EMPLOYMENT TRIBUNALS

Claimant: Ms B Williams

Respondent: Imperial College NHS Trust

Heard at: London Central Employment Tribunal

On: 10, 11, 12 and 13 September 2019
and in chambers on 16 September 2019

Before: Employment Judge Quill; Ms H Craik; Mr S Soskin

Appearances
For the Claimant: In person, assisted by Ms A Da Costa (daughter)
For the Respondent: Mr L Dilaimi, counsel

RESERVED JUDGMENT

(1) The claim for unfair dismissal succeeds. There will be a remedy hearing in relation to this claim on **12 November 2019**.

(2) The claims for indirect disability discrimination, harassment, breach of duty to make reasonable adjustments, and victimisation all fail and are dismissed.

REASONS

Introduction

1. By a claim which was allocated case number 2201589/2018 ("the Current Claim"), the Claimant brought claims alleging unfair (constructive) dismissal and breaches of the Equality Act.

2. There had been previous employment tribunal litigation between the parties, with case number 2200196/2017 ("the Previous Claim"). The Previous Claim was issued on 30 January 2017 and it concluded (following a hearing in March 2018) with a judgment and reasons sent to the parties on 22 May 2018 ("the Previous Judgment").

The Claims

3. The Claims were:

   3.1 Unfair Dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 (ERA 1996).

   3.2 Indirect Discrimination (with the relevant protected characteristic being disability) contrary to sections 19 and 39 of the Equality Act 2010 (EQA 2010).

   3.3 Harassment related to disability contrary to sections 26 and 40 of EQA 2010.

   3.4 Failure to make reasonable adjustments contrary to sections 20 and 39 of EQA 2010.

   3.5 Victimisation contrary to sections 27 and 39 of EQA 2010.

The Issues

4. At a preliminary hearing dated 1 November 2018, a list of issues had been agreed. At the outset of the final hearing, we agreed some amendments to the list. Incorporating those amendments, the agreed list of issues for this hearing was as follows (retaining the same numbering).

Constructive dismissal.

The implied term

[1] It is accepted there was a term implied into C's contract of employment that R shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

Complaints alleged to have damaged the implied term.

[2] Whether R, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee by the following:

[2a] Not upholding C's grievance appeal following the Stage 3 grievance hearing on 7 March 2017;

[2b] The meeting of 30 November 2017 between the Claimant and Ann Mounsey;

[2c] The specific acts, omissions or events identified at paragraphs 7a, 8a, 8b, 8c, 8d, 12a, 14a, 16a, 16b, and 16c below.

[3] If so, whether C terminated her contract without notice. As a result of such conduct, and in particular:

[3a] Whether C did not terminate her contract as a result of such conduct, but rather waived any such breach.

[4] If C is found to have been dismissed, R will contend that there was a fair reason for her dismissal, and that was on the grounds of some other substantial

reason, **namely breakdown in working relationships**.

Disability discrimination

[5] At the relevant time, was the Claimant a disabled person under s6 Equality Act 2010?

[5a] The Claimant contends that she is disabled by reason of depression.

Indirect disability discrimination - s.19 Equality Act 2010

[6] In dealing with the Claimant, did the Respondent apply a discriminatory provision, criterion or practice ("PCP")?

[7] What was the PCP?

[7a] Failing to take her mental health into account when dealing with her employment/line management.

The Respondent denies that this was a PCP applied by it.

[8] Did this PCP put disabled employees at a particular disadvantage when compared with employees who are not disabled? The alleged disadvantages are:

[8a] The meeting with Ann Mounsey on **11** August 2017, and the proposal that an investigation would be commenced;

[8b] The meeting with Paula Mason on 15 November 2017, and the suggestion that the Claimant should work as a Pharmacy Assistant;

[8c] Ann Mounsey inviting the Claimant to a meeting on 30 November 2017; and

[8d] Ann Mounsey speaking with the Claimant in person on 30 November 2017.

[9] Did the PCP put Claimant at that disadvantage?

[10] If so, can the Respondent show that it was a proportionate means of achieving a legitimate aim, **the legitimate aim being to manage the workforce effectively**?

Harassment – s.26 and s.40 Equality Act 2010

[11] In relation to the events listed in paragraphs [8a] to [8d] 8above:

[11a] Did they occur, either as alleged or at all?

[11b] Did any of those events relate to the Claimant's disability?

[11c] Did they have the purpose or effect:

[11c (i)] of violating the Claimant's dignity or

[11c (ii)] of creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

[11d] Was it reasonable for those alleged instances of harassment to have the effect listed in paragraph 11c?

Duty to make reasonable adjustments – s.20 and s.39(5) Equality Act 2010

[12] Did the Respondent apply a provision, criterion or practice ("PCP") to the Claimant?

[12a] The Claimant contends that the Respondent requires an employee to attend meetings in person.

[13] Did the alleged PCP place the Claimant at a substantial disadvantage as a disabled person as compared to people who are not disabled?

[13a] The alleged disadvantage is that the Claimant did not wish to attend meeting on 30 November **2017** in person.

[14] Would the following proposed adjustments have avoided alleged substantial disadvantage to the Claimant and what they have been reasonable?

[14a] The Claimant states the Respondent should have provided her with a written explanation, rather than expecting her to attend the meeting in person.

Victimisation s.27 Equality Act 2010

[15] Did the Claimant do a protected act for the purpose of section 27(2) of the Equality Act 2010?

[15a] It is agreed that the Claimant lodged an employment tribunal claim on 30 January 2017, raising complaints of disability discrimination.

[16] Did the following treatment of the Claimant occur:

[16a] Did Ann Mounsey ignore the Claimant unless in the presence of Gill Bullock?

[16b] Did Ann Mounsey, or another member of the Respondent, fail to inform the Claimant about the nature of the investigation been commenced? and

[16c] Did the Respondent failed to comply with the ACAS code of practice?

[17] If so was the Claimant subjected to this treatment because she had done the protected act?

5. The parts of the text which are in bold reflect the changes which we agreed on 10 September 2019.

5.1 The new paragraph [2c] was at the request of the Claimant.

5.2 The additional words at the end of paragraphs [4] and [10] respectively were at the request of the Respondent.

5.3 The dates at paragraphs [8a] and [13a] respectively were corrected by mutual agreement.

5.4 We informed the parties that we would not interpret 13a extremely literally, but rather would interpret it to include an implied allegation that the Claimant would be at a disadvantage if required to attend the meeting in person.

5.5 To the extent that either party was required to amend the claim or response in order to raise those issues, that permission was granted.

6. Although not expressly addressed in the list of issues, we also had to decide upon the significance to our decision of the decisions and findings of fact in the Previous Judgment.

7. Although not expressly addressed in the list of issues prepared in November 2018, we informed the parties at the outset of the hearing that we would need to consider time limit issues. The Respondent accepted that the early conciliation certificate with reference R216357/17/68 related to a different subject matter than the early conciliation certificate which preceded the previous claim, and therefore it was relevant to the time limit calculations for the Current Claim.

8. The Respondent's counsel confirmed that the Respondent accepted that the Claimant was a disabled person within the meaning of the Equality Action 2010, and that the Respondent was aware of that disability at all times relevant to this dispute.

The Evidence

9. An agreed bundle had been produced by the parties. At our request, additional documents were added during the hearing being:

9.1 The updated list of issues

9.2 Some of the Respondent's written policies

9.3 A letter from the Respondent's solicitors to the Claimant's then solicitors, dated 17 November 2017

10. We heard oral evidence on behalf of the Claimant from the Claimant and from Ms Alenah Da Costa, the Claimant's daughter. We also took into account written statements from Ms Elaine Gooda (a neighbour of the Claimant) and Mr Aqib Karmalkar (an employee of the Respondent), giving them such weight as we saw fit, taking into account the fact that they had not attended to give oral evidence.

11. We heard oral evidence on behalf of the Respondent from Ms Paula Mason (Deputy Chief Pharmacist), Ms Ann Mounsey (Chief Pharmacist) and Ms Pauline Thomas (Board Associate Director).

The Hearing

12. On Day 1, we dealt with preliminary issues, including taking account of an "Opening Note" prepared on Claimant's behalf pro bono by counsel (Ms A Meredith). We read the statements and the bundle pages referred to in the statements, and the cross-examination of the Claimant commenced.

13. The whole of Day 2 was the continuation and conclusion of the Claimant's oral evidence.

14. On Day 3:

    14.1 We heard the evidence of Ms Da Costa, who was not cross-examined by the Respondent.

    14.2 We heard the evidence of Ms Mason.

    14.3 Before Ms Mounsey gave her evidence, at our suggestion, there was a discussion between the parties about whether two brief extracts of her written statement (contained in paragraphs 10 and 14 respectively) were references to without prejudice discussions. By the agreement of the parties, and of the tribunal, some deletions were made to Ms Mounsey's statement. We informed the Claimant that we had read those extracts, but we were confident that we could put them out of our minds if the hearing continued, and if were to deliberate on the claims. The Claimant confirmed that she was content for the hearing before this panel to continue, and that she did not wish to make an application that we should recuse ourselves.

    14.4 We then heard the evidence of Ms Mounsey and Ms Thomas. Ms Thomas was not cross-examined by the Claimant.

15. On Day 4, we heard oral submissions until 1pm. We took into account the "Opening Note" on the Claimant's behalf, as well as written "closing submissions" on behalf of each party. We informed the parties that we would reserve our decision.

The findings of fact

Background and Stage 3 outcome

16. The Respondent is an NHS trust providing healthcare services across several hospital sites. Those sites include St Marys Hospital ("SMH"), Charing Cross Hospital ("CXH") and Hammersmith Hospital ("HH").

17. The Claimant was employed from 2002 until 1 December 2017. Her substantive post was as a Pharmacy Buying Officer. With effect from 2013, that substantive post had been based at HH.

18. In that substantive post, the Claimant's line managers had been Ms Rashmita Shah and Ms Julia Smith. The line manager for any specific working day alternated depending on shift patterns and to which of two teams the Claimant was allocated for that day. The immediate line manager for Ms Shah and Ms Smith was Ms Sharon Hand. Ms Hand and Ms Shah were individual respondents to the Previous Claim. (Ms Hand and Ms Shah were also originally individual respondents to the Current Claim but were removed as respondents at a preliminary hearing).

19. As per the findings of fact in the Previous Judgment, there were some difficulties in the relationships between the Claimant, Ms Shah and Ms Hand.

19.1 In April 2015, the Claimant raised a grievance in relation to Ms Hand which appeared to have been resolved to the Claimant's satisfaction. (See paragraphs 5.3 and 5.4 of Previous Judgment.)

19.2 In August 2015, the Claimant raised a grievance in relation to Ms Shah and Ms Hand. The outcome was issued in September 2015 and the Claimant did not appeal. (See paragraphs 5.5 and 5.6 of Previous Judgment.)

