



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS

MEMBERS: Ms J Forecast
Mr G Henderson

BETWEEN:

Ms B Roche

Claimant

and

London Borough of Bromley

Respondent

ON: 14 - 23 June 2021
5 - 7 & 28 July 2021 in chambers

Appearances:

For the Claimant: Miss A Ahmad, Counsel

For the Respondent: Mr S Bishop, Counsel

RESERVED LIABILITY JUDGMENT

The unanimous decision of the Tribunal is that:

1. the claimant was not constructively dismissed; and
2. the claimant was not discriminated against.

Further submissions are invited below on the question of notice pay in light of the Tribunal's findings on prior repudiatory breach (unless the parties can resolve the issue between themselves).

REASONS

1. In this matter the claimant complains that she was unfairly constructively dismissed and subjected to various forms of disability discrimination. The claimant's application to add a claim for breach of the duty to make

reasonable adjustments was considered on the first morning of the Hearing and granted for the reasons given orally to the parties. Similarly the respondent made applications to amend its response on the mornings of days two and three which were granted, again for the reasons given orally to the parties.

2. The position regarding documents was most unsatisfactory. Both parties have been professionally represented throughout yet at the beginning of this 8-day case there was no agreed bundle. There were also applications by the claimant for specific disclosure of documents on the first morning which were, eventually, resolved between the parties and led to a substantial supplementary bundle. Nor was there an agreed list of issues. All these issues were perfectly capable of having been properly discussed and agreed prior to the Hearing (or at least agreement reached as to where there was disagreement). This failure led to a significant part of the first day being ineffective and slowed down the Tribunal's preliminary reading. In addition it took until day six for a final agreed list of issues to be available to the Tribunal (which appears in the appendix to this Judgment).

Evidence & Submissions

3. We heard from the claimant (including two supplementary statements occasioned by the various amendments) and also:
 - a. Ms S Philips, former Head of Service at the respondent;
 - b. Ms T Portman, former Deputy Manager at the respondent; and
 - c. Mr R Shockness, former Principal Lawyer at the respondent.
4. For the respondent we heard from:
 - a. Ms C Whiting, Head of Service;
 - b. Ms P Davies, former Head of Quality Assurance; and
 - c. Ms J Bailey, Director of Education and Families.
5. We also had written statements for the respondent from:
 - a. Ms Jackson, IT Contracts & Operations Manager, in respect of confirmation of searches for documents;
 - b. Ms B Lindsay, HR Strategy Manager (unsigned);
 - c. Ms K Goddard-Smith, HR Consultant.
6. Both Counsel supplied helpful written submissions which were supplemented orally on the last day of the Hearing.

Relevant Law

7. Discrimination arising from disability: section 15 of the Equality Act 2010 (the 2010 Act) states:
 - (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

8. The EHRC Code advises that there must be a connection between whatever led to the unfavourable treatment and the disability. Further that the 'consequences' of disability include anything which is the result, effect or outcome of the disability. It also sets out guidance on the objective justification test.
9. The Court of Appeal decision in *City of York Council v Grossett* ([2018] EWCA Civ 1105) confirms that section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an identified 'something'? and (ii) did that 'something' arise in consequence of B's disability.
10. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. The meaning of 'unfavourable' in section 15 was considered in *Trustees of Swansea University Pension & Assurance Scheme & anor v Williams* ([2015] IRLR 885) and described as having 'the sense of placing a hurdle in front of, or creating a particular difficulty for, the or disadvantaging a person...'.
11. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant 'something'. There is no requirement that A be aware that the 'something' has occurred in consequence of B's disability.
12. Breach of the duty to make reasonable adjustments: section 20 and schedule 8(20) of the 2010 Act set out the duty to make adjustments. If an employer applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial (i.e. more than minor or trivial) disadvantage in comparison with persons who are not disabled, that employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not arise if the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled and was likely to be placed at that disadvantage (*Wilcox v Birmingham CAB Services Ltd* UKEAT/0293/10).
13. PCP is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions. It has been confirmed however in *Ishola v TFL* ([2020] EWCA Civ 112) that PCP carries the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again and although a one-off decision or act can be a practice, it is not necessarily one.

14. Interpreting the duty does not contain a strict causation test but requires a comparative exercise to test whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability. If so, the test whether it was reasonable to make a particular adjustment is an objective question for the Tribunal to answer (*Tarback v Sainsbury's Supermarkets* 2006 UKEAT).

15. Harassment: section 26 of the 2010 Act provides that A harasses B if A engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

16. In *Land Registry v Grant* (2011 IRLR 748) Elias LJ said:

"Where harassment results from the effect of the conduct, that effect must actually be achieved. However, the question whether conduct has had that adverse effect is an objective one – it must reasonably be considered to have that effect – although the victim's perception of the effect is a relevant factor for the tribunal to consider. In that regard, when assessing the effect of a remark, the context in which it is given is always highly material.

Moreover, tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

17. In *Hartley v Foreign and Commonwealth Office Services* ([2016] ICR 17), the EAT stated that a Tribunal considering the question posed by s26(1)(a) must evaluate the evidence in the round, and that the alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic 'cannot be conclusive of that question'. The tribunal should look at the overall picture, including its own findings on the adverse effects of the claimant's disability.

18. Burden of proof in discrimination claims: section 136 of the 2010 Act states:

(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.

19. It is generally recognised however that it is unusual for there to be clear evidence of discrimination and that Tribunals should expect to consider matters in accordance with these provisions and the guidance set out in *Igen v Wong and others* ([2005] IRLR 258) confirmed by the Court of Appeal in *Madarassy v Nomura International plc* ([2007] IRLR 246). In the latter case it was also confirmed, albeit when applying the pre-2010 Act wording, that a simple difference in protected characteristic and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed (although that something more need not be a great deal – *Deman*

v CEHR [2010] EWCA Civ 1279). It is important in assessing these matters that the totality of the evidence is considered.

20. Unfair constructive dismissal: In order to bring a complaint of unfair dismissal it is first necessary to establish that the claimant has in fact been dismissed.

21. If there is no express dismissal then the claimant needs to establish a constructive dismissal. Section 95(1) of the Employment Rights Act 1996 (the 1996 Act) states that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if:

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

22. In *Western Excavating (ECC) Limited v Sharpe* ([1978] ICR 221), the Court of Appeal confirmed that the correct approach when considering whether there has been a constructive dismissal is that:

“if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct, he is constructively dismissed.”

23. In *Kaur v Leeds Teaching Hospitals NHS Trust* ([2018] EWCA Civ 978) the Court of Appeal confirmed that in a normal case where an employee claims to have been constructively dismissed it is sufficient for a Tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach to so called ‘last straw’ cases explained in *London Borough of Walton Forest v Omilaju* ([2005] IRLR 35)) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation)

(5) Did the employee resign in response (or partly in response) to that breach?

24. The ‘Malik term’ referred to above is a reference to the House of Lords decision in *Malik v BCCI SA (in liquidation)* ([1997] IRLR 462) (as corrected

by Baldwin v Brighton & Hove CC [2007] ICR 680) which confirmed that to succeed in a constructive dismissal claim the employee needs to show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them. This conduct is to be objectively assessed by the Tribunal rather than by reference to whether the employer's conduct fell within the band of reasonable responses. That conduct must be assessed as a whole (Woods v W M Car ([1981] ICR 666)). In Leeds Dental Team Ltd v Rose ([2014] IRLR 8) the Employment Appeal Tribunal held that the employer's subjective intention is irrelevant. It is for the Tribunal to consider objectively whether the conduct complained of was likely to have that effect.

