seeking information on her disability and the effect on her work. The GP responded on 3 June 2016 [344]. Frankly, we found the response to be of little assistance to either Claimant or Respondent although it did enclose

two hospital letters dated 22 January 2016 and 4 March 2016. Ultimately, the GP confirmed in a follow up email that in his medical opinion the tumour does not affect the Claimant from carrying out her duties as a dental nurse [347]

Disciplinary Outcome Letter and Return to Work Proposals

5.50. Having suspended the disciplinary process to explore the health and disability issues further, the Respondent was now in a position to respond to the Claimant.

5.51. On 7 June 2016 a letter was sent simply inviting her to a meeting on 10 June to discuss matters [345]. The exact nature of the meeting in the context of the previous disciplinary process was not entirely clear. Before the meeting happened, however, a further and fuller letter was sent dated 7 June confirming in clear terms that the Respondent was not going to take any formal disciplinary action on this occasion but said how she did still require her to strive to improve her conduct "*so that there is no further perception of misconduct on your part*". Whilst that sentence can be read down to mean the previous situation could have been misinterpreted, it is clear to us that the Respondent did in fact hold the view there had been misconduct as the letter concludes with a warning of future formal disciplinary action if there is "*a repeat of similar misconduct*" and requiring an improvement in the Claimant's conduct. That begs the question what misconduct was found. It does not differentiate between the 6 matters raised at the start of the disciplinary hearing and its contents suggests all matters were found by the employer. The letter sets out 8 measures the Respondent expected the Claimant to take upon returning to work, the first three of which required her to wear glasses or contact lenses to optimise her vision, wear the hearing aid the consultant had suggested to minimise the effects of her hearing loss and to wear sensible work shoes.

5.52. The meeting took place as planned on 10 June 2016 [350]. The Respondent formed the view that the Claimant adopted an uncooperative stance in that meeting stating how she was "*just here to listen to what you say*" and how she would speak to her solicitor before she made any decision what to do next. Whilst we agree that is how it came across to the Respondent, we have to set that in the context of each party's own perspective. The Respondent's was one of an employer that had stepped back from disciplinary action and was now viewing the issues in the context of the health and wellbeing of the Claimant and others. The Claimant's perspective was one of working for an employer that was still of the view she was guilty of misconduct without justification and moreover that she remained at risk of future disciplinary action. She was again contemplating resigning.

5.53. Against the background of what had by this time could have been potential medical explanations for the Claimant's tripping and noisy working, we find there was reason to why the Respondent sought to require the Claimant to wear glasses, the hearing aid and sensible work shoes as a precursor for a return to the working environment, not least that there was a clear recommendation by the Claimant's ENT consultation to trial a hearing aid in the right ear. However, we find the Claimant's position had now changed. Whereas in the face of the disciplinary allegations, she had advanced her various impairments to explain the aspects of her behaviour and conduct in issue, now that those impairments were being addressed by the Respondent outside of a disciplinary context, the

Claimant was now of the view that her balance issue was minor, her loss of hearing wasn't the problem and she was fit to do her job without adjustments.

5.54. There was no agreement reached during this meeting as to a return to work. We find that whilst the Respondent was not going to abandon the requirements she had set, there was some flexibility as to the timeframe of the various trials. The Claimant indicated only that she would reflect on what had been said and take advice. The Respondent wrote to the Claimant the same day [359] expressing her disappointment at what she viewed as the Claimant's uncooperative approach. She explained the reasoning behind the measures she was introducing and invited the Claimant to reflect again over the weekend.

5.55. On the following Monday 13 June 2016, the Claimant obtained a two week fit note advising she was unfit for work. What we have found to be her changing position now of minimising the effects of her impairments appears to have found its way into the doctor's reasons stated on the fit note as "*under severe stress at work exacerbating pre-existing medical condition with which she normally manages well.*"

Resignation

5.56. We find the Claimant did as she had stated and reflected on the situation and took further legal advice. On 24 June the Claimant resigned [366]. It is a lengthy letter which catalogues the history of the relationship from the first suspension. Principally, there are two reasons given for the resignation happening when it does. Firstly, the fact that the Respondent still holds the views of the Claimant's guilt in the misconduct alleged. Secondly, the imposition of health related "obstacles" for a return to work. The Claimant gave 4 weeks' notice. We find those to be the reasons for the resignation.

5.57. On 27 June 2016 the Respondent wrote to the Claimant inviting her to reconsider her resignation [369]. The Claimant replied on 30 June 2016 confirming her resignation and remained off work under the fit note until the end of the notice period.

5.58. The Claimant's last day of employment was 21 July 2016.

6. **Unfair Dismissal**

6.1. The first issue for the Tribunal is to determine whether there was a dismissal. Only then do we need to consider the alternative response that any dismissal in law was, nonetheless, fair. It is for the Claimant to prove she was dismissed. Section 95(1)(c) of the Employment Rights Act 1996 provides that the employee is dismissed by her employer if-

> ***(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.***

6.2. It is well settled that in order to bring a claim within this provision the employee must prove a) that the employer has breached a term of the contract of employment; b) that the breach of that term is fundamental to the contract; c) that the employee resigns in response to that breach and not for some other reason

and, d) the employee does not delay or otherwise affirm the breach so as to deprive her of the right to resign in response. (***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***)