19.3 On 11 May 2016, there was a meeting between the Claimant and Ms Hand which led to an investigation into the Claimant's conduct, but no formal disciplinary action. (See paragraphs 5.11 to 5.13 of Previous Judgment.)

19.4 In August 2016, the Claimant informed occupational health that she had a difficult interpersonal relationship with her supervisor and that this was causing health problems for the Claimant. (See paragraph 5.19 of Previous Judgment.)

19.5 In August 2016, Ms Shah made a written complaint regarding the Claimant which Ms Hand investigated. (See paragraphs 5.21 and 5.22 of Previous Judgment.)

19.6 On 11 October 2016, the Claimant raised a written grievance. (See paragraph 5.24 of Previous Judgment.) A copy of that grievance was in our hearing bundle.

19.7 The Stage 2 outcome letter for that grievance was written by Ms Mounsey. (See paragraphs 5.31 and 5.32 of Previous Judgment.) A copy of that letter was in our hearing bundle and the date of it is 25 January 2017.

20. As per the findings of fact in the Previous Judgment, the Claimant had some health issues.

20.1 In December 2015, the Claimant was feeling anxious and stressed and reported this to her GP. Her mental health deteriorated after that. (See paragraph 5.9 of Previous Judgment.)

20.2 In January 2016, the Claimant's GP stated that the Claimant had anxiety disorder, and she was referred for counselling. (See paragraph 5.9 of Previous Judgment.)

20.3 In February 2016, the GP recorded that the Claimant was suffering from stress. (See paragraph 5.10 of Previous Judgment.)

20.4 In (or before) May 2016, the Claimant was prescribed Sertraline and remained on anti-depressants for the remainder of her period of employment. (See paragraph 5.10 of Previous Judgment.)

20.5 In June 2016, the Claimant commenced a period of sickness absence, returning to work in August. The sickness certificates for the first part of this absence referred to anxiety/depression symptoms. (See paragraph 5.17 of Previous Judgment.)

20.6 The Respondent received an occupational health report in August 2016 which referred to the counselling which the Claimant was receiving. (See paragraphs 5.19 and 5.20 of Previous Judgment.)

21. As per the findings of fact in the Previous Judgment, the Claimant was moved to CXH.

    21.1 This was a temporary relocation, not a permanent one, and the decision was made after discussion with the Claimant, and with her agreement. (See paragraph 5.28 of Previous Judgment.)

    21.2 The Claimant was content to work at CXH, at least on a temporary basis, and it was convenient due to its location and for other reasons. (See paragraph 5.29 of Previous Judgment.)

    21.3 The temporary arrangement was kept under review. On at least one occasion, the Claimant was offered the opportunity to return to HH, and declined, because she did not wish to work with Ms Shah. (See paragraph 5.30 of Previous Judgment, although no date is specified.)

22. It is not necessary for us to mention all of the allegations from the Previous Claim. We are bound by the decisions on all of the complaints in any event. However, the only two which we need to specifically mention for present purposes are:

    22.1 The Claimant alleged that Ms Mounsey's rejection (by outcome letter of 25 January 2017) of the Claimant's grievance (dated 11 October 2016) was a breach of EQA 2010, specifically harassment related to disability. (See paragraph 2.5.1 of Previous Judgment.) This complaint failed. Ms Mounsey had considered the evidence carefully and had set out her reasons in detail when rejecting the grievance. She had not accepted that the Claimant had been bullied by Ms Shah or Ms Hand. The grievance had been rejected at Stage 2 for proper reasons (and the reasons were as per the outcome letter) and the grievance was not rejected for a reason related to the Claimant's disability. (See paragraphs 7.14 to 7.17 of Previous Judgment.)

    22.2 The Claimant alleged that the relocation to CXH was a breach of EQA 2010, specifically harassment related to disability and/or victimisation. (See paragraphs 2.5.3 and 2.8 of Previous Judgment.) These complaints failed. The Respondent's intention had been to benefit the Claimant by removing her from a situation which she found difficult and which was damaging her health. The Claimant had consented to the move. At least part of the reason for the move was that (at the time), the Claimant no longer wished to work with Ms Shah. (See paragraphs 7.18 to 7.22 and 7.24 to 7.27 of Previous Judgment.)

23. In accordance with the Respondent's grievance procedures (paragraph 4.2), a member of staff who is unhappy with the outcome of stage 2, and/or who feels that the problem has not been properly dealt with, can submit a statement of their concerns to the Director of People and Organisation Development within five working days of receipt of the stage 2. The Claimant validly appealed against the stage 2 outcome by letter dated 27 January 2017. She later supplemented her appeal by submitting additional documents.

24. On 30 January 2017, the Claimant issued the Previous Claim.

25. On 3 February 2017, the Claimant and Ms Mounsey had a meeting. The Claimant was accompanied by her union representative. One of the issues discussed was the possibility of the Claimant's remaining in the temporary job on the CXH site.

Ms Mounsey informed the Claimant that this was not possible in the long term because the Buying Office staff and functions were all at the HH site and it was not possible to have a member of the Buying Office working remotely indefinitely. At this meeting, the Claimant said that she was willing to return to the HH site. This was on the proviso that she would only report to Julia Smith as line manager and would not rotate to report to Ms Shah at all. Ms Mounsey informed the Claimant that this was not an option which the Respondent was willing to consider.

26. On 7 March 2017, the Stage 3 hearing took place before a panel made up of Pauline Thomas and Karen Powell, Divisional Director of Nursing and Midwifery. The hearing was approximately three hours and the Claimant was able to present her case in full including calling a witness, Mr Karmalkar. The Claimant was accompanied by Ms Gooda, who was permitted to address the panel.

27. The panel gave careful consideration to all of the points raised by the Claimant in her appeal. On 14 March 2017, the panel gave its decision in a seven-page letter signed by Ms Thomas.

    27.1 The letter explained the panel's reasons for reaching its conclusions on each of the points raised by the Claimant.

    27.2 The letter demonstrated that the panel had thoroughly considered each of the six numbered points in the Claimant's appeal letter. In giving its reasons, the panel referred back to those six points and broke some of them down further into sub-paragraphs.

    27.3 The panel rejected most of the points raised by the Claimant in her appeal. It partly upheld one aspect, namely that the stage 2 outcome letter had underplayed the significance of Ms Shah's involvement and that Ms Shah had not been specifically interviewed as part of the determination of the stage 2 grievance.

    27.4 The panel agreed with the stage 2 findings that there was evidence of a lack of respect and total breakdown in communication between the Claimant and Ms Shah.

    27.5 The panel also found that further consideration should have been given as to whether it was appropriate to place the Claimant in Ms Shah's team during the phased return to work the previous August, and believed that a phased return under a different supervisor may have been possible and advisable.

    27.6 One recommendation made was that Ms Mounsey should have a conversation with Ms Shah to alert Ms Shah to the type of behaviours expected from her under the dignity and respect at work policy.

    27.7 A further recommendation was that it would be beneficial to extend the conversation about the importance of living by the Trust's values, and of supporting colleagues, to the wider department.

    27.8 The final recommendation was that Ms Mounsey should set up a meeting with the Claimant to discuss the next steps, given that the Claimant's redeployment arrangements to CXH had been a temporary measure for the duration of the grievance process.

28. Although it is not in her statement, Ms Mounsey told us that she did follow up on the recommendation about reminding Ms Shah of her responsibilities when Ms Shah returned to work following a period of sickness absence. We accept that she did so. However, no evidence was presented to us to suggest that the Claimant was informed that this discussion had taken place or of what Ms Shah's response had been.

Events leading to discussions of possible investigation in August 2017

29. On 22 March 2017, the Claimant sent an email to Ms Mounsey which referred to the grievance outcome letter and asked when the meeting between the Claimant and Ms Mounsey would be taking place. The email stated that the Claimant wished to have clarity about what would happen next and referred to the fact that the Claimant's father was ill. Ms Mounsey replied by email the same day to say that she was reviewing the situation and would be in touch with the Claimant by early the following week.

30. On 4 April 2017, a preliminary hearing for the Previous Claim was held. It dealt with case management, including drawing up a list of issues, which included harassment, victimisation (the alleged protected act being the 11 October 2016 grievance) and failure to make reasonable adjustments (the alleged disability being depression).

31. The meeting between the Claimant and Ms Mounsey took place on 6 April 2017.

    31.1 By the time of this meeting, Ms Mounsey was aware of the existence of the Previous Claim.

    31.2 This was a short meeting. Ms Mounsey asked the Claimant whether Human Resources ("HR") had contacted the Claimant. They had not done so, and the Claimant was frustrated by the question, as she had been under the impression that it was Ms Mounsey, rather than Human Resources, who should be following up on the recommendations in the Stage 3 outcome letter, and because she, the Claimant, had expected this meeting to be about that.

    31.3 At this meeting there was no specific discussion about the Claimant's returning to HH. It was Ms Mounsey's opinion that the Claimant was not willing to return to HH under any circumstances. Ms Mounsey therefore only attempted to discuss redeployment to other posts, rather than return to HH. The Claimant indicated that she was not interested in redeployment to other posts, at least not at that time. The Claimant did not state at this meeting that she was willing to return to HH in certain circumstances and nor (therefore) did she specify what those circumstances might be.

    31.4 Ms Mounsey informed the Claimant that she was waiting to hear back from HR as to what the next steps would be and that, in the interim, the Claimant was to remain in the same temporary post at CXH.

32. Apart from an email from Ms Mounsey to HR (Elizabeth Raleigh and Sunita Dabasia) on 6 April 2017 (reporting the outcome of the meeting with the Claimant earlier that day) we did not have documents in the bundle relating to what discussions were taking place between Ms Mounsey and HR after the Stage 3

decision was issued (on 14 March 2017) and before an email from Ms Mounsey to Ms Raleigh on 10 May 2017, headed "*BW – any update*". The email said, amongst other things, "*the fact that Brenda is sitting in her job over at CXH doing virtually nothing when the Buying Office continues to sink around her is causing huge distress to the rest of the team. I have explained that we are on the case however, is there any news?*" The email also indicates that Ms Mounsey was aware that Ms Raleigh had been updating relevant individuals in relation to the Previous Claim.

33. On 12 May 2017, Ms Raleigh (Senior Employee Relations Adviser) replied. A copy of her email is in the bundle. The subject line "*BW – any update*" is retained. Immediately following a redacted first line, the email continues, "*I would advise that you conduct this investigation interviewing the members of staff involved, focusing on the working relationships. This investigation will need to be quite detailed. It can be presented in the form of a disciplinary investigation (see example and template attached).*"

    33.1 We were not provided with the attachments to the email.

    33.2 Ms Mounsey asserted that the reference to "this" investigation was because Ms Mounsey's Stage 2 outcome had been that there had been a breakdown in relationships.