25. If an employee has been dismissed, constructively or expressly, then it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the 1996 Act. If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

26. Relevant contractual principles:

- a. Contracts of employment are subject to the same usual principles of contract law subject to any relevant statutory provisions. If an employee and employer agree a variation to their contract a new contract comes into existence and the previous contract is terminated (Hogg v Dover College [1990] ICR 39).
- b. A party who terminates a contract is not liable for any breach in so doing if the other party was already in repudiatory breach of the same contract – even if the first party did not know that when they terminated (Boston Deep Sea Fishing v Ansell [1888] 39 ChD 339, applied in the employment context in Palmeri v Charles Stanley & Co Ltd [2020] EWHC 2934).
- c. Claims in respect of unpaid notice pay can be brought either as claims of breach of the employment contract or as an unauthorised deduction from wages (section 23 of the 1996 Act).

Findings of Fact

27. Having assessed all the evidence, both oral and written, and the submissions made by the parties we find on the balance of probabilities the following to be the relevant facts.

28. The claimant is a social worker and commenced employment with the respondent on 1 October 2009 as a Consultant Practitioner. In January 2011 she was appointed as a Deputy Manager with authority to authorise expenditure up to £50 and to manage up to 7 employees.

29. On 4 February 2013 the claimant started what was initially a six month secondment to a pilot post as joint Care Proceedings Case Manager for the respondent and the London Borough of Bexley. That secondment was subsequently extended to 31 March 2014. Throughout that period the claimant had no line management responsibilities but did provide guidance to social workers and work collaboratively with other managers and supervisors. A job description for that role shows the job was at grade MG6, reporting to Ms Phillips.
30. From 1 April 2014 the joint secondment terminated but the respondent's intention was for the claimant continue in the role solely for the respondent with additional responsibilities as a practice development lead. On 20 March 2014. Ms Phillips wrote to her asking her to look at a revised job description and pointing out that the role 'will be at GM level' – GM standing for Group Manager. There was at that time no formal variation to the claimant's job description although there were discussions between her and Ms Phillips regarding appropriate revisions and in at least one draft document the role was described as 'Group Manager Care Proceedings and Safeguarding Practice Development Lead'.
31. On 1 April 2015 the claimant's appointment into the role was confirmed as permanent and a note of a supervision discussion between her and Ms Phillips on 4 June 2015 stated that her contract needed to be finalised at GM level with an updated job description and person specification.
32. The claimant's position is that from February 2013 to February 2017 she was a GM, that she had financial authority to sign for expenses up to £100 (which is why its subsequent removal and partial reinstatement were important to her), was held out by the respondent as such (e.g. she was sent an email from Ms Day, PA to the Heads of Service, dated 26 February 2016 addressed to all GMs and Ms Phillips' email dated 25 May 2016 which asked for her and other GMs' views on their training), signed her emails as one (e.g. emails dated 12 February 2016 and 19 April 2016), introduced herself as one at meetings, had her own office – which only GMs and above had - with a sign on its door saying GM and was supervised by Ms Phillips who only supervised GMs. The claimant also relies upon an organisation chart prepared and circulated by Ms Phillips on 12 August 2016 which referred to her as GM for the Court Team.
33. Ms Phillips' evidence was that the claimant was at GM level from the inception of the pilot role and remained at that level when Ms Phillips left the respondent, in March 2017. Ms Portman's evidence was also that the claimant was at GM level from 2013.
34. The respondent agrees that Ms Phillips might well have given the claimant the impression that she was a GM but they say in reality she was not (except for a specific period when she covered for an absent GM in January 2017) and her contractual paperwork had never been amended to that effect. Further that emails from Ms Phillips in May & June 2016 referred to the claimant becoming the GM for a new Court team, subject to agreement by senior management, and that this was therefore a proposal of a future event.

35. We find that at the latest by February 2016 the claimant was through custom and practice a GM at grade MG6. Even if HR had not authorised or issued a change to her contract or the associated job description, they did not signal rejection of Ms Phillips' indications either.
36. In October 2016 the claimant was absent for a period of 10 weeks for a hip replacement operation as a result of osteoarthritis – her disability. She returned to work with no adjustments and continued to drive to and from work – which depending on traffic and roadworks could be up to a 2-hour trip one way. It was commonly understood by the claimant and the respondent that she would need her other hip replaced at some point in the future.
37. In 2016 Ofsted rated the respondent's Children's Service as inadequate. This led to a wholesale change in senior management (i.e. Heads of Service and above) and a reorganisation (known internally as a realignment) a key feature of which was a 'flattening' of the management structure. Ms Phillips left at that stage and ultimately was replaced by Ms Whiting. Deputy Managers became Team Managers and almost all GM roles were removed. Heads of Service were relocated to sit alongside or at least near their teams. These changes were announced on 7 February 2017.
38. The respondent contacted those who it believed to be GMs specifically to consult with them about the impact of these changes. As the claimant's records did not show she was a GM she was not included in that exercise. On 8 February 2017 the claimant spoke to Ms Bailey – who had been appointed as the most senior manager in the service in January. Ms Bailey said she was not aware that the claimant was a GM but would investigate the position and get back to her. The claimant also emailed Ms Bailey later that evening setting out in detail why she believed she was a GM and the history of her employment. It is clear that the claimant was very capable of articulating her position and her concerns.
39. Ms Day collected the information that she could regarding the claimant's job title and status and sent it to Ms Bradford of HR on 8 February 2017 to pass on to Ms Bailey. This included the organisation chart issued by Ms Phillips in August 2016 and the claimant's supervision file.
40. At the claimant's request Ms Bailey met her on 4 April 2017. Ms Boardman of HR and Ms Whiting also attended. The only notes of this meeting available were those taken by the claimant. It is clear that the claimant was informed of the respondent's intention to change her role to Court Case Manager with a new contract and job description, at grade MG6, with no supervision or management of staff. The claimant says that this meeting was improper in that she was faced with three senior managers and that there was an imbalance of power and that she was therefore at a disadvantage when these proposals were outlined to her. We disagree with this categorisation of the meeting. Although she may not have been expecting Ms Whiting to attend, it was not in itself surprising that she should given that she was the claimant's line manager. Also, the claimant was

herself senior and experienced and able to stand up for herself. Furthermore, she was not required to agree to anything at the meeting.

41. The claimant attended a supervision with Ms Whiting on 13 April 2017 the notes of which (albeit unsigned by the claimant) show that there was still the intention to change the claimant's role as discussed at the previous meeting and that she and Ms Whiting would discuss a proposed job description which would then be passed to Ms Bailey for agreement. The discussion also showed that it was intended that the claimant would have a regular slot at certain management meetings.
42. Although not exactly clear when, Ms Whiting made a number of changes to the way the claimant carried out her role. One was removing her as a member of the Legal Gateway Panel that agreed which cases would go into pre proceedings and care proceedings. The claimant says that the last panel she attended was on 16 March 2017, that this change was made with no reason given and made her job harder to do. Ms Whiting's evidence was that the claimant's attendance was not necessary and she (the claimant) never raised it with her. Ms Whiting did accept in her evidence however that with hindsight she should probably have allowed the claimant to continue to attend these meetings while a review of the panel process was completed. The claimant's authority to sign for expenses was also removed in its entirety.
43. Additionally on 7 April 2017 the claimant was asked to vacate her office as it was required by one of the Heads of Service who were relocating (although in fact it was then left empty for some time). She was initially allocated an unsuitable desk in a general area with insecure and inadequate facilities. This was a temporary arrangement however and within two months was given a suitable alternative permanent location.
44. In May 2017 the claimant's husband was unexpectedly advised that he needed urgent, critical heart surgery. He was admitted on 15 May 2017. The claimant informed Ms Whiting and was absent by agreement between 15 and 31 May 2017.
45. On or around 7 June 2017, Ms Whiting acknowledged some annual leave requests from the claimant and also asked her to put in a request for:

'the additional annual leave you had – I think it was from 15th May – 31st May?'
46. On the same day, the claimant sought advice from Ms Bradford on the respondent's compassionate leave policy. She confirmed that up to five days was normally granted in respect of the serious illness of a close family member or up to 10 days in exceptional circumstances with Chief Officer approval. She added:

"It may be that five days could be considered with the rest as leave but this will be for you to agree with your manager"
47. The claimant completed the relevant form requesting that her absence be treated as compassionate leave that day and sent it to Ms Whiting. In her

covering email she suggested that Ms Bailey had the authority to agree the additional days.