6.3. The contractual term the Claimant alleges to have been breached by the Respondent in this case is the implied term of trust and confidence. This was stated in ***Mahmud v BCCI [1998] AC 240*** as being–

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

6.4. Breach of this term can amount to a fundamental breach but whether there has been a breach is a question of fact and degree for the Tribunal to determine. As Lindsey P emphasised in ***Croft v Consignia Plc [2002] IRLR 851***

> ***it is an unusual term in that it is only breached by acts or omissions which seriously damaged or destroyed necessary trust and confidence. Both sides are expected to absorb lesser blows.***

6.5. We start with the alleged breach/breaches in respect of which it is necessary to work through the key stages of the relevant chronology relied on by the Claimant from her initial suspension on 23 March 2016. As to the initial suspension decision itself we do not conclude there is a breach. Although suspension in any disciplinary matter may not always be a neutral act as employers and disciplinary procedures very often seek to stress, it is nevertheless the start of a process that commonly arises in employment and will often be based on a reasonable and proper cause. At the start, the suspension in this case was potentially such a case, particularly in light of the apparent issue between the Claimant and her colleagues. We remind ourselves that it arises at the start of the process, after issues have arisen and, usually, before any significant investigation has taken place. It can be deployed to serve a number of purposes. In this case, we do not conclude there was any breach of the implied term arising from the decision to suspend the Claimant.

6.6. However, from the end of March 2016, it quickly became clear that the employer had already reached her conclusion. That conclusion is first expressed as an expectation that a final written warning will be imposed. Whilst the employer may at that stage have been contemplating the Claimant's employment continuing, the decision to impose a final written warning before any meaningful procedure has concluded, or before the Claimant had even responded in full to the allegations, is not, in our judgment, an act done with reasonable or proper cause but it is an act which seriously damages the relationship of trust and confidence. The Respondent's intended outcome then escalates beyond issuing a warning to exploring with the Claimant a way to end the employment. We consider the Respondent's own notes of the meeting on 8 April 2016 to be clear. She told the Claimant she could not work with her again and that it was now time to discuss how many weeks' pay she was going to get after she had dismissed the Claimant. The events that immediately follow that suggest there may have been a degree of ambiguity in the actual discussions that took place and the notes, written principally as the Respondent's later reflection on the day's events, may reflect sentiments held more than words actually spoken. We also caution ourselves that there may have also been some degree of responding to the heat of the moment as the following day, the Claimant herself sought clarification

whether she had been dismissed. Even applying those reasons for caution in this situation, our judgment is that the Respondent's reply of *I have not dismissed you yet* is itself an affront to the implied term, importing as it does the likely end result. In any event, whatever the potential for ambiguity up to this point, matters could not have been stated in clearer terms than those put in the 10 April 2016 letter, concluding with the section "*Proposals for dismissal*" and setting out the Respondent's view that there was now no alternative other than to dismiss the Claimant and asking whether she would resign or be taken along the path of dismissal proceedings. In our judgment, the facts of this case simply do not provide the just and proper cause that would be required for making such a statement and it is simply not possible for it to amount to anything other than a breach of the implied term.

6.7. We would not have been surprised to see a resignation follow swiftly from this letter but the Claimant does not resign. She does respond in unequivocal terms that she regards the employer's actions to amount to a breach but even that does not prompt a resignation then or even soon afterwards. Instead she attends and engages with the disciplinary hearing on 22 April. Despite that hearing enlarging on the allegations against the Claimant without prior notice, it is that process which ultimately leads to the disciplinary process being paused and, instead, investigations commence into the Claimant's health with a view to assisting the Respondent to plan the work and identify any requirements for reasonable adjustments. The Claimant positively engaged in this process, giving her consent to obtain a medical report. We are satisfied that this amounts to an affirmation of the contract in the face of the earlier breach. An objective assessment of the Claimant's position at that stage is that the employment relationship was to continue. Consequently, were matters to end there, we would conclude that any resignation that followed would not have amounted to a dismissal in law.

6.8. However, matters did not end there. There is some delay in the medical report being obtained during which time the Claimant remains suspended but we do not attribute that to any serious fault of the Respondent. The response from the GP, limited as it is, nevertheless forms the basis of the Respondent's new plan to return the Claimant to work subject to various additional requirements which are expressed in her letters of 7 and 10 June and explored further at the meeting on 10 June. We have found the Claimant's resignation was submitted in response to the terms of that return to work plan and the conclusions expressed in it, siting two aspects in particular. Firstly, what she describes as the health related obstacles and secondly, the fact that the Respondent continued to hold a view of her guilt in the alleged misconduct. In respect of the matters described as the health related obstacles, that is the requirements in respect of glasses, hearing aid and footwear, we have serious doubt that this can be regarded as conduct likely to seriously damage trust and confidence but even if it does not we are satisfied that the respondent expressed how it continued to hold the view that the Claimant had committed all the misconduct it alleged and the return to work came with a warning of what would happen on a repeat and a requirement for improvement. In the circumstances, we conclude that is conduct which seriously damages trust and confidence. The only issue is whether it was done with reasonable and proper cause.