    33.3 We did not hear evidence from Ms Raleigh.

    33.4 Neither the Stage 2 outcome letter (25 January 2017) nor the Stage 3 outcome letter (14 March 2017) refer to the employer's intention to conduct a further "investigation". Nor was this mentioned to the Claimant on 3 February 2017 or April 2017.

    33.5 The Claimant was not aware, as of 12 May 2017, that Ms Raleigh and Ms Mounsey were in discussions about an investigation.

    33.6 Ms Mounsey told us, and we accept, that she did not believe that either the Claimant, or any other person in the Buying Office, had done anything that merited disciplinary action being taken against them.

34. Ms Mounsey began to seek a suitable investigator. While waiting to hear back from colleagues, she wrote to Ms Raleigh on 24 May 2017. Following a discussion of other matters relating to the Claimant (and only the Claimant), the email concluded: "*Secondly - is the investigation into the breakdown of the working relationship for the ET or for the fact that we don't consider that she can go back to the office - and she herself has said this twice and I agreed with her the last time she said it.*"

35. On 11 July 2017, at the Claimant's request, Paula Mason agreed that the Claimant would be removed from the purchasing team completely and Ms Mason would be taking over all line management responsibility for the Claimant. It was agreed that this was simpler. In terms of work duties, the Claimant would have no further work for the Buying Office and instead would work entirely on returns of medication at CXH. It was agreed that there was sufficient work available. [The nature of the temporary work was that where there was unused and unopened medication which had not left the hospital site, it could be recovered from the wards and re-issued. The Claimant's role was to help facilitate that process.]

36. By 20 July 2017, it appeared that an appropriate investigator had been identified. This was to be Sarah Horton, Cellular Pathology Quality & Governance Manager. One of Ms Mounsey's colleagues (Emily Kessler, Associate General Manager, Pharmacy) informed Ms Raleigh by email (cc'ing both Ms Horton and Ms Mounsey) that Ms Horton was keen to start work as soon as possible, and implied that Ms Horton's availability was contingent on doing all, or most, of the work before September.

37. At around 9.30am on Wednesday 26 July 2017, Ms Kessler and Ms Horton and Ms Raleigh met to discuss the investigation. Ms Mounsey did not attend the meeting. We have no documents and no witness evidence which directly confirm what said that meeting. There are, however, three emails which give some indication of what was discussed:

    37.1 Following the meeting, shortly after 5pm, the same day, Ms Kessler sent an email - which was copied to Ms Horton and Ms Mounsey and Ms Mason - with the heading "*Investigation que*ry". The email said "*Hi. We are talking about how we inform our staff that there is an informal investigation and how it is presented to staff. Our staff are likely to ask which policy we are following - which is the disciplinary. They will then be concerned that they are being investigated for a disciplinary issue themselves. What is the best way to approach coms around this? Thanks Emily"*

    37.2 Ms Raleigh replied to all on 1 August 2017, stating that the investigator should explain the process and that the management team might also need to reassure the members of staff involved.

    37.3 On 2 October 2017, at 14:18, Ms Raleigh sent an email to Ms Mounsey (not copied to anyone else) which included the following passage, "*When I met with the potential investigator we talked through how the investigation should be conducted and that it would be a 'some other substantial reason' investigation. The investigation centres around BW's capability to return to the role due to the breakdown working relationships*."

38. We are satisfied that Ms Raleigh's comments in the 2 October email are referring to her recollection of what she had said to Ms Horton on 26 July 2017. We discuss our additional inferences from these emails in our analysis below.

39. In the meantime, Ms Mounsey had not yet gone back to the Claimant, as she had said she would at the end of the meeting on 6 April 2017. The Claimant sent an email on 9 August 2017 enquiring about her employment status and "what happens next". She referred to having been told (by Ms Mounsey and Ms Mason) that she was "no longer part of the Pharmacy Buying Office". She did not specify whether she agreed or disagreed with that assessment. She did not say that she wanted to go back to HH, or that she was willing to go back on certain conditions. (We should add that in her email, the Claimant refers to Ms Mason having made her comment in July 2016, but we are sure that the Claimant was referring to 11 July 2017. The Claimant also refers to Ms Mounsey having made her comment in March 2016, and we are sure that the Claimant has made a mistake with that date as well. Most likely it is a reference to the 3 February 2017 meeting, but, if not, it is a reference to another meeting in 2017.)

40. A meeting between the Claimant and Ms Mounsey took place on 11 August 2017.

40.1 The Claimant said that Ms Mounsey appeared to be angry at the start of the meeting.

40.2 Ms Mounsey does not accept that she was angry. In any event, even on the Claimant's case, the start of the meeting was a discussion about the possibility of a data protection breach having occurred and that part of the meeting is not relevant to the issues which we have to decide. Our finding is that Ms Mounsey was not angry and did not display any anger during (at least) the parts of the meeting which are relevant to the issues before us.

40.3 The Claimant had requested a letter from the Respondent regarding the current status of her employment. Ms Mounsey informed her that Ms Raleigh would be sending such a letter. (If that did happen, we have not seen a copy).

40.4 Importantly, there was then some discussion about a possible investigation. Ms Mounsey is certain that she did not tell the Claimant that this was to be a "disciplinary" investigation into the Claimant's conduct. We accept that and, indeed, the Claimant does not allege that the word "disciplinary" was used at this meeting. On the contrary, the Claimant formed the opinion that what was being offered was a "reinvestigation" into the allegations that she had made in her grievance. The Claimant believed that the behaviour of managers in the Buying Office was going to be an important part of the investigation. In an email to Ms Mounsey dated 13 August 2017, the Claimant expressed the view that this investigation might be an opportunity for other members of staff "*to speak up*" and named two people whom she thought might have something to say.

40.5 Ms Mounsey did not tell the Claimant that the person who was to conduct the investigation was to be Ms Horton.

40.6 Ms Mounsey did not say that this was to be a "some other substantial reason" investigation, or that it was to centre around the Claimant's capability to return to her substantive post in the Buying Office.

41. On 13 August 2017, the Claimant wrote to Ms Mounsey asking for more details. Her email asserts that she was told that it was to be a re-investigation, and she puts that word in quotation marks. The Claimant said that she would only be willing to participate if a specialist external company was used.

42. Ms Mounsey acknowledged receipt of that email on 15 August 2017, stating that she would supply more information in due course.

42.1 She did not deny saying that it was to be a "*re-investigation*".

42.2 Furthermore, in an email to Ms Raleigh on 2 October 2017, Ms Mounsey said "*I did verbally tell her that we were going to reinvestigate the breakdown in working relationships*".

42.3 In her oral evidence, Ms Mounsey told us that she does not recall whether she said (on 11 August) "*investigation*" or "*re-investigation*".

42.4 We find that the word "*re-investigation*" was used on 11 August 2017.

42.5 By using this word, Ms Mounsey did not intend to imply that the investigation into the Claimant's grievance was to be re-opened.

42.6 Ms Mounsey was not clear about specifically what she did mean. As a result, the Claimant formed the opinion that the Respondent might decide that Ms Hand or Ms Shah had acted incorrectly (towards the Claimant and/or other employees).

43. There was no substantive reply to the Claimant's email of 13 August 2017 and Ms Mounsey did not write to the Claimant to supply details of the proposed investigation/reinvestigation.

44. Although not referred to in the written witness statements, we were told that a meeting did take place with Ms Shah and Ms Hand and others to inform them that there would be an investigation. No documents were supplied to us in relation to the timing of, or contents of, that meeting, and we were told that this was because no documents had been created, and it was an entirely oral discussion.

45. Sadly, on 4 September 2017, the Claimant's father passed away. As a result, the Claimant was absent from work until 2 November 2017. During her absence, she was prescribed with another anti-depressant, fluoxetine.

Whether Ms Mounsey ignored the Claimant

46. Up until about 2013, both the Claimant and Ms Mounsey were based in CXH. As mentioned above, the Claimant was relocated to HH due to a reorganisation. By the time that the Claimant returned (on a temporary basis) to CXH, Ms Mounsey was now mainly based at SMH.

47. Ms Mounsey's evidence was that she therefore no longer had the opportunity for as many social conversations with colleagues based at CXH.

48. Ms Mounsey informed us that she did not believe that she ignored the Claimant at all. During her temporary relocation to CXH, the Claimant shared an office with Gill Bullock who was a good friend of the Claimant's and who was also a PA to Ms Mounsey.

49. When the Claimant and Ms Mounsey saw each other during this period, it was almost always because Ms Mounsey had come to see Ms Bullock. The Claimant accepts that Ms Mounsey greeted her/acknowledged her on these occasions.

50. One specific occasion which Ms Mounsey recalls is 30 November 2017, which turned out to be the Claimant's last day working. Ms Mounsey recalls that as she left the site that day, she said goodbye to each of Claimant and Ms Bullock, and we accept that she did so.

51. Each of the Claimant and Ms Mounsey gave evidence about one time that they met in a corridor one evening. The Claimant had been visiting her father. The Claimant's recollection is that Ms Mounsey smiled to her, but did not say anything, and that Ms Mounsey was some distance away. Ms Mounsey's recollection is that she did actually speak some words of greeting. We are entirely satisfied that both of them are giving truthful accounts of what they remember. One possible explanation for the difference in accounts is that one of them is not remembering

accurately. We think it is likely that, in fact, Ms Mounsey did say something, but the Claimant did not hear it because they were not in close proximity.

52. We are satisfied that Ms Mounsey did not deliberately ignore the Claimant.

Ms Mason's management of the Claimant, and the meeting on 15 November 2017

53. While managing the Claimant, Ms Mason acted appropriately, including making referrals to Occupational Health as and when required, and being mindful of the Claimant's medical conditions, and of the illness of the Claimant's father. She approved time off and flexible working requests appropriately and conducted return to work meetings. She dealt with the Claimant's absence appropriately, including the Claimant's return to work in November. She did not ignore any Occupational Health advice, and did not fail to discuss the contents of that advice with the Claimant.

54. During 2017, the pharmacy department had received funding approval for three new posts. The new posts were to be Band 3 Pharmacy Assistants, and there was to be one each based at HH, SMH and CXH. Band 3 was the same pay grade that that Claimant was on in her substantive post, albeit the Claimant's job title was not Pharmacy Assistant.

55. The proposed duties for these three new posts were similar to the duties which the Claimant had been performing on a temporary basis in CXH. In fact, one of the reasons for creating these posts was that the Respondent had noticed the value of the work which the Claimant had been doing temporarily, and had spotted the potential for an economic saving. It had been estimated that the creation of these new posts would mean that the Respondent saved more money (by preventing unnecessary waste of medication) than the costs of the posts. The proposed duties for the new posts were not identical to what the Claimant had been doing, and the proposed job description included tasks which the Claimant had not been performing.

56. The Respondent advertised the posts at SMH and HH and filled them. Because the Claimant was absent from work, and because the Respondent did not wish to fill the new post at CXH without finding out if the Claimant was interested, the Respondent did not advertise the post at CXH.