48. On 8 June 2017, the claimant and Ms Whiting discussed the request during a supervision meeting. Ms Whiting agreed five days as paid special leave and asked the claimant to take the remainder as annual leave, R&R leave and/or unpaid leave. She added comments to this effect on the special leave form on 20 June 2017 which she then returned to the claimant.

49. The day after the supervision meeting, Ms Whiting advised the claimant that Ms Bailey was on leave and on the 10th she sought HR advice because the claimant was not happy with the options given and explained:

'I have advised her she can take it up with the Director or request unpaid leave. She does not want to consider unpaid leave and she has not taken it up with the Director.'

50. Ms Whiting emailed Ms Bailey asking for her opinion and Ms Bailey wrote to the claimant on 12 July 2017 restating the options already suggested by Ms Whiting and suggested as an alternative that she take 5 of the 8 extra days as annual leave and three as time off in lieu against future additional hours.

51. The claimant requested a one to one with Ms Bailey which took place on 31 July 2017, attended also by Ms Bradford. The claimant was advised that despite inconsistent past practice, her request had been dealt with fairly under the respondent's policy. Subsequent to that meeting Ms Bailey agreed to a different solution, proposed by the claimant, offsetting three of the extra days against unused CPD days from 2016-17.

52. In the meantime, Ms Whiting had sent a draft job description to the claimant (which showed grade MG6) on 3 June 2017 and at a supervision on 8 June 2017 it was agreed that the claimant would look at it and come back with comments by 16 June 2017. At this supervision the claimant also raised her concerns regarding changes to her level of financial authority as she believed this would set her apart as having different authority to other GMs. Ms Whiting's position was that the new role required no financial authority as it had no line management responsibility but confirmed that Ms Bailey had agreed that the claimant would have the same financial authorisation as a Team Manager i.e. up to £50.

53. At a supervision between Ms Whiting and the claimant on 6 July 2017 discussion continued about the scope of the claimant's role and it was again agreed that Ms Whiting would send an amended job description to the claimant who would return a finalised draft to be agreed by Ms Bailey and Ms Boardman and that a new contract would then be prepared. Discussions also continued about the appropriate level of financial authority for the claimant as she was not satisfied by the terms of an email Ms Whiting had sent setting out her level of authority. In that supervision they also discussed whether the claimant could work from home as she wished (which is what she had been doing and wanted to continue to do) but the notes

show that thenceforth working from home had to be requested and agreed by Ms Whiting depending on the reason given.

54. An email exchange on 7 July 2017 between Ms Whiting and the claimant shows the claimant's comments on the draft job description. Ms Whiting sent it to Ms Bailey on 17 July 2017 making it clear what was still outstanding for the claimant and suggesting how to word it to meet her concerns.
55. Later in July 2017 the claimant emailed a Legal Assistant to request some information. The Assistant did not quickly reply so the claimant called her and was told that the assistant had been told by Ms Whiting not to provide the claimant with the information. The claimant emailed Ms Whiting seeking clarification. They discussed the issue and the claimant says that Ms Whiting said she would be told when she needed to know information which the claimant found humiliating. Ms Whiting's evidence was that she was trying to effect efficient communication and ensure the legal team were not asked for information that was already available elsewhere.
56. On 31 July 2017 Ms Boardman emailed Ms Whiting and Ms Bailey, confirming that the claimant's updated job description would be put into the appropriate template and, based on an evaluation, the role had been assessed as grade PT6 rather than MG6, as it had no management responsibility although the salary band remained the same. She also confirmed that once this was finalised she would send a revised contract.
57. At the claimant's supervision on 11 August 2017, Ms Whiting confirmed that she was still waiting for the contract to be finalised and it was agreed that the claimant would liaise with Ms Boardman.
58. On 16 August 2017 Ms Taylor of HR wrote to the claimant enclosing a contract for appointment to the permanent post of Case Manager Court Proceedings and a copy of the job description for the role 'as recently agreed'. The enclosed contract confirmed that the post was effective from 1 August 2017 and was graded at PT6.
59. The claimant signed the contract on 18 August 2017, acknowledging receipt of the letter of appointment and written statement of employment particulars and accepted the appointment on the terms and conditions set out therein. She wrote in manuscript above her signature:

'I have been employed in this role since 3/2/2013 as MG Grade 6'.
60. It is clear that the claimant and Ms Whiting had a difficult relationship. There were a number of issues over which they disagreed compounded by Ms Whiting having a different management style to Ms Phillips with whom the claimant had got on well. The claimant was also clearly dissatisfied with the way her supervisions were carried out and she felt had been inaccurately noted. By the time the claimant signed the new contract on 18 August 2017 however, she was well aware of Ms Whiting's style and knew what her new role would involve having engaged in a dialogue regarding it. She had inputted into the terms of the job description and her comments had been

taken on board. By this time the practice had also been adopted of the claimant adding her own feedback in to the supervision notes.

61. With regard to her osteoarthritis, the claimant attended her consultant on 21 August 2017 and arranged a date for her second hip replacement on 24 November 2017. She had hoped to be able to delay the operation into the following year given that her husband was still recovering from his surgery and she did not wish them both to be unwell at the same time. The pain she experienced from her hip also fluctuated and she believed it was possible therefore that she would not need the operation so quickly. Unfortunately, however, her condition did not improve and it therefore became apparent to her at some point that she would have to go ahead with the operation on 24 November 2017.

62. On 20 September 2017 the claimant attended her GP as she was suffering pain in her elbow. The GP's notes record:

'likely tennis elbow... rest, ice, physio
patient asking for x-ray as has osteoarthritis in hips and knees
explained this is unlikely to show anything and symptoms fit more with tennis elbow'

Agreement was reached between the claimant and Ms Whiting for the claimant to have time off for a number of physio appointments. The claimant gave reasonable notice of the first three.

63. On 27 October 2017 Ms Whiting informed the claimant that she would be absent from the office from 10-27 November 2017.

64. The claimant and Ms Whiting met on 8 November. It is apparent that the claimant had been trying to meet with Ms Whiting earlier although in the email exchange with Ms Whiting's PA, it appeared to be simply a case of rescheduling a supervision planned for 3 November. There was no indication from the claimant in that exchange of any urgency or particular importance for the meeting with Ms Whiting.

65. The claimant and Ms Whiting have very different accounts of the meeting. What is clear is that the claimant informed Ms Whiting that she would be having her second hip replacement operation on 24 November 2017 and she would then be absent for approximately 12 weeks. She also told Ms Whiting that she would be leaving early that day as she had another physiotherapy appointment. The claimant says that Ms Whiting was angry, shouted at her and not only failed to offer any sympathetic comment regarding her impending surgery but also said she would not offer any expression of sympathy as the surgery had not yet happened. Ms Whiting says that she was surprised by the claimant's announcement of her surgery but showed sympathy, did not shout and it was the claimant who became angry and banged the door behind her as she left. It is also agreed that in that meeting Ms Whiting for the first time raised the question of the claimant making up her time for her physiotherapy appointments.

66. At 17:51 that day Ms Whiting emailed Ms Bailey as follows:

'Bernadette informed me today that she is having her second hip operation on 24th November and will be off work for 12 weeks!

Not unexpected but still very short notice. I've informed Sharon Bradford.