6.9. We are satisfied that if imposing the requirements in respect of the glasses, hearing aid and shoes does sufficiently undermine trust and confidence, it was

nonetheless based on reasonable and proper cause in light of all the evidence and issues before the employer at the time. There was a degree of uncooperative response by the Claimant and, but for that, the proposals were such as were likely to evolve during their further investigations, for example if the hearing aid trial proved little value. We are not so satisfied the same can be said in respect of the conclusion that the Claimant was guilty of all the misconduct alleged. There were broadly two elements to the allegations of misconduct. The first related to the Claimant's conduct and attitude in the workplace experienced first-hand by Dr Sullivan earlier in the year. In order for there to be reasonable and proper cause for believing that arose from choice in how she conducted herself rather than the effects of any impairment, the medical position had to be explored sufficiently and we are satisfied it was. We have concluded the Respondent did have reasonable and proper cause for concluding that there was misconduct in that regard. The second element, however, is made up of the wider allegations against the Claimant in respect of her conduct towards her colleagues, in particular intimidation of Colleen, encouraging disclosure of confidential information and dishonesty in her previous responses. Those allegations were framed as serious charges requiring a commensurate degree of investigation before conclusions could reasonably be drawn. They were not matters on which the Respondent could reach conclusions from her own first-hand experience. We have concluded they were not subject to a sufficient investigation and nor were they considered against the wider background. We are not satisfied there was reasonable and proper cause for that aspect of the employer's conduct. Having accused the Claimant of dishonesty, intimidation of colleagues and encouraging disclosure of confidential information, the Claimant was entitled to conclude from receipt of the 7 June letter that the employer believed she was guilty of those charges. Although she had affirmed the earlier breaches where the employer had invited her to resign instead of being dismissed, this further breach is in a similar vein and renewed and/or revived the breach of contract in response to which we conclude the claimant was entitled to resign.

6.10. The resignation comes 2 weeks after this meeting during which time the Claimant was signed off sick. In those circumstances we do not regard that period as being sufficient to amount to a delay from which affirmation could be inferred. Consequently, we conclude there was a breach of the implied term, that the Claimant's resignation was in response to it and she had not affirmed that breach. There is therefore a dismissal for the purpose of s.95(1)(c) of the 1996 Act.

6.11. We then turn to whether that dismissal was unfair. The Respondent relies on some other substantial reason based on the Claimant's failure to co-operate in taking care for her own safety so that the Respondent could be confident that further incidents did not occur that risked causing injury to the Claimant or others.

6.12. At the stage of considering the reason for dismissal under s.98(1), for a reason to amount to some other reason (other than those set out in section 98(2)) of sufficient substance to amount to a potentially fair reason for dismissal, it must merely be of a type of reason that could justify the dismissal of an employee. At this stage it is not a question of the reasonableness of the employer's reliance on that reason. If we accept the reason for dismissal was such a reason, we then turn to the question posed by s.98(4) of the 1996 Act to determine the reasonableness of relying on that reason.

6.13. The first consideration, however, is identifying the reason for dismissal itself and how that relates to the plea of some other substantial reason. Our conclusions on dismissal are not that the breach arises in respect of the imposition of conditions for various health and safety adjustments upon the Claimant's return to work, but in respect of the employer's view of the Claimant's guilt in respect of the second group of serious misconduct allegations, notwithstanding that the employer does not impose a disciplinary sanction. We take the view that the reason for dismissal, as we have found it, is not therefore relevant to the potentially fair reason advanced by the employer. To that extent the employer has failed to discharge the burden of establishing the reason and that that reason is a potentially fair one. It is not necessary for us to go further in analysing whether the reason is a potentially fair one or, if it is, whether it was reasonable to rely on that as sufficient reason to dismiss. The dismissal in law is, therefore, an unfair dismissal.

7. **Unfavourable treatment**

7.1. Section 15 of the Equality Act 2010 Act provides:-

> ***(1) A person (A) discriminates against a person (B) if-***
> ***(a) A treats B unfavourably because of something arising in consequence of B's disability, and***
> ***(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.***
> ***(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.***

7.2. Having regard to the 2011 Code of Practice on Employment, in particular chapter 5, and **Basildon & Thurrock NHS Trust v Weerasinghe UKEAT/0397/14/RN**, this statutory provision requires analysis of the treatment, the reason why that treatment is unfavourable and whether that reason arose in consequence of the Claimant's disability. As with all prohibited discrimination, the impugned act or omission must be in no way whatsoever because of the protected characteristic.

7.3. Mr Bourne also refers us to **Pnaiser v NHS England and Another [2016] IRLR 170** on the question of knowledge of disability. We approach the statutory provision as requiring knowledge of the underlying facts that constitute the disability (or should have been reasonably expected to know). At one extreme, an employer may have knowledge of a disability even though it is not aware of a precise clinical diagnosis. At the other, there may be knowledge of a diagnosis ascribing a label to an impairment yet the facts may establish it did not know, nor could it be reasonably expected to know, that the Claimant had the disability.

7.4. If unfavourable treatment is made out when there was knowledge of the disability, we then consider any justification defence advanced. The aim that any justification is based on needs to be clearly identified in order for any assessment of its legitimacy and thereafter the proportionality of the measure which necessarily permits the discrimination to be lawful. The measure of both legitimacy and proportionality is to be assessed in the light of the discriminatory treatment.