57. On 15 November 2017, Ms Mason met the Claimant and informed the Claimant that the Respondent was proposing to recruit an employee to carry out duties which were similar to those which the Claimant had been doing on a temporary basis. The purpose of the meeting was to find out if the Claimant was potentially interested. The Respondent was not necessarily proposing to slot the Claimant automatically into the role and she might have had to undertake some sort of selection process. The Respondent was willing to consider the Claimant said, and to take things from there. Ms Mason had no fixed idea about what the Respondent would or would not agree to. She had asked Ms Raleigh and Ms Mounsey for guidance. However, Ms Mason was willing to commence a discussion with an open mind and to see how things developed. In principle, Ms Mason was willing

to make changes to the role and potentially adapt it in terms of working hours or duties.

58. The Claimant informed Ms Mason that she was not interested in the post at all at that time. Ms Mason suggested that they resume the discussion at a further meeting, but the Claimant said that she did not want to do so. The Claimant felt offended by the suggestion that the matter be discussed again. She believed that she had made it clear that she was not interested in the post.

59. The reasons that the Claimant did not want to continue the discussion at that time included that:

    59.1 She was feeling depressed and she wanted more time before thinking about a permanent move to another post.

    59.2 Doing "returns" was not what she saw as her long-term career path.

    59.3 She had some concerns about the physical requirements of the job, taking into account both some physical health problems that she had at the time, and also the effects of her medication.

    59.4 The Claimant's opinion was that if the Respondent was going to decide to permanently remove her from her substantive post, and place her elsewhere, then, firstly, the time was not right, and, secondly, she would want something more similar to the administrative duties of the Buying Officer post.

Events leading up to Ms Mounsey's letter of 20 November 2017

60. In the latter half of August 2017, after the Claimant's email of 13 August, there were discussions between Ms Mounsey, Ms Kessler and HR about the investigation, and the Claimant's request for an external investigator. By 31 August 2017, Ms Mounsey appeared to be satisfied that the investigator would be an internal person, and asked Ms Kessler to check if Ms Horton could still do it and/or to liaise with Karen Powell to find out if anyone else was available. Ms Kessler replied to say that she was fairly sure that Ms Horton probably would not be able to do it, but that she would speak to Ms Powell. Ms Mounsey does not recall getting a specific update from Ms Kessler, but told us that she was sure that Ms Horton remained as the nominated investigator. The Claimant was not informed of this.

61. As mentioned above, the Claimant commenced a period of absence near the beginning of September 2017. We were presented with no evidence of any discussions to move things forward in September.

62. On 2 October:

    62.1 At 11:19, Ms Raleigh requested an update from Ms Kessler, cc'ing Ms Horton and Ms Mounsey and Ms Mason.

    62.2 At 12:20, Ms Kessler replied (also cc'ing the same people) referring to the Claimant's absence, and also saying that there had been a decision that clearer terms of reference were required and that this had not yet happened. The email concluded "*Following this, and other developments with the on-*

going ET, we are seeking a meeting with Brenda and would appreciate your involvement".

62.3 At 12:40, Ms Raleigh asked what had been said to the Claimant at the meeting on 11 August. The remainder of the paragraph was redacted. In a new paragraph, the email referred back to Ms Raleigh's own email of 1 August (see above). Ms Horton was not cc'ed on this email and does not appear to have been cc'ed on later emails.

62.4 At 12:47, Ms Mounsey replied saying that "*everyone then rightly asked for the terms of reference for this*", and referring to the death of the Claimant's father, and stating that these were reasons that there had been no further progress.

62.5 At 14:18, Ms Raleigh sent a further reply stating "*There is a lot going on with BW so there needs to be a plan going forward in place. As I mentioned on the phone, we do not have external agencies dealing with internal processes*." The email then continued with the extract (cited in full above) referring to Ms Raleigh's recollection of what she had said to Ms Horton on 26 July 2017.

63. On 3 October 2017 or 3 November 2017 (or both), the Claimant's solicitors wrote to the Respondent's solicitors seeking clarification of what the investigation was to be about. (We did not see a copy of a letter with either date. However, in other documents, the Claimant refers to such a letter being dated 3 October 2017, and the Respondent's solicitors refer to such a letter being dated 3 November 2017.)

64. We were supplied with no reply to any 3 October letter. Furthermore, based on the evidence we have, there were no discussions taking place with Ms Horton, or anyone else, in relation to "terms of reference" for a potential investigation. No interviews with Ms Hand or Ms Shah or anyone else took place in September or October (or at all) pursuant to any investigation.

65. During the Claimant's absence, the Claimant had a discussion with her solicitor.

65.1 During that discussion, the Claimant was informed about a conversation which had taken place between the Claimant's solicitor and the Respondent's solicitor.

65.2 The Claimant told us that she is sure that she was told that there was to be a <u>disciplinary</u> investigation.

65.3 We are satisfied that the Trust's solicitor did not say that there was to be "disciplinary investigation" when informing the Claimant's solicitor that there was to be an investigation. Ms Raleigh had told the investigator on 26 July 2017 that it was to be a "some other substantial reason" investigation, and we do not think that it is plausible that either (i) the Trust's solicitor would have wrongly believed that it was to be a "disciplinary" or (ii) would have incorrectly referred to the investigation as a "disciplinary investigation".

65.4 We are satisfied that the Claimant is being truthful and that, in 2019, she is genuinely convinced that the word "disciplinary" was used in October/November 2017. It is possible that the Trust's solicitor did say that the format of the investigation would match the format of disciplinary investigation (which is what had been discussed by Ms Raleigh and Ms

Kessler). It is also possible that the Trust's solicitor did not use the word "disciplinary" at all, and that either the Claimant's solicitor misinterpreted what she was told, or else the Claimant has seen the references to "disciplinary" in the documents disclosed as part of these proceedings, and has come to be convinced that that is what she was told at the time. In any event, our findings on this issue do not give us any reason to doubt the Claimant's credibility.

66. As a result of what she was told by her solicitor, the Claimant came to the view that there was to be an investigation about her. On 2 November 2017, she wrote to David Wells (Director of People and Organisation Development) expressing concern about this and stating that it had upset her greatly to hear this. She did not say that she believed that the investigation about her was to be a "disciplinary" one. She did say:

"*Whilst I was off work sick recently my solicitor … called me to tell me that [the Respondent's solicitors] told her that the Trust was to carry out another investigation about me? and this upset me being in such a vulnerable state. (I am feeling harassed even more) My solicitor told me to look out for a letter when I got back to work, but although [Ms Mounsey] mentioned there was to be another investigation verbally to me in August, I have not received anything in writing*";

and

"… *please do not refer me back to Elizabeth Raleigh and Ann Mounsey*".

The email went on to say that Ms Mounsey and Ms Raleigh had "never really asked to talk to me in person" (which is factually inaccurate, at least as far as it related to Ms Mounsey) and that the Claimant was seeking transparency.

67. Mr Wells replied to agree that he would meet the Claimant to discuss one of her topics of concern (namely the operation of the Trust's disciplinary procedure). He said that he would not / could not discuss the Claimant's individual case, given that it was the subject of litigation.

68. In accepting the meeting (for 16 November 2017), the Claimant wrote again to Mr Wells on 9 November 2017. This email referred to what Ms Mounsey had said on 11 August 2017 about a potential investigation, and complained that she had not received anything in writing (or otherwise) to confirm what the investigation would be about since then. Ms Raleigh's line manager (Anita Niczyporuk) received a copy of this email and copied extracts from it to Ms Mounsey at 9:32 on 16 November. Ms Niczyporuk's email said to Ms Mounsey "*If I understand correctly, this issue has been on-going for nearly a year and we need to bring this to a swift resolution, as the longer we wait, the more risk there is for the Trust. Can you please confirm with me who the investigator is for the breakdown of working relationships or has Brenda been redeployed to a suitable role on a permanent basis and this investigation is not going ahead.*" The email went on to suggest that Ms Mounsey also meet the Claimant to provide clarification of outstanding issues, and to discuss the fact that the Claimant was finding the situation stressful.

69. In her reply the same day, Ms Mounsey did not state that Sarah Horton was to be the investigator. On the contrary, she asked Ms Niczyporuk to advise her "*under which policy this investigation is going ahead*". Her email also treated it as self-evident that no investigation could have commenced during the Claimant's absence. It also stated that the Claimant was not the only staff member about whom Ms Mounsey had to be concerned.

70. The Claimant did meet Mr Wells on 16 November 2017, and found the meeting useful, and she believed that he had been sympathetic to the points she had raised.

71. On 17 November 2017, the Respondent's solicitors wrote to the Claimant's solicitors. It is expressed to be a reply to the Claimant's solicitors' letter dated 3 November 2017 (which we have not seen). The letter is partially redacted, but we were told by Mr Dilaimi – and we accept – that the redacted part does not refer to a disciplinary investigation.

72. Amongst other things, the letter stated,

> "*You request clarification of the alleged incidences of the breakdown in the relationship; there are no allegations in such terms. The investigation has been instigated because your client informed Ann Mounsey, Chief Pharmacist and chair of the stage 2 grievance hearing, during the grievance hearing in January 2017 that she could not return to work within the Pharmacy Purchasing Office, at Hammersmith Hospital, and she was not prepared to attend mediation. Based on the evidence of your client plus the other information before the grievance panel, the outcome of the Stage 2 grievance hearing found that there had been a breakdown in communication and working relationships between Mrs Williams and the staff in the pharmacy purchasing office*
>
> *"As a result, your client was temporarily located at Charing Cross Hospital undertaking tasks which do not form part of her substantive role whilst she pursued a stage 3 appeal; by its very nature, this was put in place as a temporary arrangement and cannot continue indefinitely. To date, your client has not returned to her substantive post within the Pharmacy Purchasing Office.*
>
> *"As such, the investigation into the breakdown in working relationships has been commenced, in order to establish how best to proceed in a situation where your client informed the Trust that she cannot return to her substantive post.*"

73. On 20 November 2017, Ms Mounsey wrote to the Claimant. The letter had the heading - in bold – "Formal Meeting". The opening sentence was "*I'm writing to invite you to a formal meeting to discuss the outstanding issues which you raised to David Wells attention following our meeting in August and to discuss the next steps.*" The letter went on to say that Ms Mounsey would be accompanied by Ms Raleigh, and that the Claimant could be accompanied (though not by someone acting in a "legal capacity").

    73.1 The letter did not say which of the Respondent's procedures (if any) the formal meeting was part of.

73.2 The reference to the "issues you raised to David Wells attention" was something which the Claimant was disappointed by and upset by. The Claimant's email to David Wells had specifically asked him not to refer her back to either Ms Mounsey or Ms Raleigh, and this proposed meeting was to be with both of them.

73.3 The reference to "following our meeting in August" was a concern to the Claimant. After that meeting, she had written on 13 August and had no substantive reply, and she had more recently been told by her solicitor that the Trust was proposing an investigation about her.