She has also had 3 half days weekly for physio appointments and when I asked whether it was related to her hip she said it was totally unrelated and due to tennis elbow. She wasn't happy with me when I asked her how she intended to make up the time she has been off which is 11 hours.

Regards'

67. At 17.55 Ms Whiting emailed the claimant regarding her physio appointments and said:

'I was made aware by you in advance that you would be off on 24/10/2017 and 1/11/2017 but was not informed in advance about today's appointment.

My understanding is that you have been off for 3 appointments which I make to be a total 11 hours. Please can you let me know how you intend to make up these hours before you go off for your operation.

Thanks

Regards'

68. Ms Whiting emailed the claimant again at 18:06 saying:

'Thank you for informing me that you will be off from 24th November for a hip operation and are likely to be off for 12 weeks. We agreed that you will give me the letter to confirm this operation tomorrow. I will inform HR about your being off work.

As I am going on leave as from Friday and you will be off by time I return I have asked you to complete the monthly report for the PLO Board prior to your departure. This report can be drafted and sent to me and Ron Shockness only before you leave.

I have also asked that you inform me about how you intend to make up the hours you took for your 3 physiotherapy appointments before you go off on 24th November. This is contained in separate email.

You confirmed that you have finished all the QAing work you completed for the Connected Person's Team and that you have no other work to complete before you go off on 24th November. I expressed my thanks to you for doing this work.

I will be in contact with you on my return from leave and after you have your operation.

Regards'

69. The next day the claimant left a copy of the letter from her consultant confirming the date of her operation to be 24 November 2018 on Ms Whiting's desk. She deliberately removed the date of that letter (21 August 2017) in such a way as to indicate it had not in fact been dated. She did this as she did not want Ms Whiting to know that she had had much more notice of the date of the operation than she was giving to the respondent as she expected Ms Whiting to be annoyed and did not want another confrontation.

70. On 10 November 2017 at 08:20, Ms Whiting emailed the claimant again regarding her hip operation and on this occasion copied Mr Dare, who would be covering Ms Whiting during her absence on leave. She said:

'Thank you for giving me a copy of the letter from your consultant. I will pass this onto HR for their information.

I have informed David Dare. He is aware of what I have asked you to do regarding your workplan during my absence and making up the hours regarding the 3 physio appointments.

My best wishes to you and I hope all goes well with the operation. Please get in contact with me after the operation when you are able, to keep me informed about your recovery.

Regards'

71. On 13 November 2017 Ms Taylor emailed the claimant, the claimant having spoken to her, and confirmed that all employees are given a reasonable time off to attend doctor or dental appointments and that hospital appointments would normally be managed in the same way and that time taken for hospital appointments does not have to be made up.

72. On 15 November 2017 the claimant emailed Ms Whiting. It was a lengthy email commenting on the issues raised by Ms Whiting in her emails and also additional matters. She referred to the meeting of 8 November saying she could be under no illusion that she found the meeting extremely distressing. She referred to Ms Whiting's tone and temperament in the meeting and that the thanks she had offered had been in a raised voice and grudging tone. She asked not to be contacted after her operation until the week beginning 18 December but that she should feel free to text/call thereafter. As for the physio appointments she apologised for failing to advise in advance of her appointment on 8 November which was an oversight and confirmed that she had spoken to HR and that time taken for hospital appointments did not have to be made up and that therefore she would not be making a proposal to do so.

73. She then referred again to the meeting on 8 November which she said she found profoundly distressing and was taken aback by Ms Whiting's harsh and unfeeling response towards the news that she would need further significant surgery. Ms Whiting did not reply to this email.

74. Ms Whiting did however email the claimant on 22 November 2017 regarding a draft board report expressing her disappointment that the draft had been copied to everyone despite an explicit instruction to send it just to herself and Mr Shockness. She asked the claimant to send the second draft by close of business the following day.

75. The claimant's last days at work prior to her sick leave were due to be 22 & 23 November 2017 though she was absent on the 22nd due to a chill and cold symptoms. It is not clear if she attended on the 23rd. She did not return to work prior to her later resignation.

76. Having considered the evidence as to what was said and the tone of the meeting on 8 November 2017 together with the correspondence that followed, we find that Ms Whiting was angry at the late notice given by the claimant of her lengthy absence due to start on 24 November, that she showed this anger and raised her voice/shouted. It is also more likely than not that the claimant responded in a similar tone. We observe that it is not surprising Ms Whiting was angry at the short notice given the operational difficulty that it would cause her especially as she herself was going on leave within a couple of days (which the claimant had known since 27 October) and was not due to return before the claimant would have left. As to whether Ms Whiting failed to express any sympathy and positively refused to offer any until the operation had happened, we find that any sympathy that was offered was, as the claimant herself said in the subsequent email, in a grudging tone and further that in the course of the argument that followed she said something that referenced the operation not having happened yet.
77. There was a cordial exchange of texts between the claimant and Ms Whiting on 20 & 21 December 201.
78. On 8 January 2018 the claimant's consultant confirmed in a letter that the claimant was making good progress in recovering from her operation, that he was happy for her to drive and she was discharged from his clinic as she was doing very well.
79. Texts between the claimant and Ms Whiting continued in the New Year. The tone of these texts was generally cordial and professional. Only the relevant extracts are noted below.
80. In an exchange on 31 January 2018, Ms Whiting asked to discuss the claimant's return to work. The claimant replied that she was signed off for 12 weeks but would keep Ms Whiting posted. Ms Whiting said that she was expecting the claimant back on 19 February and if that changed she would be grateful if she could let her know as soon as possible. She asked whether a referral to Occupational Health (OH) would assist. The claimant did not reply to that specific question.
81. Ms Whiting texted the claimant again on 15 February 2018 and asked her to confirm if she would be back to work on the 19th. The claimant replied that she had been signed off by her GP for a further four weeks. In all the circumstances the claimant could have arranged/provided such confirmation earlier.
82. On 26 February 2018 Ms Whiting informed the claimant by text that she was going to make an OH referral for her after advice from HR.
83. Medigold Health, the respondent's OH provider, wrote to the claimant on 1 March 2018 inviting her to attend an appointment at their office in Croydon on 7 March. Due to postal delays because of snow, the claimant did not receive the letter until 8 March and consequently did not attend the appointment.

84. On 8 March 2018 Ms Whiting texted the claimant saying that she had been informed that she missed the appointment, asked if she had received the appointment letter and said that they would arrange another appointment for her. She also asked if she had a personal email address which would be an easier way of making sure she received appointment details. No such email address was provided nor any explanation for not doing so.

85. The claimant replied to that text on 13 March 2018 advising that she had been signed off from for a further period and attached the sick certificate. The corresponding entry in her GP notes reads:

Diagnosis. Post op hip replacement Work related stress; Duration 12-Mar-2018 - 01-May-2018)
in Social services. being held responsible for a failed Ofsted
Stressed, tearful. not suicidal
Offered talking therapy. given leaflet and encouraged to call
declined antidepressants
she is looking for a new job'

The claimant indicated in her evidence that the GP's notes were not accurate with regard to her having said she was looking for a new job but we find that a GP would only record such if it, or something very similar, was said.

86. Ms Whiting replied on the same day asking her to confirm if she received the OH appointment date and if so why she did not attend and confirming that she would need to have an OH appointment. Ms Whiting texted the claimant again on 22 March informing her that she had arranged with OH to send her another appointment and that she would also be sending a letter that day which she did, confirming that another appointment was being sent for 6 April and emphasising how important it was that she attend.

87. On 5 April 2018 the claimant cancelled the OH appointment for the next day and texted Ms Whiting belatedly explaining why she had not attended the March appointment, that she felt unwell and was unable to attend the following day and asked for a local appointment saying:

'Given the distance when u re arrange it please ensure it is local to me as the location offered is in excess of 80 miles from my home.'