7.5. Against those directions, we turn to consider each of the nine alleged acts of unfavourable treatment set out in the Claimant's schedule [68]. Before doing so

me must consider two matters relevant to all allegations. The first is knowledge. In each case, the knowledge that the Respondent ought reasonably to be expected to have of the Claimant's disability does not change. That is informed by the discussions the Respondent had with Mrs hind at the time of the transfer, her own first-hand experience of the Claimant in the workplace, the information obtained from the Claimant's GP and what was likely to be available had the employer made more specific enquiries of the Claimant's medical practitioners. We have found there was in fact knowledge of an acoustic neuroma, that it had an effect on the Claimant's right sided hearing to a mild effect, her left sided hearing being normal. In view of the fact that there are numerous references to the Claimant being otherwise asymptomatic as a result of the impairment we are not satisfied the extent of the knowledge of the disability that the Respondent ought reasonably to be expected to know goes any further than that. Any professional enquiry undertaken at the time would not have altered that knowledge.

7.6. The second matter is the time limit or jurisdiction point. The consequences of the Claimant presenting her claim on 31 August 2016, together with early conciliation taking place between 5 July and 5 August 2016, is that the earliest date any matter could be in time is 6 April 2016. Many of the allegations fall after that date, or are alleged to continue to a point after that date. Some fall before that date. The latter are prima facie out of time. We are not invited to exercise any discretion to extend time on a just and equitable basis. We will, however, have to consider whether any of those earlier matters form part of a discriminatory act extending over a period, the end of which is in time.

7.7. The first unfavourable treatment alleged is being criticised for "Stomping". This criticism continued through the disciplinary process, ending at a time that is in time for the purpose of jurisdiction. We have found as a fact that this treatment did occur and can be characterised as unfavourable. However, we have also found the stomping was one of a range of behaviours the Claimant engaged in out of choice in response to both her dissatisfaction with the Respondent's handling of her grievance and the underlying substance of her grievance at the time of a growing deterioration in their personal working relationship. The treatment did not therefore happen because of something arising in consequence of the disability. The allegation is not made out and is dismissed.

7.8. The second allegation is being criticised for her working methods. This is an extension of the "stomping" allegation. As before, this criticism continued through the disciplinary process, ending at a time that is in time for the purpose of jurisdiction. We are satisfied the Claimant was criticised and that this is unfavourable treatment. For the reasons already given, we are not satisfied that this was because of anything arising in consequence of her disability. We dismiss this allegation.

7.9. The third allegation is the difference in pay compared to other nurses. This arises on 21 January and 18 March 2016 and is therefore out of time unless it forms part of a wider discriminatory act extending over a period of time which itself ends within time. As to the substance of this claim, we are satisfied that there is a difference in pay across the dental nursing staff and that those who are paid less than others, such as the claimant, can reasonably regard that treatment as unfavourable treatment. However, we are entirely satisfied that this is a historic state of affairs arising from the informality of pay rates in this very small employer. The differentials originate during the time of Mr Hind, when the Claimant asserts

there was no unfairness and no discrimination and even before there was any sense of a disability. There is absolutely no link whatsoever between this matter and the Claimant's disability nor can it be said to be because of anything arising in consequence of it. We dismiss this allegation.

7.10. The fourth allegation is the offensive and discriminatory comments with regard to the Claimant's emotional wellbeing. The Claimant relies principally on the contents of the 10 April 2016 letter as the source of the alleged comments which, in part, repeats the discussions held on 18 March. It is in time. However, the Claimant was unable to identify which parts of this letter were offensive or discriminatory, or, for that matter defamatory, in her evidence. To that extent the Claimant has not established the unfavourable treatment as pleaded. Although we would be inclined to step back from that specific allegation and take a broad view of the letter which we hold is capable of amounting to unfavourable treatment, even then we have not found any link between the matters that triggered the drafting of that letter and the Claimant's disability. Any unfavourable treatment is not, therefore, because of something arising in consequence of her disability. We dismiss this allegation.

7.11. The fifth allegation is put in terms of malicious allegations of damage to the upstairs radiator, it being knocked off its bracket. This arises first in the discussions on 18 March and continues to the hearing on 22 April. It is in time. This is a confused claim as the Claimant's principal case is that she did not bump into the radiator and did not knock it off its brackets. Elsewhere her case is based on the premise that the acoustic neuroma causes visual vertigo resulting in clumsy gait/balance issues which explains the radiator being moved and on other occasions that she dropped something on it. This allegation is to be considered against the Respondent's conclusion and belief as to how the radiator was moved rather than the fact of how it was and to succeed that belief must be a belief in something which arises in consequence of her disability. We have not found there to be such a link in the Respondent's reasoning whether by her assumption or otherwise, the reason for the belief being the claimant rushing around. Moreover, in the Claimant's case we have not found there to be an actual link between the Claimant's disability and her clumsiness or balance. The necessary link between the unfavourable treatment and the prohibited reason is not made out. We dismiss the allegation.

7.12. The sixth allegation is that on 6 June 2016 the Claimant was subjected to future ongoing monitoring of her conduct despite no formal disciplinary action being taken against her. This relates to the return to work plan although the letter of 6 June contains no such condition. Nevertheless, the essence of the Claimants case is found in the Respondent's letter of 7 June 2016 which does set out the intention to continue to monitor the Claimant's conduct on an ongoing basis. The allegation is in time. Turning to the substance, it is clear that that monitoring was proposed, although it never got to the stage of implementation. We are satisfied however, that a proposal to do it in the future is sufficient to amount to unfavourable treatment. We have also considered our findings and conclusions in section 6 above as to where the Respondent's response to the misconduct allegations has reasonable and proper cause and where it does not, in the context of the contract of employment. However, in either cases we are satisfied that the underlying basis of the employer's treatment is not in any way related to anything that arises in consequence of the disability. The causal link necessary in a s.15 claim is not made out. We dismiss this allegation.