74. When the Claimant read the letter, she formed the opinion that the letter was part of a disciplinary procedure being commenced against her. The Claimant emailed Mr Wells on 21 November 2017 to ask if he would also attend the formal meeting which Ms Mounsey had proposed. She mentioned that she was feeling "overwhelmed. Mr Wells replied on 23 November to say that he would not personally attend, but that he encouraged the Claimant to do so. He told the Claimant that she could contact Ms Niczyporuk if she had questions about the meeting, and that Ms Niczyporuk would inform the Claimant's managers that she was feeling overwhelmed.

75. On 22 November 2017, the Claimant's solicitor wrote to the Respondent's solicitor seeking clarification of what meeting was going to be about and stating that the Claimant would not be attending without such clarification.

76. The letter also requested disclosure of meeting notes relating to the investigation which had been mentioned in Respondent's solicitors' letter of 17 November 2017. The reply, sent by email on 28 November 2017, stated (amongst other things), "*We had set out in our letter of 17 November 2017 that an investigation into the breakdown in working relationships had commenced. However, we understand that this is not in fact the case. As a result, the Trust has requested to meet with your client in order to discuss with her potential options available to move forwards as the current situation is unsustainable. The Trust is also open to any suggestions from Ms Williams regarding how she wishes to move the situation forwards.*"

77. On 24 November 2017, the Claimant sent an email to Ms Mounsey. In the email, the Claimant stated that she was not sure what Ms Mounsey had in mind in relation to the Claimant's job role and she asked whether the meeting was to be about "breakdown of relationships" or the Claimant's job role, and suggested that the solicitors' correspondence indicated the former. She stated that she would not be attending the meeting "*until both sides can sort the situation out legally*".

78. Not having had a reply, on 27 November, the Claimant sent a further email asking Ms Mounsey to put options regarding the Claimant's job role in writing.

79. On 29 November 2017, after the Claimant had left work for the day, Ms Mounsey wrote to the Claimant stating that a meeting room had been booked for the following day at 9.30am. It said, amongst other things, that the meeting was to discuss:

79.1 the possibility of a return to the substantive post at HH;

79.2 a permanent transfer "*into the Band 3 post at CX which you are currently undertaking on a temporary basis*";

79.3 "*adding you to the Trust's redeployment register in order to search for suitable alternative vacancies for other permanent employment*";

79.4 other suggestions that the Claimant might have.

80. A later email the same day said that the meeting could take place at a later date if the Claimant needed more time to arrange someone to accompany her.

30 November 2017 and the Claimant's resignation letter

81. On 30 November 2017, at 9:10, the Claimant emailed Ms Mounsey to state that she would prefer to receive everything in writing and was therefore declining the meeting and referred to the effect the situation was having on her health.

82. On receipt of the email, Ms Mounsey telephoned Ms Raleigh to discuss it. Ms Raleigh advised Ms Mounsey to go and speak to the Claimant to see if it was possible to persuade the Claimant to attend the meeting at 9.30am. This is what Ms Mounsey did. The meeting between her and the Claimant was quite brief. It was not a hostile meeting. Ms Mounsey told the Claimant that she would like the meeting to go ahead and that she thought the meeting would be useful. The Claimant said that she had been clear already and that she was not proposing to attend meeting. Ms Mounsey agreed to write to the Claimant and, at 18:20 sent an email to the Claimant stating "*I will write you a letter confirming the options in a bit more detail*". The Claimant did not see this email before submitting her resignation

83. That evening Claimant typed a resignation letter dated 30 November 2017. She attended the workplace the next day and placed the letter on Ms Mounsey's desk. Ms Mounsey read the letter the same day, 1 December 2017, and that, therefore is the effective date of termination.

84. The letter asserted that there had been a fundamental breach of the Claimant's contract of employment and asserted that this had left Claimant in an impossible position with no option but to resign, and that the Claimant believed that the Respondent had commenced a "*completely baseless disciplinary investigation against me which you have not outlined issues you are referring to*", which was why she had refused to meet. Ms Mounsey replied on 6 December 2017 stating the resignation was accepted, offering to speak to Claimant and also stating "*I do not fully understand your last paragraph with regard to a disciplinary investigation*".

The Law

Constructive Dismissal

85. For the purposes of considering a claim of unfair dismissal, an employee is deemed to have been dismissed if "*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*". [Section 95(1)(c) ERA 1996].

86. The Claimant has the burden of showing that the conditions in section 95(1)(c) are met. To do so, a claimant must establish each of the following:

    86.1 There was a breach of contract by the employer.

    86.2 The breach was (or breaches were) sufficiently serious to justify resigning in response.

    86.3 She resigned in response to the breach and not wholly for some unconnected reason.

    86.4 She did not wait so long before terminating the contract, that she is deemed to have waived the breach.

87. It is an implied term of a contract employment that: "*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*" See Malik v Bank of Credit and Commerce International SA (In Liquidation) [1998] A.C. 20.

    87.1 The decision about whether there has been a breach of this term is an objective question, and arguments that the employer might not have intended to breach the term are not necessarily relevant.

    87.2 It is not sufficient for the Claimant to show that there have been acts calculated or likely to damage the relationship of trust and confidence. The Claimant must also establish that such acts were without reasonable and proper cause.

88. Conduct of an employer can cumulatively amount to a fundamental breach of contract entitling an employee to resign even where each individual incident, did not amount to a breach of contract in isolation. However, the incident comprising the "last straw", whilst it need not itself be a breach of contract, must contribute something to the cumulative breach, and cannot be a purely innocuous act Omilaju v Waltham Forest LBC (No.2) [2004] EWCA Civ 1493.

89. The tribunal must bear in mind that not every breach of an employment contract is sufficiently serious to justify treating a resignation as a constructive dismissal. The tribunal must assess whether the breach is sufficiently serious by looking at all of the relevant surrounding circumstances and applying an objective test. That being said, a finding that there has been conduct which amounts to a breach of the implied term of trust and confidence usually means that there has been a fundamental or repudiatory breach going to the root of the contract.

Unfair Dismissal

90. A constructive dismissal is not necessarily unfair: Savoia v Chiltern Herb Farms Ltd [1982] I.R.L.R. 166. A constructive dismissal can be fair if the employer can show what the reason was, and that it was a potentially fair reason and that it acted reasonably.

91. The employer has the burden of showing the reason for dismissal, notwithstanding that it was the employee, not the employer, who actually decided to terminate the contract of employment. This requires the employer to show the reasons for the

conduct which entitled the employee to terminate the contract. Berriman v Delabole Slate Ltd 1985 ICR 546.

92. In this case, the Respondent asserts that (if there was a dismissal, which it denies) the reason for dismissal was breakdown in working relationships, and that this was "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". See section 98(1)(b) of ERA 1996.

93. If the Respondent fails to prove breakdown in working relationships was the reason for its conduct, and/or fails to show that its reason fell within section 98(1)(b), then the dismissal (if any) will be unfair.

94. Provided the Respondent does persuade us that the reason was as it alleges, then a dismissal is potentially fair. It would be necessary for us to consider the general reasonableness, taking into account the Respondent's size and administrative resources. We must decide whether the Respondent acted reasonably or unreasonably in treating the circumstances as a sufficient reason to act the way it did. See section 98(4) ERA 1996.

95. It is not the role of this tribunal to assess the evidence and to decide what we would have done had we been the employer. In other words, it is not our role to substitute our own decisions for the decisions made by the Respondent.

Indirect Discrimination

96. Section 19 of EQA 2010 says in part.

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are—
> … disability; …

97. The phrase "provision, criterion or practice" (generally abbreviated to "PCP") is not defined in the EQA 2010. It can be given a broad interpretation. In an appropriate case, a discretionary decision, and/or one-off management decision could amount to a PCP, provided that the same decision would also have been applied equally to others not sharing the Claimant's protected characteristic. See *British Airways Plc v Starmer* [2005] I.R.L.R. 863 (at paragraphs 17 and 18).

98. However, for the purposes of section 19, a PCP must be something which could potentially apply to employees who do not share the protected characteristic. So,

a practice of (allegedly) mistreating workers for reasons specific to the relevant protected characteristic would not be a PCP (within the meaning of section 19) because it would necessarily not be applied to individuals who did not have the characteristic. See the Supreme Court decision in *Onu v Akwiwu; Taiwo v Olaigbe* [2016] UKSC 31; [2016] 1 W.L.R. 2653 (at para 32: "*The only PCP which anyone can think of is the mistreatment and exploitation of workers who are vulnerable because of their immigration status. By definition, this would not be applied to workers who are not so vulnerable. Applying it to these workers cannot therefore be indirect discrimination within the meaning of section 19 of the 2010 Act*.")

99. There are two aspects to the "particular disadvantage" limb of the test for indirect discrimination. The first is the requirement that the PCP puts or would put persons who share the Claimant's protected characteristic at a particular disadvantage when compared with persons who do not share it. (This is sometimes referred to as "group disadvantage".) The second is a requirement that the Claimant must herself be placed at that particular disadvantage.

100. If the PCP is shown to place persons with the relevant protected characteristic, and the Claimant herself, at a particular disadvantage, the burden of proof switches to the Respondent to show that the PCP is nevertheless a proportionate means of achieving a legitimate aim (EQA 2010 s.19(2)(d)).

101. The phrase "legitimate aim" is not defined in the Equality Act 2010. The Employment Statutory Code of Practice offers guidance which a tribunal should take into account. According to the code, reasonable business needs and economic efficiency may be legitimate aims in some cases. (See para 4.29 of the code).

102. If the employer is able to satisfy the tribunal that the specific aim in question was a legitimate one, then the tribunal must consider whether the discriminatory PCP is a proportionate means of achieving that aim. The Respondent must show that the PCP was appropriate with a view to achieving the legitimate aim and was reasonably necessary for that purpose. A measure which is appropriate to achieving the aim but which goes further than is reasonably necessary in order to do so is disproportionate.

103. Furthermore, when assessing proportionality, the tribunal must also consider:

    103.1 The importance of the aim to the employer, in comparison to the impact of the PCP on the affected group.

    103.2 Whether there would be a less discriminatory means of achieving the (legitimate) aim relied upon by the Respondent employer.

Harassment

104. Section 26 of EQA 2010 says in part.

> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—
… disability …

105. It is not sufficient for a claimant to prove that the conduct was unwanted or that it has the purpose or effect described in section 26(1)(b) EQA 2010. The claimant also has to prove that the conduct was related to the particular protected characteristic. The tribunal must also have regard to each of the factors mentioned at section 26(4).

Reasonable Adjustments

106. As per section 20(3) EQA 2010, where a PCP of an employer puts an employee who is disabled person at a substantial disadvantage in comparison with persons who are not disabled, then the employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

107. We must determine whether or not the Respondent did in fact have the alleged PCP. If so, a comparison exercise is required to determine whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person.