88. On 6 April 2018 Ms Bradford requested an estimate from the Bromley Pensions Team, Liberata, of benefits payable to the claimant if she left by reason of redundancy on 31 August 2018. We did not have the benefit of evidence from Ms Bradford as to why she made this request or on whose, if anyone's, instructions. Two paragraphs had been inserted into Ms Whiting's witness statement by the respondent's legal team dealing with this issue but Ms Whiting confirmed that those paragraphs had not been drafted by her and she had no knowledge of the matters referred to therein. She said that she had not requested the quote and had not had any conversations about the cost of exiting the claimant and had not wished to, as she was very good at her job. We are unable to make any findings of fact as to the circumstances of the request and although we agree with the claimant that the timing of this request seems suspicious, we found Ms

Whiting's evidence to be credible that she had no knowledge of it. It is quite possible that the HR department did this on their own initiative.

89. On 12 April 2018 Ms Whiting emailed OH asking for a new appointment for the claimant and that it needed to be in Croydon 'due to travelling issues'. Her wording suggests that she was trying to ensure what she thought would be a more local appointment for the claimant but had not appreciated that the original appointment had been in Croydon. Although she was undoubtedly very busy, having been put on notice of this issue she should have made proper enquiries and did not do so. An opportunity to avoid the later difficulties was therefore missed.

90. On the following day Ms Whiting texted the claimant saying:

'Hello Bernadette hope you are getting better. I've sent you a letter to remind you that we would like you to attend the OH appointment. They have sent you another appointment and it's in Croydon so you should be able to get there. Please make sure you attend.'

The claimant did not reply and therefore did not say that Croydon was inappropriate - another missed opportunity.

91. On 16 April 2018 the claimant's sick pay reduced to half pay.

92. Also on 16 April 2018 Ms Whiting wrote to the claimant again referring to the appointment in Croydon which was to be on 27 April. The claimant again did not reply when she could have done.

93. On 25 April 2018 at 11.56 Ms Whiting texted the claimant:

'Good morning Bernadette, hope you are making a good recovery. I've been asked by HR to remind you of the OH appointment for Friday 27 April 2.45 at the Medigold office in Croydon. They sent you a letter with the details. I'm expecting you back to work on Tues 1 May unless I hear differently.'

94. At 12.27 OH emailed Ms Whiting to say that the claimant had called to advise that she was unable to attend the appointment due to other commitments and was unavailable until after 8 May. In all the circumstances this was unreasonable behaviour by the claimant.

95. In an exchange between Ms Bradford and OH at 13.16, Ms Bradford asked for a telephone assessment to be done rather than a cancellation

96. At 13.30 Ms Whiting texted the claimant:

'Dear Bernadette I've been informed by Medigold that you have declined the OH appointment due to other commitments and will not be available until 8 May. I have asked them to complete a telephone OH assessment with you in light of these difficulties and they will be calling to arranged this. I will be in contact by letter shortly as I will need to arrange a meeting with you as part of the required sickness procedures. I would ask that you keep in contact with me so I know how you are'

97. At 14.37 Ms Bradford emailed OH again (copying in Ms Whiting) asking if a face to face appointment could be offered nearer to the claimant's home, perhaps in West Malling.

98. OH telephoned the claimant on her mobile on the 27th at the time of the scheduled appointment but she did not answer. She was at her granddaughter's sports day.

99. On 27 April 2018 Ms Whiting wrote to the claimant as follows:

'Sickness Review Meeting — 12 pm Wednesday 2 May 2018

I am sending this letter in advance of the meeting arranged for you to attend on 2 May 2018 and referred to in the letter from Sharon Bradford sent on my behalf and dated 26 April.

As you know I had hoped to meet you once you had been assessed by Occupational Health with a view to considering any advice that could be offered to assist and support your return to work. However, as you have not attended an appointment with Occupational Health and to avoid further delay I have now arranged to meet with you. Your absence was initially due to planned hip replacement surgery and I was sorry to note that your most recent medical certificate dated 12 March states as reason for absence 'post op hip replacement; work related stress' and covers a period of absence of 50 days up to 1 May 2018.

The meeting on 2 May is to obtain an update on your current fitness and likely return to work date and to discuss with you how we can best support your return to work. You will understand that as well as considering your well-being I must also balance the needs of the service and consider the impact of your absence since 24 November 2017 on the service.

I understand that you did not attend the first OH appointment with Medigold offered to you on 7 March as you say you did not receive the letter until after the appointment due to the snow then and problems with the postal deliveries in your area. You were offered another OH appointment on 6 April which you did not attend and you gave the reason as not being well enough. You mentioned the distance to travel to the appointment and asked me to ensure the appointment was made local to your home. The Medigold office you were offered was in Croydon which I do not believe is an unreasonable distance to travel. You did not communicate with me fully and did not explain the reasons for your inability to travel to Croydon. You were then offered a third appointment on 27 April. This was in a letter from Medigold dated 14 April but I understand that you responded to Medigold on 25 April by phone to advise them that you could not attend due to other commitments. You advised Medigold that you are unavailable to attend an appointment until after 8 May 2018. This is unsatisfactory and I have asked Medigold to try to contact you for a telephone assessment today instead of a face to face appointment. I hope you will co-operate with that assessment.

I need to understand from you why you are not available for appointments whilst absent from work. If not available for any reason you should be communicating the reason to me. There is also a cost to my budget for cancelled appointments which is a further concern.

Your current medical certificate is up to 1 May and you have not indicated to me whether you will in fact be returning to work on 2 May or whether you will be providing a further medical certificate. I am aware that you have had a separate letter from HR advising you that your absence due to sickness will be on half pay from 16 April 2018.

I am very concerned that you have not communicated satisfactorily with me during your absence and that you have not answered questions I have raised with you in my communications. Your brief text messages have not given me the information I require and you have not responded to my request for you to let me have a personal email address to contact you.

I should advise you that if you do not engage with the Occupational Health process, which would give me some medical advice, it means that any advice on how to manage your case may be based on limited information and it will be necessary to consider your case under

the Council's procedure for Managing Employee Ill Health based on the information available. Your lack of engagement with this process to date is not acceptable and I hope to discuss the reasons for this with you when we meet on 2 May.

I look forward to meeting with you then. We have booked a room at the Civic Centre. If you wish to meet at alternative venue then please let me know before the date of the meeting.'

100. As the claimant has alleged, this letter was in breach of the respondent's own policy that at least 7 days' notice of such meetings should be given. Its contents and tone - whilst not in all the circumstances known to the respondent at the time unreasonably critical - clearly did amount to an admonishment.

101. On 30 April 2018 at 12.06 Ms Whiting texted the claimant:

Good afternoon Bernadette

Further to my text of 25/04/2018 I would like to know if you will be back at work tomorrow. Please confirm today. Thanks Regards Carol

102. The claimant attended her GP that day at 12.40. The notes of that consultation read:

having texts and phone calls from work they tell her she has to go back but she really can't face it making her very anxious.

She is resigning - will need to give 2m notice

Review in 1m

Document eMED3 (2010) new statement issued not fit for work a Fit Note Document

(Diagnosis: stress at work; Duration 30-Apr-2018 28-May-2018)

103. At 14:21 Ms Whiting texted the claimant again:

Apologies HR have just confirmed you are due back on 2 May.

104. On 1 May 2018 there was an exchange of texts between Ms Whiting and the claimant as follows:

Ms Whiting to claimant:

Dear Bernadette as you haven't provided me with an email address with which to correspond with you in an easier fashion. I called you earlier as I said I would. Just wanted to make sure you got my message that I would like you to call and speak with me as part of keeping in touch as I would like to hear how you are and if there is anything we can do to support your return to work. I'm sorry you are not able to return to work at the moment We set up a meeting tomorrow which you are required to attend and if you are not able to then we need to know the reason why. Regards Carol

Claimant to Ms Whiting:

Given I have just been signed off for 28 days I will not attend the meeting tomorrow.