7.13. The seventh allegation is being accused of breach of confidential information with regard to pay. This is said to arise first on 18 March but continuing through correspondence and meetings up to 22 April 2016. It is in time. Again, as a fact, we are satisfied that did happen and that such criticism of an employee is capable of amounting to unfavourable treatment. Equally, however, we are at a loss to understand how it can be said that the Claimant engaging in those discussions, whether or not there is in fact any contractual restriction on confidentiality, can be said to arise in consequence of her disability. The evidence before us simply does not established any link. We dismiss this allegation.

7.14. The eighth allegation is being forced to wear a Hearing aid, sensible shoes and glasses as part of the terms of the Claimant's terms and conditions of employment on 7 June 2016. It is in time. On a strict interpretation of the Claimant's pleading, we are not satisfied that this allegation is made out in fact insofar as there was ever any change to the Claimant's terms and conditions of employment nor that the Claimant was in fact ever forced to wear any of these items. To that extent, the allegation is not made out in fact. However, taking a step back, it is the case that the Claimant was being made subject to a return to work plan which included the wearing of these items. Even though this may not have altered her terms and conditions of employment, the treatment did in fact happen. But even when considering this looser interpretation of allegation 8, we are not satisfied it is reasonable to interpret the requirements as being unfavourable treatment. In the first place, the aim and purpose is to improve the safety of the Claimant and others. Secondly, the reason for these measures flows from the Claimant's own position advanced to the employer earlier in the process and from what the Claimant herself had insisted was contributing to her balance or clumsiness. Further, she accepted on 10 June that her work shoes came with a heel strap that she would use in future and at that time her consultant had recommended the trial of the hearing aid. But more fundamentally, the Claimant's case is confused to the point that we either accept that her disability does not engage these adjustments and that she is able to do her job without them, in which case we conclude that the requirements are not because of something which in fact arises in consequences of the disability, or we accept her earlier contentions that the disability did give rise to these issues, in which case we conclude that the treatment is not unfavourable as it is a necessary adjustment to be implemented. In any event, we are satisfied that the Respondent has justified the treatment as a proportionate means of achieving the legitimate aim of improving the Claimant's, and others, health and safety and wellbeing in the workplace. We dismiss this allegation.

7.15. The ninth allegation is being subject to constant criticism and offensive comments with regard to the Claimant's mood. The Claimant relies on the 10 April letter. It is in time. There is a substantial overlap with the fourth allegation as the criticism here referred to is limited to that contained in this letter and we do not accept therefore that what that letter contains amounts to constant criticism. We are unable to accept that there is a link between the Claimant's disability and her mood in the context of the issues that prompted that letter. We are satisfied that there is a specific set of circumstances related to the pay and conditions grievance which lies at the root of this episode, and that is not in any way related to anything arising in consequence of disability. We dismiss this allegation.

8. **Failure to Make Reasonable Adjustments**

8.1. So far as is relevant to the circumstances of this case, the duty to make adjustments arises under section 20(3) of the Equality Act 2010 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.***

8.2. In determining whether the duty has arisen, the Tribunal must identify each element of the section in turn, that is to identify the PCP; the identity of a non-disabled comparator (where appropriate) and the nature and extent of the substantial disadvantage suffered by the Claimant. Only by breaking down those elements can a proper assessment be made of whether the adjustment contended for was reasonable or not. **(Environment Agency v Rowan [2008] IRLR 20 EAT)**

8.3. Paragraph 20 of part 3 of schedule 8 imports a requirement of knowledge on the employer in respect of both the employee's disability and that he is likely to be placed at the disadvantage created by the PCP. The duty to make a reasonable adjustment does not arise unless the Respondent has knowledge of both but in this case, knowledge is not put in issue.

8.4. Whether an adjustment is reasonable or not is a question of fact for the Tribunal taking into account all the relevant circumstances and applying the test of reasonableness in its widest sense. There is no longer a statutory equivalent of the old Disability Discrimination Act section 18B, but similar provisions are reflected in the code of practice which still direct us to factors such as the extent to which the adjustment would have the desired effect of eliminating or substantially mitigating the effects of the disadvantage. Elias LJ expanded on this in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** where at para 29 he said

> ***Paragraphs 6.23-6.29 of the Code give guidance as to what is meant by 'reasonable steps' and para. 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage. So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.***

8.5. The Claimant's amended claim by way of the Scott schedule was presented in May 2017 and contains 5 alleged failures [76-77]. None of them has been addressed by the Claimant in her evidence in any direct sense. It is for the Claimant to show that the duty to make an adjustment arose and to advance at least a prima facie case that an adjustment could reasonably have been made which would have avoided the disadvantage. Whilst we might be able to infer certain aspects of some of the PCP's from the surrounding facts of the case, the absence of evidence from the claimant on this part of the claim means we are approaching the realm of speculation when seeking to determine the presence or effect such PCP's may have had on the Claimant and the extent of any disadvantage caused. There is no assertion that any such adjustments were ever raised with the Respondent. Similarly, we are left to construct from the

surrounding evidence our conclusions on the reasonableness or otherwise of the adjustments contended for. One piece of evidence we do have is, of course, an assertion by the Claimant arising from the return to work plans in June 2016 that she was fit for work and did not need any adjustments. We cannot ignore that when considering the elements of each of these allegations. We also have to consider our jurisdiction in respect of the time limits. In the context of failures to make reasonable adjustments, section 123(3)(b) and (4) define when a failure to do something arises.