108. If so (and if the employer had the relevant knowledge about the Claimant's disability), we must consider if the Respondent did or did not take such steps as were reasonable for it to have to take to avoid the disadvantage.

Victimisation

109. Section 27 of EA 2010 states (in part)

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(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 purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

110. The Claimant must show two things: first, that she has been subjected to a *detriment*; and, secondly, that she was subjected to that detriment *because* of a protected act.

111. Therefore, if we are satisfied that there has been a detriment, then we must determine what, consciously or subconsciously, motivated the Respondent to subject the Claimant to that detriment.

112. The protected act relied on is the Previous Claim. The Previous Claim was a protected act.

Burden of Proof

113. Section 136 EA 2010 sets out the manner in which the burden of proof operates in a discrimination, harassment or victimisation case.

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Time Limits

114. Section 123 of EA 2010 states (in part)

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

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

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

115. Section 140B of EA 2010 states (in part):

(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 140A.

(2) In this section—
(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier,

is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

116. Where there is a single period of early conciliation, followed by a claim, then the time limit issues for that claim take account of the start and end dates of that early conciliation. Where a Claimant purports to commence a second period of early conciliation, then it does not necessarily follow that time limit issues are affected by the start and end dates of the purported further early conciliation period. If a claimant purports to commence a second period of early conciliation in relation to the same matter, then the second (purported) early conciliation does not affect the time limit for a claim. On the other hand, if the second early conciliation relates to a different matter then (the second certificate is a pre-requisite for the Claimant to bring a claim in relation to this different matter and) the time limit can be affected. The issue of whether the "matter" is the same or different is a question of fact for the tribunal.

117. In applying section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

ACAS code

118. Where the code does apply to a particular dismissal, a failure to follow it is relevant to the question of the reasonableness of a dismissal. However, a failure to comply with the ACAS Code (when it applies) does not inevitably render the dismissal unfair and the tribunal must take all the circumstances into account.

119. In Lund v St Edmund's School, Canterbury 2013, the EAT stated that it is not the outcome of the process which determines whether the ACAS Code applies, but its initiation. The Code applies where disciplinary proceedings are commenced against an employee even if, by the time of the eventual dismissal, the dismissal reason is not classified by the employer as "conduct" or "breach of code of conduct".

120. However, subject to the Lund point, where there is a dismissal, relying on "some other substantial reason" (ie not a disciplinary breach) for breakdown in the working relationship, the ACAS Code does not apply. See the EAT's decision in Phoenix House Ltd v Stockman and anor 2017 ICR 84.

Issue Estoppel

121. Issue estoppel prevents a party reopening an issue that has been decided in earlier proceedings involving the same parties. Issue estoppel does not mean that a later tribunal can never depart from an earlier tribunal's finding of fact. However, where the earlier tribunal has made a finding of fact which was crucial to its decision on a cause of action in the earlier proceedings then the parties are estopped from calling that finding of fact into question in subsequent proceedings. The opposite is also true. Where the earlier tribunal has made a finding of fact, but it was not a finding about the existence (or non-existence) of a *necessary ingredient* of the earlier cause of action then it is not necessarily impermissible for one of the parties to seek to reopen that factual issue in subsequent proceedings between the same parties involving a different cause of action.

Analysis and conclusions

122. We propose to analyse the constructive dismissal claim last, and to first go through the other claims in the order in which they appeared in the list of issues.

123. We were not specifically invited by the Claimant to depart from any specific findings of fact which formed part of the reasons for the Previous Judgment. Mr Dilaimi, for the Respondent, suggested that we were bound by all such findings of fact for events up to and including 30 January 2017 (the date of issue of the Previous Claim), but were not otherwise bound.

124. In the previous Judgment:

    124.1 Paragraph 7.18 begins: "*We next consider allegation 3. This allegation concerns the initial decision to move the claimant to Charing Cross. There is no doubt, that she was moved. As to whether this was unwanted, the situation is complicated. It is clear that there was a breakdown in the working relationships. The claimant did not want to work with Ms Shah, whom she now hated. It was necessary to preserve the position pending the outcome of claimant's grievance.*" We regarded ourselves as bound by that finding of fact to the extent that it relates to the situation in November 2016 (the time of the move to CXH). We did not believe that the earlier tribunal was making a finding of fact that it was impossible that the relationship between Ms Shah and the Claimant could ever be improved to the extent that Ms Shah could line manage the Claimant. In the alternative, we do not regard ourselves as bound by such a hypothetical finding, as the earlier tribunal was specifically considering the allegation that the act of moving the Claimant to CXH was an act of harassment, and not an allegation about whether the Claimant might ever move back to HH.

    124.2 Paragraph 7.25 includes the comment that the circumstances were such that, "*it [had] become impossible for Ms Shah to continue managing the claimant*".

This comment is made in the context of whether moving the Claimant to CXH, in November 2016, was an act of victimisation. We regarded ourselves as bound by that finding of fact to the extent that it relates to the situation in November 2016. We did not believe that the earlier tribunal was making a finding of fact that it was impossible that Ms Shah could ever line manage the Claimant in the future. In the alternative, we do not regard ourselves as bound by such a hypothetical finding, as the earlier tribunal was specifically considering the allegation that the act of moving the Claimant to CXH was an act of victimisation, and not an allegation about whether the Claimant might ever move back to HH.

124.3 Paragraph 7.37 (the final paragraph of the judgment) includes the following passage: "*It is clear to us the claimant has little, if any, insight into the effect of her own behaviour, or any responsibility that she may have for the deterioration in the working relationship. It is clear that the claimant's reaction to Ms Shah, from an early stage, was disproportionate. This is then reflected in the claimant's behaviour over a number of years. There are a number of attempts to salvage the situation. The respondent, ultimately, recognised that the claimant could not be managed by Ms Shah, and set about finding a new role for her. The respondent's managers behaved appropriately in difficult circumstances.*" We agree with the Respondent's counsel that in making these observations, the earlier tribunal was only considering matters up to 30 January 2017. For example, the Stage 3 grievance outcome was not referred to in the analysis of the Claimant's phased return to work under the line management of Ms Shah (paragraphs 7.29 to 7.36 of the Previous Judgment). To some extent, paragraph 7.37 is merely an overview, referring back to what had been set out earlier in the reasons, rather than a location where any fresh findings of fact are set out. In any event, for the purposes of our liability decision, it is not necessary for us to say anything more than that we have made our own findings of fact in relation to events after 30 January 2017. The extent to which paragraph 7.37 is binding on us at the remedy stage is a matter which can be addressed at the remedy hearing.

Issue [5a] – Disability

125. The Respondent concedes that the Claimant has had depression since no later than 30 January 2017. The basis of this concession was not that the Respondent was seeking to argue that the depression did not start earlier, but rather that, in the Respondent's opinion, the issue of whether the Claimant was a disabled person prior to 30 January 2017 was irrelevant to the complaints which we had to consider. Our finding is that the Respondent had the requisite knowledge of the fact that the Claimant might be disabled, and the effects that her condition might have on her, from no later than November 2016. At paragraph 7.27 of the Previous Judgment, a finding of fact is made, "*She was moved to preserve her own mental health*".

Issues [6] to [10] - Indirect Disability Discrimination

126. Our decision is that the PCP proposed by the Claimant is not one which is suitable for the purposes of section 19 of EQA 2010. Therefore this complaint fails.

127. As noted by the Supreme Court in *Onu v Akwiwu; Taiwo v Olaigbe*, the PCP must be something which could potentially apply to employees who do not share the protected characteristic. However, the Claimant has specifically framed the PCP on which she relies by reference to her own mental health.

128. In reaching this conclusion, we do not overlook the fact that the Claimant was a Litigant in Person at the final hearing. However, she has not been a Litigant in Person throughout. As discussed above, the claim was issued at a time that she was being represented by a firm of solicitors, which submitted the claim on her behalf. The wording of the PCP appeared in an agreed list of issues. The Claimant was not legally represented at the hearing at which the list was agreed, but nor has she subsequently sought to amend the wording of the alleged PCP. The "opening note" prepared by pro bono counsel (and dated 10 September 2019) referred to this PCP wording and put forward arguments as to why this wording should lead to a finding in the Claimant's favour in relation to section 19 EQA 2010.

Issues [11] - Harassment

129. The Claimant refers back to the incidents referred to at paragraphs [8a] to [8d] of the list of issues. Each of these incidents did occur, and the Respondent does not argue otherwise.

Meeting on 11 August 2017 – [8a]

130. In relation to [8a], the fact that Ms Mounsey met the Claimant on 11 August 2017 was, in part at least, related to the Claimant's disability. As decided by the previous tribunal, the Respondent's reasons for moving the Claimant to CXH (on a temporary basis) included a belief by the Respondent that this move was appropriate due to the Claimant's health. The meeting on 11 August 2017 was (in part at least) to discuss the fact that this temporary arrangement would come to an end at some stage.

131. For similar reasons, the Respondent's proposal to commence an investigation also related to the Claimant's disability to some extent. In the words of Ms Raleigh, the investigation was to centre around the Claimant's "*capability to return to the role due to the breakdown working relationships*." The initial (temporary) move out of the substantive role had been partially connected with the Claimant's health.

132. The meeting did not have the purpose or effect of violating the Claimant's dignity, and nor did it have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

    132.1 The meeting (or at least an update about her employment situation) was something which the Claimant had been seeking.

    132.2 Immediately after the meeting, the Claimant seemed content to some extent, albeit she sought further information.

133. The proposal to commence an investigation did not have the purpose or effect of violating the Claimant's dignity, and nor did it have (at least in August 2017) the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

133.1 The purpose of the proposal was that the Respondent wished to have a written report which would potentially form the basis of future decisions.

133.2 The effect of the proposal on the Claimant, immediately after the meeting, was that she thought that it might be positive for her, and lead to (some of) the outcomes that she had sought from her grievance. She sought further information so that she could decide whether or not to participate, and did not believe, at that time, that she had no choice in the matter.

134. Thus, the events of 11 August 2017 did not amount to harassment.

Meeting on 15 November 2017 – [8b]

135. In relation to [8b], the fact that Ms Mason met the Claimant on 15 November 2017 was, in part at least, related to the Claimant's disability. As decided by the previous tribunal, the Respondent's reasons for moving the Claimant to CXH (on a temporary basis) included a belief by the Respondent that this move was appropriate due to the Claimant's health. The meeting on 15 August 2017 was (in part at least) to discuss the fact that this temporary arrangement would come to an end at some stage.

136. The meeting did not have the purpose of violating the Claimant's dignity, and nor did it have the purpose of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

136.1 The Respondent's desire to discuss the Pharmacy Assistant role with the Claimant, prior to advertising it to others, was entirely appropriate. Indeed, not doing so might have left the Respondent open to criticism.

136.2 The timing of meeting was not inappropriate, given that the posts at the other hospitals had already been advertised. The Claimant had been back at work for close to two weeks, and there was no reason to delay the discussion. Ms Mason made clear that the Claimant was not being forced to make a decision on the spot, and that the discussions could take place over time.