You cannot but be aware that the notice you provided to me was woefully inadequate, my union representative is unable to work to such a tight schedule. Please ensure when you rearrange the meeting that you provide me with sufficient notice.

Thank you for your concern.

Regards Bernadette

Ms Whiting to claimant:

Thank you for your response I will pass onto HR your concerns about the short notice and will seek their advice about such matters. Likewise it would have been helpful to hear from you earlier why you couldn't attend the meeting. I will be in touch tomorrow by text and letter regarding another date and we will be expecting you to attend with your rep this time. Please can you confirm you have sent me your sick note in the post. Hope you are feeling better soon. Regards Carol

Ms Whiting to claimant:

Sorry I forgot to say that if you are saying you cannot attend a meeting with us in the next 28 days I will need something from your GP that says why you cannot attend a meeting with us as part of our usual sickness procedures. Regards carol

105. Then between 2 & 4 May 2018:

Ms Whiting to claimant:

Dear Bernadette, I'm giving you plenty of advance notice that we have arranged a meeting for you on Monday 14 May at 12.00 East Wing E86 second floor Civic Centre. A letter is in the post to you. Please can you make sure you attend and make the necessary arrangements for your TU rep to attend.
Thanks

Claimant to Ms Whiting:

Just to update you. I have been signed off by my GP for a further period and the cert is in the post to you. Regards.

Ms Whiting to claimant:

Dear Bernadette thank you for your text. Sorry you are still not well. I will pass this info to HR and our legal.

Could I request that in future you do not contact me outside working hours unless of course in an emergency. Thanks. Regards Carol.

106. On 11 May 2018 solicitors instructed by the claimant wrote to Ms Whiting advising her that the claimant would not be attending the sickness review meeting scheduled for 14 May.

107. On 15 May 2018 the solicitors wrote to Ms Bailey informing her of the claimant's 2 months' notice of resignation on the basis of a break down in the relationship of trust and confidence between her and Ms Whiting. They then set out the basis upon which they submitted this amounted to a constructive dismissal.

Conclusions

108. Unfair constructive dismissal

109. It is clear that although the claimant had had concerns regarding her treatment and specific elements of the proposed job description, by the time

she signed to accept the August 2017 contract she had raised those concerns and, at least to some extent, they had been addressed. The scope of the proposed role had first been raised with her in April 2017 (in particular that it would not have any line management responsibility) and was the subject of discussion between then and her acceptance of it in August. She had had significant input into the drafting of the documentation. She had not been the subject of any inappropriate pressure and had made a decision of her own free will to accept the new job description and contract offered to her. By doing so her previous contract was terminated.

110. Accordingly, although the claimant had been GM of the Court Team at grade MG6, once she signed the new contract she became Case Manager Court Proceedings at grade PT6 (with no change in pay). Any breach of contract or constructive dismissal claim arising from the previous contract therefore accrued at that point and the time limit for bringing such a claim (3 months) started to run. It is not appropriate – nor has it even been argued by the claimant – that it would be appropriate to extend time to allow such a claim to be pursued. Further, the claimant is not entitled to rely on any breaches under that previous contract as breaches of the new contract.
111. Accordingly, those matters complained of at paragraph 22 of the list of issues, even if proved and amounted to a fundamental breach, could not now amount to a constructive dismissal as they all pre-dated the claimant signing her new contract on 18 August 2017. (Although paragraph 19 of the particulars of claim cross-referred to at issue 22(l) refers to inadequate management support beyond August 2017, there was no particularised complaint of that. The specific criticisms the claimant had of management post-August 2017 are dealt with below.)
112. As to whether the claimant was constructively dismissed because of the conduct of the respondent after signature of the new contract, the allegations of breaches are at paragraph 18 of the list of issues. Taking each in turn:
 - a. Any unreasonable reaction to and retaliation against time off for surgery. We have found that Ms Whiting did react angrily to the claimant in the meeting of 8 November 2017. This was not a reaction to the fact that the claimant would be having surgery but to the very late notice that the claimant gave her in that meeting of the impending 12 week absence especially as Ms Whiting was herself about to start a period of absence. Although Ms Whiting's reaction was in some respects understandable, as the more senior manager she should not have reacted as she did. Her reaction was not so bad however as to constitute a fundamental breach. As to whether there was any retaliation by her, we deal with the issue of making up time for physiotherapy appointments below and apart from that, there is no behaviour that could properly be described as retaliation. All subsequent dealings between Ms Whiting and the claimant were professional.

- b. Giving the claimant a list of work to do before she went for her surgery. The instructions given by Ms Whiting to the claimant in respect of work that needed to be completed were entirely professional and reasonable. Furthermore, the claimant was involved in a dialogue regarding that work. This did not amount to a breach of the contract of employment at all let alone a fundamental one.
- c. Time off for physiotherapy appointments:
 - i. Ms Whiting informing the claimant that she would be required to make up the time for physiotherapy appointments. Ms Whiting was clearly in error when she told the claimant this. She failed to check the position with her new employer as she should have done. The claimant (who of course had much longer service with the respondent and had a good understanding of their internal policies given her own previous line management responsibilities) believed that this was an error and quickly checked the position with HR. By 13 November 2017 she had been told that she did not need to make up the time. Ms Whiting accepted the position. In all the circumstances, this did not amount to a fundamental breach of the contract. For completeness, if we are wrong and this did amount to a fundamental breach it is apparent that a significant period of time then elapsed before the claimant's resignation. The claimant affirmed the contract in the meantime not least by accepting her lengthy period of paid sick absence and her engagement with the respondent during that absence.)
 - ii. Was this in response to the claimant's advice of her surgery. No. The motivation for Ms Whiting requiring the claimant to make up the time, was the late notification of her absence for surgery rather than the surgery or associated sick leave itself.
- d. Chasing the claimant regarding making up this time, and insisting it was done before her absence. Again Ms Whiting remained in error chasing the claimant and it is true that she chased her more than once in a very short period of time. She also insisted on it being completed at a time when she must have known the claimant was in pain as she was awaiting the surgery. However in context of the late notification by the claimant of her absence and Ms Whiting herself due to be off (which the claimant knew) and the swift correction by HR of Ms Whiting's instruction, we again find that this did not amount to a fundamental breach. Again if it did (or taken together with the matters referred to at (c) above it did), the claimant had affirmed the contract of employment prior to her resignation.
- e. Failing to provide a local OH appointment. Clearly the respondent did initially fail to provide what the claimant considered to be a local OH appointment. The claimant first knew that Croydon was the proposed location when she received the letter on 8 March 2018.

She requested a local appointment on 5 April 2018. In the meantime on 12 March 2018 she had already indicated to her GP that she was looking for a new job. By 27 April 2018 the respondent had offered a telephone assessment but the claimant was unavailable on that day and furthermore indicated that she would not be available until 8 May. The respondent could have done better in its dealings with the claimant in this respect. Ms Whiting had the information available to her that the first OH appointment offered was in Croydon. It appears that when the claimant asked for a more local one as the one offered involved an 80 mile trip, Ms Whiting did not pay enough attention to the detail and therefore simply offered Croydon again. Equally, the claimant did not fully explain her circumstances and why Croydon was unacceptable to her. This failure to communicate satisfactorily was no doubt in large part due to the relationship having soured between them. In all the circumstances although there was an initial failure to offer a local OH appointment as requested, it did not amount to a fundamental breach and in any event, the claimant was by then already looking for a new job.