8.6. The first alleged failure is that the Respondent did not provide an adapted telephone or change the Claimant's duties to an exclusively clinical role. The PCP that the Claimant relies on is stated as "Reception Telephone". Whilst the PCP is expressed simplistically, we accept that the Claimant was required to work on reception from time to time and when doing so, the use of the telephone was part and parcel of that work. To that extent, the Respondent did apply a PCP of using the telephone. We are not satisfied that this put the Claimant at a substantial disadvantage. Fundamentally, the impairment affected the Claimant's right side only, and then only to a mild degree. She had insisted before us that the hearing aid proposed by her consultant was not needed. We were left with the situation that the Claimant was not disadvantaged in using the telephone to her right ear but, even if she was (on the basis that 'substantial' means merely more than minor or trivial), there was no evidence to show she was disadvantaged at all by using her left ear. We are not satisfied that the duty to make an adjustment is made out and there is, consequently no failure to make either adjustment contended for. In any event, the requirement to use the telephone as part of her duties has existed throughout the Claimant's employment and the time within which the Respondent might reasonably have been expected to make an adjustment, if the duty had arisen, would have expired a long time ago.

8.7. The second and third allegations are expressed as a failure to change the Claimant's duties so that she worked on the ground floor only and a failure to relocate the x-ray machine to the ground floor. They are adjustments that were not contended for during her employment although it is possible to interpret the Claimant's responses during the hearing on 22 April 2016 as being related to balance, albeit we have not found that to be a consequence of the disability at the relevant time. We do not accept that there could be any disadvantage. Two PCP's are alleged. The first is that the Respondent required the Claimant to work on the first floor which involved using the stairs. We are satisfied that is a PCP applied to all staff. The second is the requirement to undertaking x-ray developing on the first floor. Whilst we are satisfied that this, too, was a PCP applied to all staff including the Claimant we do not see that it adds anything to the first PCP alleged or the subsequent analysis of the duty to make reasonable adjustments. We then turn to the substantial disadvantage. We are not satisfied the Claimant has established any disadvantage. The case is based on balance problems which are highlighted when using the stairs but in the claimant's case we have not found the balance to be a consequence of the Claimant's condition. As such we are not satisfied that the duty to make a reasonable adjustment is made and there is, consequently, no failure to make the adjustments contended for. We dismiss this allegation.

8.8. The fourth allegation is that the Respondent failed to give support to the Claimant when she was struggling to remember information. The PCP contended for is simply stated as "Employee support". We have considered this from a

number of angles and sought to apply a generous interpretation of what the Claimant actually means. Nevertheless, we are unable to conclude that the Respondent has applied a PCP at all. In considering what is meant, we think it is not improper to work backwards from what the Claimant says was the disadvantage or the adjustment contended for. However, in this case that did not assist either. The disadvantages are said to be memory loss and hearing loss. We do not accept that there is a disadvantage of memory loss as an effect of the disability. We are not satisfied that there is any evidential basis for concluding a link between the Claimant's mild right sided hearing loss and ability to remember information. This allegation is not made out and no duty to make adjustments has arisen. Moreover, the Claimant's adjustments are expressed in negative terms, as an absence of support and criticisms. Even turning those into their positive opposites to identify an adjustment, does not assist our analysis. We have found there was support in this workplace for the Claimant in professional training and staff meetings. We suspect that what the Claimant means is the emotional, empathetic relationship that she previously had with Mr Hind but in the absence of a PCP which places the claimant at a substantial disadvantage, this allegation must be dismissed.

8.9. The final allegation is a failure to alter the rota so that the Claimant only worked with the Respondent. The Claimant identifies the PCP as working with associate dentist. By that we understand her to mean Mr Kushner as opposed to the position itself. We accept that after his initial induction period, all nursing staff could work with Mr Kushner in different shifts and there was therefore such a PCP. We have identified his accent as the communication difficulty which all members of staff experienced. We are not satisfied that the Claimant's mild right sided hearing loss put her at a substantial disadvantage compared to the other staff who declared no hearing difficulties but experienced the same communication difficulty. That being the case, we are not satisfied that the duty to make adjustments arose and we dismiss this allegation. In any event, if such a duty did arise, it did so by Autumn 2015 and any adjusted rota could reasonably have been implemented within a week or so. The failure contended for is therefore well out of time unless it formed part of a discriminatory act extending over a period which itself ended in time.

9. **Victimisation**

9.1. The first issue is whether the grievance letter of 21 January 2016 amounts to a protected act. If it does not, that determines the victimisation claims. Under s.27(2) of the 2010 Act, a protected act is defined as:-

> ***(a)bringing proceedings under this Act;***
> ***(b)giving evidence or information in connection with proceedings under this Act;***
> ***(c)doing any other thing for the purpose of or in connection with this Act;***
> ***(d)making an allegation (whether or not express) that A or another person has contravened this Act.***

9.2. The Claimant has clearly not brought proceedings or given evidence in proceedings under the act. Her claim of a protected act stands only in respect of subsections c and d of s.27(2). We must consider whether the grievance can be said to be for the *purpose* of the 2010 Act, *in connection* with it, allege a *contravention* of it.