137. The meeting was unwanted in the sense that the Claimant did not wish to have any discussion - on 15 November 2017 - about whether to move from the temporary role to another role, and also because she did not wish to move to a Pharmacy Assistant role at all.

138. The meeting did not have the effect of violating the Claimant's dignity, and nor did it have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Claimant states that she was "offended" by the suggestion that the discussion resume on another occasion, but that falls short of demonstrating the required effect. For example, an "offensive environment" had not been created by Ms Mason's suggestion of further discussions.

139. Even if the Claimant did perceive that her dignity had been violated, or an intimidating, hostile, degrading, humiliating or offensive environment had been created, our judgment is that such a perception would not have been reasonable. From an objective point of view, Ms Mason's willingness to refrain from advertising the Pharmacy Assistant vacancy until the Claimant had had a longer period to think

about whether she might be interested was a suggestion which was beneficial to the Claimant and not a threat or a disadvantage.

140. Thus, the events of 15 August 2017 did not amount to harassment.

Ann Mounsey inviting the Claimant to a 30 November 2017 meeting – [8c]

141. Ms Mounsey repeatedly invited the Claimant to this meeting. On the first occasion, on 20 November 2017, the letter had the heading - in bold – "Formal Meeting". It was not Ms Mounsey's purpose to violate the Claimant's dignity, or to create an intimidating, hostile, degrading, humiliating or offensive environment for her.

142. The conduct was unwanted. The Claimant's email to David Wells on 2 November 2017 made clear that she did not wish to be "referred back" to either Ms Mounsey or Ms Raleigh. By repeatedly inviting the Claimant to a meeting to discuss these matters, the Respondent was doing something which the Claimant had made clear to it that she did not want. Ms Mounsey, however, had not been informed about that part of the Claimant's communications with Mr Wells.

143. Ms Mounsey's repeated requests to meet the Claimant on 30 November 2017 were related to the Claimant's disability. Our reasons for this finding are similar to our findings in relation to the 11 August meeting: in part, at least, the reason for the meeting was to address the fact that the Claimant was temporarily in a different post, having been placed in that post due to the Respondent's concerns over the Claimant's health. Further, Ms Niczypruk's advice to Ms Mounsey (email of 16 November) suggested that "stress" be addressed in the meeting.

144. The Claimant did perceive that the purported insistence on holding the meeting on 30 November 2017 had the effect of creating a hostile or intimidating environment for her. She did have the perception that her employer was intending to discipline her (or, at the least, to commence a disciplinary investigation against her). She believed that the employer was giving her conflicting information about the investigation, and also that her request to deal with people other than Ms Mounsey and Ms Raleigh was being ignored.

145. We note that the Respondent's letters, inviting the Claimant to the meeting did supply the Claimant with details of support that was available to employees to help them cope with difficult situations. We also note that the Claimant was told that she could bring both a union representative (or workplace colleague) and also a family member or friend to provide support. Furthermore, while there was a lot of correspondence sent by Ms Mounsey to the Claimant some of it was seeking clarification of points which the Claimant had made, or else supplying new information about the meeting.

146. On balance, our decision is that, when all the circumstances of the case are considered, it was not reasonable to perceive the correspondence about the 30 November 2017 meeting as violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. These statutory words create a specific hurdle for a claimant to get over, and we must not cheapen the significance of those words. As we will discuss in more detail below, our decision is that the Respondent pushed too hard for this meeting

to take place; however, its actions fell short of the tort of harassment related to the Claimant's disability.

Ann Mounsey speaking with the Claimant on 30 November 2017 – [8d]

147. This conversation was related to the Claimant's disability to some extent, as its purpose was to seek to persuade the Claimant to hold the face to face meeting which had been the subject of correspondence from 20 November 2017 onwards.

148. The Claimant had certainly (by her email of 9:10 on 30 November 2017) made clear that she had not changed her mind about having the formal meeting. Ms Mounsey's visit to the Claimant's location in order to have a further discussion was therefore unnecessary. Given that the Claimant had asked to have things put in writing to her, on balance, our decision is that this encounter was "unwanted".

149. The Claimant's perception was that Ms Mounsey's words and actions contributed to the creation of a hostile and intimidating environment. She felt overwhelmed, pressured and stressed. However, we accept that Ms Mounsey made clear that she was not seeking to insist that the meeting went ahead, but rather was seeking to ensure that the Claimant knew that the three options were for the meeting to go ahead that day, or else take place on a later date when the Claimant was accompanied, or else that the meeting not take place until after Ms Mounsey had written to the Claimant.

150. As we will discuss in more detail below, our decision is that the Respondent acted inappropriately in having Ms Mounsey speak to the Claimant on 30 November to try persuade the Claimant to allow the formal meeting to take place that morning; however, its actions fell short of the tort of harassment related to the Claimant's disability.

<u>Duty to Make Reasonable Adjustments – Issues [12] to [14]</u>

151. Based on the evidence, we are satisfied that the Respondent did have a PCP that it required employees to attend (certain) meetings in person. In reaching this decision, we are not deciding that the employer had an invariable rule, from which it never departed. Furthermore, we note that the proposed 30 November 2017 was described as "Formal Meeting", but without specification as to whether it was part of a disciplinary procedure, grievance procedure, capability procedure, etc.

152. Had the meeting taken place, it is likely that the Claimant would have been at a disadvantage in comparison with employees who did not have depression.

153. We do not accept that the Claimant's proposed formulation of the disadvantage (at [13a] of the list of issues) in itself triggered the duty to make reasonable adjustments. It is true that the Claimant did not wish to have the meeting, but her lack of desire for the meeting is not, in itself, something which caused greater disadvantage to the Claimant than to a non-disabled employee who did not wish to have a "formal meeting".

154. However, in the event, the Respondent did not apply its PCP to the Claimant on 30 November 2017. It did not hold the meeting. The Claimant therefore did not suffer the disadvantage that she might have suffered had the meeting taken place.

155. The Respondent did not provide the Claimant with a (full) written explanation of what would otherwise have been discussed face to face on 30 November 2017. However, the Respondent did offer to do that (by email sent at 18:20, which was before the Claimant communicated her resignation). Therefore, the Respondent did not outright refuse the adjustment which the Claimant had requested, albeit it did not put the adjustment in place as soon as it was requested.

156. The reasonable adjustments claim fails.

Victimisation – Issues [15] to [17]

157. The presentation of the Previous Claim in January 2017 was a protected act, as was the Claimant's contribution to the agreed list of issues at the preliminary hearing in April.

Ms Mounsey ignoring the Claimant – Victimisation [16a]

158. Our finding is that the Claimant has failed to satisfy us of the factual basis for this assertion. On the balance of probabilities, we are satisfied that, Ms Mounsey did not ignore the Claimant (regardless of the presence of Ms Bullock).

159. For that reason, this element of the victimisation claim fails.

Failing to inform the Claimant of the nature of the investigation – Victimisation [16b]

160. Our finding is that the true nature of the investigation which the Respondent was proposing to carry out was as stated in Ms Raleigh's email of 2 October 2017. It was going to be a "*some other substantial reason*" investigation and it was to centre around the Claimant's "*capability to return to the role due to the breakdown working relationships*".

161. We infer from the fact that the phrase "*some other substantial reason*" was used by an experienced HR officer that the employer was contemplating that somebody might be dismissed as a result of the investigation.

162. We are satisfied that the employer was not anticipating that anyone else, other than the Claimant, was at risk of dismissal as a result of the report.

163. Having carefully considered all the available evidence, our interpretation of Ms Kessler's 26 July 2017 email is that she wanted advice on how senior staff could safely reassure Ms Hand, Ms Shah and others that the investigation would not lead to termination of *their* employment, or disciplinary sanctions against *them*.

164. Our interpretation of the evidence is that the employer was deliberately seeking to find a way of avoiding saying to other staff, or to the Claimant, that the investigation was to centre on the Claimant, rather than all staff in the Buying Office.

165. We are satisfied that the Respondent was proposing the investigation because it wanted to find a way of bringing the Claimant's temporary assignment at CXH to an end. The Respondent's desire to end the temporary assignment in due course was in no way connected to the protected act, but was because the arrangement had only ever been temporary, and because it did not suit the Respondent's

business needs. The Respondent was not unduly hasty about seeking to end the arrangement.

166. We are also satisfied that the Respondent's lack of transparency about the true nature of the investigation was not because of the protected act (whether consciously or subconsciously).

166.1 Ms Mounsey did use the word "reinvestigation" on 11 August 2017. It was an inaccurate choice of word, but she would have used that word anyway, regardless of the protected act.

166.2 Ms Mounsey did fail to respond substantively to the Claimant's 13 August email, which sought details of the investigation and sought an internal investigator. The main causes of that failure to reply were a lack of adequate HR support and the fact that Ms Horton's investigation did not progress. Later on, the Claimant was absent following the death of her father. The failure to give an explanation of the investigation to the Claimant, and the failure to update the Claimant after internal discussions in August and/or October, was not motivated by the protected act.

166.3 There was confusion and contradiction in the letters sent by the Respondent's solicitors as to whether an investigation had started. We are satisfied that this was not motivated by the protected act.

167. For that reason, this element of the victimisation claim fails.

Failure to follow ACAS Code - Victimisation [16c]

168. Paragraph 1 of the Code reads as follows:

> This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.
>
> • Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.
>
> • Grievances are concerns, problems or complaints that employees raise with their employers.
>
> The Code does not apply to redundancy dismissals or the non-renewal of fixed-term contracts on their expiry.

169. The Code did not apply to the situation the Respondent was dealing with following completion of the Stage 3 outcome in April 2017. Put another way, there was no breach of the Code in connection with any of the issues which we had to consider.

170. We do acknowledge that paragraph 2 of the Code refers to the need for fairness and transparency, and that paragraph 4 refers to the need to deal with matters promptly. In addition to the fact that these paragraphs are addressing disciplinary and grievance matters specifically, in our opinion, any lack of transparency, or lack of speed, was not because of the protected act.

171. For that reason, this element of the victimisation claim fails.

Constructive Dismissal

172. The Claimant withdrew her argument that allegation [2a] (failure to uphold her grievance after the Stage 3 hearing) was something that amounted to, or contributed to, a breach of contract.

173. We have found as a fact that allegation [16a] (that Ms Mounsey ignored the Claimant) did not occur. We have also found that the Respondent had not been obliged to comply with the ACAS Code of Practice (see allegation [16c]).

174. In relation to allegation [8b], our finding is that Ms Mason acted correctly and reasonably at the meeting of 15 November 2017, and that it was fair and reasonable to commence a discussion about the Pharmacy Assistant vacancy and fair and reasonable to suggest that the discussion could resume on a later date.