- f. 27 April 2018 writing to the claimant admonishing her for not attending OH. It is clear from the terms of Ms Whiting's letter that she was, in some respects, admonishing the claimant. Much of the criticism contained within that letter, however, was justified given the claimant's poor or non-existent responsiveness to requests for information and, at times, a lack of cooperation. As to her specific failure to attend the OH appointment, there was fault on both sides as Ms Whiting had failed to grasp the significance of the appointment being in Croydon and the claimant had on occasion failed to clearly articulate this. Clearly the purpose of the letter however was to ask the claimant to attend a sickness review meeting at which she would have had the opportunity to give her version of events and to express her needs for any adjustments going forward. The questions posed and matters raised by Ms Whiting in that letter, and the tone adopted, were all legitimate management issues and did not amount to a fundamental breach. The failure to give the notice required by the policy, although regrettable, also did not amount to a fundamental breach.
- g. 1 May 2018 Ms Whiting sending curt text messages. Ms Whiting sent three texts to the claimant on that day with one response from the claimant. The tone of the texts was not curt. They were business-like and set out the respondent's expectations but also referred to keeping in touch to hear how the claimant was, asked if anything could be done to support her return to work and expressed a hope that she would feel better soon. This did not amount to a fundamental breach. Further, the claimant had already indicated to her GP on 30 April that she was resigning.

113. We find therefore that none of the alleged fundamental breaches after 18 August 2017 amounted to such individually. We have also considered

whether taken collectively they amounted to a course of conduct in fundamental breach of the contract but conclude they did not. There was a series of events that arose at times due to the unreasonable conduct of Ms Whiting and at times due to the unreasonable conduct of the claimant, and all in the context of an antagonistic relationship between them. This resulted in an undoubtedly unpleasant working atmosphere and a regrettable failure to communicate properly. This did not amount however to conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

114. Accordingly the claimant was not constructively dismissed and there was no discriminatory dismissal.

115. Given that conclusion, it is not necessary to deal with the respondent's defence of prior repudiatory breach by the claimant in respect of her claim of unfair constructive dismissal (it is potentially relevant to the unpaid wages claim - see below). For completeness however we find that - objectively assessed - the claimant's act of deliberately concealing the date of the consultant's letter that gave the date of her operation was an act of gross misconduct. She did it expressly to prevent Ms Whiting knowing that she had in fact had several weeks' prior notice of the operation date (even if it was only a possible date) and yet had only given approximately two weeks' notice to the respondent. The claimant knew that Ms Whiting would quite reasonably be annoyed by that. Such an act in all the circumstances would intrinsically damage the relationship of trust and confidence between employer and employee especially in the context of the time-critical decision-making roles in the claimant's department which was still in the throes of responding to a failed Ofsted inspection and Ms Whiting's own impending annual leave which the claimant had known since 27 October would overlap with her own absence (and in practice reduced the notice to Ms Whiting to 2 days). Indeed, in her own witness statement the claimant was critical of what she saw as short notice being given to her of Ms Whiting's leave. Given that was her thinking, the claimant must have known that her own much lengthier absence would put pressure on Ms Whiting with hardly any time to make cover arrangements.

116. Whether the respondent - if it had been aware of this at the time - would have in fact dismissed the claimant is uncertain. As Ms Whiting herself acknowledged there would have had to have been an investigation and all the circumstances taken into account which, together with the claimant's length of service and previous clean conduct record, may well have resulted in a lesser penalty. Dismissal would certainly however be available as an outcome to the respondent.

117. We do not find, however, as relied upon by the respondent that simply giving 16 days' notice of an operation and 12 weeks absence amounted to gross misconduct even when taken with such other matters referred to in paragraph 58 of the amended grounds of resistance that we have found to be proved.

118. Discrimination arising from disability

119. It is clear that the claimant's predicted absence resulting from her hip replacement operation on 24 November 2017 arose in consequence of her disability. Her actual absence also arose in consequence of her disability until 30 April 2018. Thereafter it arose in consequence of work-related stress.

120. Her physiotherapy appointments, however, did not arise in consequence of her disability. Her own GP's notes dated 20 September 2017 and Ms Whiting's text to Ms Bailey on 8 November 2017 make that clear.

121. As stated above in respect of constructive dismissal, the acts of Ms Whiting requiring the claimant to make up time for her physiotherapy appointments, her behaviour towards the claimant in the meeting of 8 November 2017 and her letter to the claimant dated 27 April 2018 (mistakenly referred to as 28 April in the list of issues) all constituted unfavourable treatment. Her texts to the claimant dated 1 May 2018, however, did not.

122. Those acts of unfavourable treatment, however, did not arise in consequence of the claimant's disability or her actual and predicted absence. They were a reaction to the claimant's late notification to Ms Whiting both of her operation date and planned lengthy absence as well as, in the case of the letter of 27 April 2018, the failure by the claimant at times to keep the respondent fully and timeously informed of her medical position.

123. Accordingly, although Ms Whiting and the respondent clearly had knowledge of the claimant's disability, the claims of discrimination arising from disability fail.

124. Breach of duty to make reasonable adjustments

125. The alleged PCP is requiring an employee to attend an OH appointment at the venue offered.

126. On the facts as found the respondent did so require of the claimant until, on 25 April 2017 by text and on 27 April 2018 by letter, she was informed by Ms Whiting that OH had been asked to contact her for a telephone assessment rather than a face to face one. Ms Portman's evidence was also that she had been offered an appointment closer to home on request. Accordingly, the pleaded PCP is not established notwithstanding the undoubted failure by Ms Whiting and others within the respondent, to give early and proper consideration to the details of the claimant's position and what she was saying about her ability to attend an appointment in Croydon. More care should have been taken at an earlier stage to make the necessary arrangements.

127. Alternatively, if there was such a PCP it did put the claimant at the necessary substantial disadvantage but she was, albeit somewhat

belatedly, offered a reasonable adjustment when the telephone assessment was requested.

128. On either analysis, the claim for a breach of the duty to make reasonable adjustments fails.

129. Harassment

130. The acts of Ms Whiting requiring the claimant to make up time for her physiotherapy appointments, her behaviour towards the claimant in the meeting of 8 November 2017 and her letter to the claimant dated 27 April 2018 all constituted unwanted conduct that would reasonably (taking into account the perception of the claimant) have the effect of violating the claimant's dignity, etc. Her texts to the claimant dated 1 May 2018, however, did not for the reasons already stated.

131. That unwanted conduct however was a reaction to the claimant's late notification to Ms Whiting both of her operation date and planned lengthy absence as well as, in the case of the letter of 27 April 2018, her failure at times to keep the respondent fully and timeously informed of her medical position. We have carefully considered whether, given that the factual background to all these events was the claimant's operation and absence which were clearly related to her disability, that reaction was therefore also related to it. We conclude however that it was not. There was one too many link in the causal chain for that to be the case.

132. Accordingly the claims of disability related harassment fail.

133. Unpaid Wages

134. For the reasons stated above we conclude that the claimant was guilty of a repudiatory breach of her (new) contract of employment in November 2017. Accordingly that is a defence to her claim under the same contract for unpaid notice if it is brought as a breach of contract claim. However the claim form refers to claims of both breach of contract and unpaid wages and we have not been addressed on whether the respondent also has this defence to the statutory claim. It is hoped that the parties can resolve this between themselves but if not, it will be addressed at the remedy hearing listed for 21 October 2021 (originally listed for two days but now shortened to one). Written submissions are to be lodged with the Tribunal no later than **4pm on 14 October 2021**. If the hearing is not required the parties shall notify the Tribunal no later than **23 September 2021** so that the day can be released to another case.