9.3. Firstly, we were bound to accept the Claimant's own evidence that 3 of the 4 complaints in her grievance are not said to be within the scope of the act in the way they are framed and the nature of the concern they raise. It is only the disparity in pay that the Claimant relies on. The grievance about that disparity arises because the Claimant believes she is "*the second most qualified nurse at the practice*". The grievance suggests no unlawful reason for that disparity. We have considered whether there could be inferred a reference to equal pay within this statement but the context leads us to conclude otherwise. Firstly, all the staff that the Claimant is comparing herself to are female. Secondly, the Claimant accepted in evidence that when this letter was written, her employer would have no idea this letter was written by reference to the 2010 Act nor was there any suggestion in her evidence that that was her intention or purpose. The nearest the grievance letter gets to the statutory definition is that is uses the words "*not equally*" and "*making me feel discriminated against*". We have considered whether these words are enough. In answering that question we are content that the threshold is low and that the language does not have to be explicit. However, we also have to be satisfied that the statute and the consequences that flow are actually engaged.

9.4. In this case we are not satisfied it is engaged. The word "unequal" is used in the context of unfairness amongst a team of female colleagues. No other characteristics are referred to and none have been relied on in evidence before us. The letter gives no hint of why the perceived unfairness might arise and, significantly, makes no mention to the Claimant's disability. The phrase "discriminated against" is not enough on its own. Read in full, the nearest the grievance gets to suggesting unlawful discrimination is in the context of the Claimant being a part time worker. However, that is not how the Claimant puts her case, that reference is not found in the part of the grievance that she relies on as being the protected act and, in any event, is not a type of discrimination the Equality Act 2010 provides for.

9.5. We have concluded that the grievance letter cannot properly and reasonably be construed as being in connection with or for the purpose of the Act nor does it contain an allegation of a contravention of the act.

9.6. It therefore follows that the 11 detriments alleged cannot be because of a protected act. We would add, however, that if we are wrong and the grievance letter is a protected act, we are entirely satisfied that the reason why all 11 alleged detriments occurred, if they are indeed detriments, was not because the Claimant's grievance letter. In respect of the first allegation, where an employee raises a grievance that is also a protected act, we do not accept holding grievance meetings can be a detriment. To conclude otherwise would be to paralyse an employer from acting appropriately in response to a protected act which would, in itself, be likely to demonstrate a true detriment of inaction. The beginning of an enquiry into the grievance is a necessary first step and is, in all cases, what the employee would reasonably expect to happen. Moreover, we do not accept the grievances were dismissed because of their nature, we accept the Respondent's reason for dismissing the grievance was because she genuinely believed the Claimant was wrong and the difference in pay was historic. We do not accept the subsequent suspension and disciplinary response was done because of the grievance. The only link to the grievance is that it potentially provides an explanation for the Claimant's out of character behaviour in early 2016 arising from her dissatisfaction with her lot. The alleged detriments at numbers 2 – 10

are all stages of that same disciplinary process leading to the change of direction and the return to work plan. Once the disciplinary ball started rolling, we see no causal link between what happens at those stages and the earlier grievance letter. As to allegation 11, we see no causal link between the Claimant handing in her resignation letter and the grievance nor does the resignation itself make any reference to the earlier grievance or its outcome. For those reasons we dismiss the allegations of victimisation.

10. **Harassment**

10.1. Harassment is defined in section 26 of the 2010 Act and arises where:-

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

10.2. We are required to consider separately the discrete elements of this provision, namely whether any conduct found to have taken place was unwanted, had the prescribed purpose or effect and was related to the relevant protected characteristic (***Richmond Pharmacology v Dhaliwal [2009] IRLR 336***). This case is also relevant to the threshold of when conduct amounts to harassment, Underhill P said at para 22:-

> ***"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."***

10.3. Whilst that passage focused on dignity as a prohibited purpose or effect within s.26(1)(b)(i), we take the view the essence of a threshold applies similarly to the other prohibited purposes or effects in s.26(1)(b)(ii) and that threshold is regulated by the concept of the reasonableness or not of the conduct having the prohibited effect as set out in in s.26(4)(c). Similarly, the meaning of the words is itself a measure of the threshold and, as the Court of Appeal stated in ***Grant v HM Land Registry & Another [2011] IRLR 748***, the significance of the words must not be cheapened. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

10.4. The relevant protected characteristic is the Claimant's disability. The unwanted conduct we are concerned with is set out in the 7 allegations [78-81].

10.5. The first allegation identifies the suspension in March 2016 as the unwanted conduct. We have no doubt it was unwanted. However, there is no explicit reference to disability in that and we are not satisfied that any link to it can be read into the circumstances of the suspension of the reasons for it. The case advanced by the Claimant to link the conduct to the protected characteristic refers back to chain of events starting with her not working with Mr Kushner in his early months which she says then causes the Respondent's opinion of her to change for the worse. We do not see how any of that can turn the decision to suspend into conduct having the proscribed effect. We have considered the reference to personal circumstances in the suspension letter which must include the claimant's neuroma amongst other personal issues, but those personal circumstances are referred to as a reason for the Respondent's reluctance to suspend the claimant and, in our judgment, shows what we accept is the separation in the employer's mind between the reasons for suspension and the disability. If, therefore, this conduct can be said to be related to the protected characteristic, which we do not accept, we are satisfied that it is conduct which, nonetheless, was certainly not done for the purpose of creating the proscribed effect nor is it reasonable for it to have that effect. We dismiss this allegation.