175. There was no "formal meeting" between the Claimant and Ms Mounsey on 30 November 2017; there was, however, a face to face conversation between them. Thus allegation [2b] does not have to be considered separately and is simply a duplication of [8c].

176. Thus, the remaining allegations from Issue 2, "Complaints alleged to have damaged the implied term" are as follows:

[7a] Failing to take her mental health into account when dealing with her employment/line management.

[8a] The meeting with Ann Mounsey on 11 August 2017, and the proposal that an investigation would be commenced.

[8c] Ann Mounsey inviting the Claimant to a meeting on 30 November 2017.

[8d] Ann Mounsey speaking with the Claimant in person on 30 November 2017.

[12a] The Claimant contends that the Respondent requires an employee to attend meetings in person.

[14a] The Claimant states the Respondent should have provided her with a written explanation, rather than expecting her to attend the meeting in person.

[16b] Did Ann Mounsey, or another member of the Respondent, fail to inform the Claimant about the nature of the investigation been commenced.

177. In relation to [8a] and [16b], our decision is that, as of 26 July 2017, the Respondent was proposing to commence an investigation, a possible outcome of which was that the Claimant would be dismissed for "some other substantial reason" if it was decided that there was a breakdown in working relationships.

178. In relation to Ms Kessler's email of 26 July 2017, our inference is that the Claimant is not one of the individuals included in the group "our staff" being referred to. Our opinion is that "our staff" refers to Ms Shah and Ms Hand and potentially other members of staff in the Buying Office, but not the Claimant.

179. For the avoidance of doubt, it is not our finding that, as of 26 July 2017, the Respondent had decided that it would inevitably dismiss the Claimant (for some other substantial reason, or at all). On the contrary, we are satisfied by the

contemporaneous documents and oral evidence that the Respondent's first preference was that the Claimant be redeployed elsewhere, away from the Buying Office. However, we do find that:

179.1 The Respondent was not seeking to put any measures in place to facilitate the Claimant's return to her post in the Buying Office in HH.

179.2 The Respondent was not contemplating that there might be a recommendation that someone else, other than the Claimant, might be dismissed (or removed from the Buying Office).

179.3 The Respondent wanted to avoid saying, upfront and outright, that the investigation was for the purpose of considering whether there was a potentially fair reason to dismiss the Claimant.

179.4 The Respondent deliberately chose to use a vague description of the investigation in its discussions with staff.

179.5 There was some concern (at least on the part of Ms Kessler) that the vague description might cause (for example) Ms Shah or Ms Hand to be worried, when the Respondent knew that they actually had no reason to be worried.

180. The Respondent allowed things to stagnate.

180.1 Ms Raleigh and the Respondent's solicitors were of the view that an investigation had already commenced and (in the case of Ms Raleigh, at least) that it was an investigation which might result in the Claimant's dismissal by reason of "some other substantial reason". [We are content to assume that there was no intention to dismiss unfairly, and we repeat that we are not suggesting that dismissal was being seen as a foregone conclusion.]

180.2 On the other hand, neither Ms Mounsey nor Ms Horton, nor anyone else, was actually taking any active steps to progress matters. (We have not seen any evidence of Ms Horton doing anything after the meeting of 26 July 2017, and Ms Mounsey took no substantive action to move things forward between meeting the Claimant on 11 August 2017 and writing to the Claimant on 20 November 2017, albeit we note that there was some correspondence between her and Ms Raleigh in October.)

181. Following her meeting with Ms Mounsey on 11 August 2017, it was entirely reasonable for the Claimant to infer that a further investigation was due to begin which might yet lead to some sort of action being taken against Ms Hand or Ms Shah. (As an aside, we are not suggesting that the Claimant's belief that Ms Shah or Ms Hand had acted in a way which merited formal action of some sort was justified. The Previous Judgment made clear that they each acted reasonably towards the Claimant.) Ms Mounsey knew that the Claimant had formed that impression, but did not correct it, despite the fact that it was Ms Mounsey's use of the word "reinvestigation" that made it appear to the Claimant that her grievance complaints were being looked at again. As a result, the Claimant was surprised and concerned to learn, following discussions between the Trust's solicitors and her own solicitors, that, in fact, the investigation was "about" the Claimant, rather than about the alleged actions of others.

182. The lack of transparency about what the investigation was really going to be about was a breach of the implied term requiring confidence and trust. The Respondent

acted in a manner likely to seriously damage the relationship of confidence and trust and it did so without reasonable and proper cause.

183. In relation to [8c], [12a] and [14a], the heading of the 20 November 2017 letter was "Formal Meeting". It said that the Claimant was "entitled" to be accompanied. It said that the meeting was to be with Ms Raleigh and Ms Mounsey. Given the contents of the email of 2 November 2017 to Mr Wells, the Respondent knew (or ought to have known) that this would be a letter which would alarm the Claimant.

    183.1 it was with the two people whom she had expressly asked not to be referred back to;

    183.2 it seemed to be in line with the warning which her solicitor had given to her (based on what the Respondent's solicitors had supposedly said) that she was due to receive a letter in connection with an investigation about her;

    183.3 It specifically stated that the "formal meeting" would discuss the matters which the claimant had raised with Mr Wells and the matters discussed between the claimant and Ms Mounsey in August.

184. It was therefore reasonable for the Claimant to be concerned about the subject matter of the meeting and to seek clarification of the status of the meeting and about specifically what the Respondent's intentions were. In our opinion, while there was some correspondence between the parties prior to 30 November 2017.

    184.1 If the Respondent was actually intending this to be a "formal meeting" as part of the proposed investigation, then there was an unreasonable failure by the Respondent to tell the Claimant clearly exactly what the investigation was about, and what the consequences of the investigation might be for her, before purporting to have her attend a "formal meeting"; alternatively,

    184.2 if the Respondent was not actually intending this to be a "formal meeting" as part of the investigation, then the Respondent, knowing of the reasonable concerns which the Claimant had raised about both the meeting and the investigation, unreasonably failed to expressly state that to the Claimant in response to her queries.

185. In either case, the lack of transparency about the intentions for the "formal meeting" breached the implied term requiring confidence and trust. The Respondent acted in a manner likely to seriously damage the relationship of confidence and trust and did so without reasonable and proper cause.

186. In relation to allegation [8d], our finding is that it was a "last straw". The Claimant believed that it was not reasonable for Ms Mounsey to ask her in person, on 30 November 2017, to attend the meeting, given that the Claimant had previously made clear that she did not wish to attend (without further clarification, at least) and had done so most recently at 9.10am that morning.

187. Our finding is that the Claimant resigned in response to the breach of the implied term requiring confidence and trust (with the last straw being the events of 30 November 2017) and she did not waive the breach.

188. The breach was a sufficiently serious one for the Claimant to treat the contract as having been repudiated by the Respondent.

189. Therefore, our finding is that the Claimant has been dismissed within the meaning of Section 95(1)(c) of ERA 1996.

190. The Respondent suggests that the dismissal (if any) was for the potentially fair reason of "some other substantial reason", being breakdown in working relationships. However, the breaches which we have found were the lack of transparency (about the investigation and the "formal meeting"). The cause of this lack of transparency was not the (alleged) breakdown in working relationships. The (alleged) breakdown in working relationships was the reason for the Respondent commencing (or seeking to commence) an investigation, but is not the reason for failing to be transparent about the investigation or "formal meeting". The Respondent has therefore failed to persuade us that it had a fair reason for the actions which caused the claimant to resign (ie caused the constructive dismissal). For that reason, the dismissal is unfair.

191. We have not, in this liability judgment, addressed the issues of Polkey or contributory fault. This is because we did not hear detailed submissions from either side. We will determine both of those issues as part of our deliberations following the remedy hearing.

Time Limit

When was the claim issued?

192. The Current Claim was validly issued on 7 March 2018, following an early conciliation period from 6 December 2017 to 6 January 2018.

193. There had previously been an application (submitted by email dated 20 February 2018) to amend the Previous Claim to have the further complaints added to that. However, that application was rejected. The email dated 20 February 2018 included a new printed form ET1 (as well as new particulars of claim) and sought to have a fall-back position that the letter/attachments be treated as a new claim. By letter (dated 1 March 2018 and) emailed to the Claimant's solicitors on 2 March 2018, the purported new claim was rejected because it had not been presented by any of the means permitted by the relevant practice direction. As mentioned in the letter, "*Email submission to a local office is not a valid presentation of a claim*".

194. No application to reconsider that rejection was made, and nor was there any appeal. It was not argued at the final hearing that the decision to reject the 20 February 2018 ET1 was incorrect. Thus, there was no valid presentation of the current claim prior to 7 March 2018.

Calculations relevant to time limit

195. Day A was 6 December 2017 and Day B was 6 January 2018. The period from 7 December 2017 to 6 January 2018 (inclusive) does not count in the calculation to work out the time limit (section 140B(3) of EQA 2010). This is a period of 31 days.

196. A complaint in relation to an act or omission which occurred on or after 7 November 2017 is within the time limit set out at section 123(1)(a) of EQA 2010. In relation to incidents alleged to have occurred earlier than 7 November 2017: they will be in

time if they form part of conduct extending over a period of time, where the conduct continued until at least 7 November 2017; they will provisionally be out of time if they were isolated events, and it would be necessary to consider the discretion granted to us by section 123(1)(B) of EQA 2010.

Is each claim in time or not, and should any extension be granted?

197. The unfair dismissal claim is in time (and the Respondent acknowledges that).

198. From the list of issues, [8a], the actual meeting with Ann Mounsey on 11 August 2017 is an act prior to 7 November 2017, as is the proposal made at that meeting that there would be an investigation. However, the proposed investigation itself was an on-going state of affairs which lasted until the termination of the Claimant's employment. Therefore, our finding is that [8a] refers to conduct extending over a period of time (such conduct continuing until, and after, 7 November 2017) and the Equality Act complaints based on [8a] are therefore in time.

199. From the list of issues, [16b], the alleged failure to inform the Claimant about the nature of the investigation being commenced, we must take account of s121(3)(b) and 123(4) of EQA 2010. A failure is not necessarily to be treated as a continuing state of affairs, but rather is deemed to have occurred when the relevant person decided not to supply the information to the Claimant. In this case, however, on the Respondent's case, there was no decision to fail to provide information to the Claimant. On the contrary, the Respondent submits that it would have supplied full details of the investigation to the Claimant in due course, and any delay was simply because "terms of reference" had not been agreed. Therefore, if there was a failure to supply adequate information, then that was a continuing act which continued until the end of employment. Therefore allegation [16b] is not out of time.

200. From the list of issues, [16a], Ms Mounsey ignoring the Claimant is alleged by the Claimant to have continued up to the date of termination. Allegation [16a] is therefore not out of time.

201. Harassment allegations [8b], [8c], [8d] are in time, as is the allegation of failure to make reasonable adjustments.

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Employment Judge Quill

Date 17 October 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 October 2019

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FOR EMPLOYMENT TRIBUNALS