Employment Judge K Andrews
Date: 30 July 2021

1. Disability is conceded.

SECTION 15 – DISCRIMINATION ARISING FROM DISABILITY

2. Did the Claimant's actual and predicted absence arise in consequence of her disability?
3. Did the Claimant's physiotherapy appointments arise in consequence of her disability? Claimant says the joint pain was arthritis related.
4. Did Ms Whiting require the Claimant to make up time for physiotherapy appointments as a result of her absence/predicted absence?
5. Did Ms Whiting shout at the Claimant? Was Ms Whiting unsympathetic towards the Claimant and if so was it as a result of her absence/predicted absence?
6. Did the Respondent send a letter of 28th April and a text message of 1st May as a result of the Claimant's absence/predicted absence?
7. Did the above acts constitute unfavourable treatment?
8. If so, can the Respondent justify such conduct as being a proportionate means of achieving a legitimate aim, the legitimate aim being:
 - a. The Claimant very often would not keep in contact with Ms Whiting via letter or email, however was willing to correspond through text message. [paragraph 21 of Grounds of Resistance] Corresponding in this was therefore a proportionate means of achieving a legitimate aim in that the Respondent was able to maintain regular contact with the Claimant in line with the Respondent's policy for managing sickness absence.
9. Knowledge of disability

- a. Did the Respondent know, or could the Respondent reasonably have been expected to know about the Claimant's disability.
- b. Did Ms Whiting know, or could the Ms Whiting reasonably have been expected to know about the Claimant's disability?

SECTION 26 – HARASSMENT

10. Did the Respondent engage in unwanted conduct towards the Claimant? Specifically did the events pleaded at paragraphs 34 to 38 of the Particulars of Claim occur?
11. If so, was any such conduct related to the Claimant's disability?
12. If so, did any such conduct have the effect of violating the Claimant's dignity or did it create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
13. In considering whether the conduct had the effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect.

S20 FAILURE TO MAKE REASONABLE ADJUSTMENTS (subject to Cs application to amend)

14. Did the Respondent apply the PCP of:
 - a. Requiring an employee to attend an OH appointment at the venue offered.
15. Did the application of any such PCP put the put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that she had more difficulty in making this journey and as such was more likely to suffer admonishment.
16. The Claimant contends that reasonable adjustments would have been to:

- a. Permit the Claimant to attend a local venue for the Occupational Health appointment.
 - b. Not admonish her for her inability to attend.
17. Were any such adjustments “reasonable” and, if so, was any failure to make such adjustments reasonable or justified.

UNFAIR DISMISSAL AND/OR DISCRIMINATORY DISMISSAL

18. Was the Claimant’s resignation caused or triggered by:
- a. Any unreasonable reaction to and retaliation against time off for surgery (Para 21)
 - b. Giving the Claimant a list of work to do before she went for her surgery (Para 21)
 - c. Time off for Physiotherapy appointments:
 - i. Ms Whiting informing the Claimant that she would be required to make up the time for Physiotherapy appointments.
 - ii. Was this in response to the Claimant’s advice of her surgery?
(Para 21-22)
 - d. Chasing the Claimant regarding making up this time, and insisting it was done before her absence (Para 22)
 - e. Failing to provide a local OH appointment (Para 24)
 - f. 27th April 2018 writing to the Claimant admonishing her for not attending OH (Para 24)
 - g. 1st May Ms Whiting sending curt text messages. (para 25 ET1)
19. Had the claimant affirmed her contract since any of those acts?

20. Was any conduct in paragraph 18 above, which occurred after the last affirmation, if any:
 - a. Sufficient to amount to a repudiatory breach of contract?
 - b. Innocuous in terms of breach of the Claimant's contract?
21. If neither, was any conduct in paragraph 18 above, which occurred after the last affirmation, part of a course of conduct breaching the term of trust and confidence in the contract?
22. Did the following alleged conduct amount to a repudiatory breach of the contract of employment
 - a. Downgrading the Claimant (para 9 ET1)
 - b. Demoting the Claimant from Group Manager without consultation and after the realignment process had already concluded (para 10 ET1)
 - c. Denying existence of and refusing to acknowledge the Claimant's Group Manager role (para 11 ET1)
 - d. At a meeting of the 4th April 2017 requested by the Claimant to discuss her role, 3 senior managers attended and removed Claimant from being head of the Court Team, (para 13 and 14 ET1)
 - e. Claimant required to vacate office, unsuitable desk given, no phone or docking station, not told how long for, and told to borrow desks (Para 14 ET1)
 - f. Removal of financial authority – approval of expenses, then agreeing only £50 (para 15)

- g. Removal of the Claimant from Legal Gateway Panel meetings (ET1 para 16)
 - h. Instruction to Legal Assistant to withhold information from those meetings (ET para 16)
 - i. Informing the Claimant that she was not permitted to contact the Legal Assistant (ET para 17)
 - j. Refusal of compassionate leave (ET para 18)
 - k. Refusal to consider and subsequent refusal to grant extended compassionate leave (ET para 18)
 - l. Inadequate management support, no job description and no consultation. (para 19 ET1)
23. If not, did they when combined with the breaches in paragraph 1 above amount to (as in Omilaju) a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?
24. What was the status of the contract dated 18/8/2017, was it?
- a. A new contract terminating by agreement of the then existing contract?
 - b. A continuation of the existing contract and/or an affirmation of that contract?
25. Had the claimant otherwise affirmed the contract before the matters complained of paragraph 18 above?
- UNFAIR Constructive Dismissal**
26. If there was a constructive dismissal, was it for a fair reason under ERA 1996, ss 98(1), 98(2)?

27. Was the dismissal unfair s.98(4) ERA 1996?
28. Were parties required to follow the ACAS Code?
 - a. Has the Claimant breached the Code?
 - b. Has the Respondent breached the code?

Discriminatory Constructive Dismissal

29. Did any discriminatory conduct materially influence the conduct that amounted to a fundamental breach of the Claimant's contract?

UNLAWFUL DEDUCTIONS FROM WAGES/BREACH OF CONTRACT

30. It is agreed that subject to the Respondent's defence of repudiatory breach by the Claimant, that the Claimant was entitled to full pay during her notice period between 16 May 2018 and 15 July 2018.

ACAS UPLIFT:

31. ACAS Code of conduct.
 - a. Did the Respondent breach the ACAS Code of conduct and should any award be subject to an uplift of 25%?
 - b. Did the Claimant breach the ACAS Code of conduct and should any award be subject to a reduction? If so how much?

REMEDY

32. In the event of a successful claim, are the following orders appropriate: -
 - a. a declaration that the Respondent committed an act of unlawful disability discrimination?
 - b. A declaration that the Respondent breached the Claimant's contract of employment?

- c. Compensation for loss of earnings and/or pecuniary loss arising out of discrimination?
- d. Compensation for injury to feelings?
- e. An award of interest?

Additional: Defence of Repudiatory Breach by the Claimant.

1. Did the Claimant's conduct in paragraph 57 and 58 of the amended Grounds of Resistance, namely:
 - a. Giving 16 days notice of an operation and 12 weeks absence.
 - b. Giving the Respondent a copy of her consultant's letter dated 21 August 2017 with the date deliberately removed by her.taken together with the matters in paragraph 58 of the amended Grounds of Resistance, amount to a sufficiently serious breach of the implied duty of mutual trust and confidence, and/or the contractual terms as to conduct, so as to amount to a repudiation of the contract entitling the Respondent to lawfully dismiss the Claimant on 15 May 2018 with, or without, notice, or on 15 July 2018 without notice, taking into account the Equality Act 2010?
2. In answering the question in paragraph 1 above, the tribunal will determine whether any conduct relied on by the respondent in paragraphs 57 and 58 mentioned immediately above:
 - a. amount to a breach by the Claimant, whether minor or major; or
 - b. amount to a breach, whether minor or major and whether discriminatory or not, by the Respondent.
3. If the contract was repudiated by the Claimant:
 - a. Are there matters which remain as being discrimination by the Respondent.
 - b. Was the dismissal fair?
 - c. What effect, if any, does that have on the Claimant's claims for the unlawful deductions from wages/breach of contract claim?