10.6. The second allegation is the further decision to extend the suspension. There is no explanation given by the Claimant as to why or how this further period of suspension is said to be related to her protected characteristic. We can see, however, that in the letter of 30 March 2016 extending the period of suspension the Respondent does refer to her health issues. That is again in the context of an enquiry as to whether this may be the cause of the Claimant's uncharacteristic recent behaviour and she asks the question if there are issues she needs to be aware of. Whilst that is not how the Claimant puts her case, we would in any event reject that those references are capable of amounting to harassment as it is clearly not reasonable for a legitimate enquiry such as this, expressed in the terms that it was, to have the proscribed effect. We therefore dismiss this allegation. As to time limits, both acts of suspending and extending the suspension occur out of time. Jurisdiction would only engage if they form part of a wider discriminatory act extending over a period which itself ends within time.

10.7. The third allegation is the "detailed investigatory report", that is the letter of 10 April 2016. As with the earlier allegations, there is reference to the Claimant's disability within it but, again, put in the context of an enquiry into potential explanations for the Claimant's out of character behaviour. It also goes further than the earlier suspension letters to begin to explore whether, if the disability is having an effect on the Claimant's behaviour, it might be something she is not herself aware of. Read in its entirety, we do not accept that this was anything other than an expression of support on a subject the employer was uncomfortable trespassing into but which she did in the context of understanding the recent history and support. We conclude any reference to the disability in this context was neither for the purpose of, nor is it reasonable for it to have, the proscribed effect. We therefore dismiss this allegation.

10.8. The Fourth allegation is the disciplinary meeting held on 22 April 2016. The Claimant specifically refers to the exchange about the brain tumour and the Respondent's question whether that is something that she should be concerned about as an employer. This occurs at the end of a lengthy meeting and in the context of the neuroma increasingly appearing to become an explanation for the

Claimant's issues in the workplace. The statement is followed by further statements by the Respondent that the Claimant "*had never said it was really much of an issue before, yet suddenly it becomes an issue*". The meeting is brought to a close for the Respondent to consider all the points raised. It is then followed by a change of direction where the emphasis turns to exploring the Claimant's health and disability. We are satisfied that the reference to the Claimant's disability is properly discussed in this context and was neither done for the purpose of, nor is it reasonable for it to have, the proscribed effects to amount to harassment. We dismiss this allegation.

10.9. The fifth allegation is the employer's request for GP records. That of course must be related to the protected characteristic, by definition. However, it was done with the Claimant's explicit consent and in a context where it was clearly an appropriate step to take, as to which, the Claimant herself criticises the employer for not doing it earlier. We do not find this to be unwanted conduct still less can it be said to have been done for the purpose of creating, or reasonably having, the proscribed effects. We dismiss this allegation.

10.10. The sixth allegation is the "GP/Return to work meeting". It is said to be related to the protected characteristic because of the adjustments that were proposed, the absence of any other adjustments, and Mr Vivian being intimidating. We have rejected that Mr Vivian's conduct was intimidating and have found the Claimant to be in control of all of the meetings held with her employer. We note that it is at this stage of the chronology where the Claimant's position changes from one of requiring adjustments to insisting that none are needed. There was justification for why the Respondent believed the proposed adjustments were relevant and appropriate and consequently we do not accept that there was a purpose of creating the proscribed effect nor that it is reasonable to have that effect. We dismiss this allegation.

10.11. The final allegation is the Claimant's resignation. That is an act of the Claimant, not the Respondent. Whilst the Claimant's reason for resigning may be said to be reliant on the previous matters, they have already been considered as discrete allegations of harassment and dismissed. This is not a separate act that the employer engages in and this allegation is dismissed.

11. **Conclusion and Remedy**

11.1. It follows that the claims of discrimination fail but the claim of unfair dismissal succeeds. Unless the parties are able to reach agreement on remedy, the matter will be set down for a remedy hearing in due course. In order to assist the parties with any agreement that might be possible, we can make the following observations on matters relevant to remedy from the evidence we have had put before us so far.

11.2. The first is that we note the Claimant received job seekers allowance for a short period after her employment terminated in July until she obtained new employment on 6 September 2016. The recoupment provisions will therefore apply to the terms of any financial remedy Judgment we promulgate in future.

11.3. The second is that the Claimant was out of work for a little over 6 weeks. The new employment she obtained continues. Whilst the hourly rate is less than in her old job, her net pay exceeds that which she previously received. We will

have to consider whether there has been a complete mitigation of loss as her new total earnings exceed that in her old job. Alternatively, we will have to consider whether continuing in that new job rather than seeking alternative employment is a failure to mitigate any loss that does exist.

11.4. The third is that there is a live issue of contributory conduct which appears to have some force and may well lead to a reduction in compensation.

11.5. The fourth is that we have not felt able to reach a conclusion on whether the claimant's employment would in any event have ended fairly at some future point. We express no view either way but observe this will remain a live issue for any remedy hearing.

11.6. We recognise that in making these remedy observations we have not heard from the parties fully on the issues. Should the matter reach a remedy hearing we will of course consider such further evidence and submissions as the parties may wish to advance.

_____

Employment Judge Clark

Date 25 October 2017

REASONS SENT TO THE PARTIES ON

27 October 2017

FOR THE TRIBUNAL OFFICE