



EMPLOYMENT TRIBUNALS

Claimant: Ms. A Trela

Respondent: Nestle UK Limited

Heard at: Nottingham

On: 3rd, 4th, 5th, 6th March 2023
7th March 2023 (In Chambers deliberations)

Before: Employment Judge Heap

Members: Mr. J Purkis
Mr. R Jones

Representation

For the Claimant: Mr. B Uduje – Counsel
For the Respondent: Ms. R Rumble - Counsel

JUDGMENT

1. The complaint of constructive dismissal fails and is dismissed.
2. The complaint of wrongful dismissal fails and is dismissed.
3. The complaints of a failure to make reasonable adjustments fails and is dismissed.
4. The complaints of direct disability discrimination, indirect disability discrimination and discrimination arising from disability are dismissed on withdrawal by the Claimant.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Ms. Angelika Trela (“The Claimant”) against her now former employer, Nestle UK Limited (“The Respondent”). By way of a Claim Form presented to the Tribunal on 10th June 2021 and following a period of early conciliation which took place between 27th May 2021 and 9th June 2021 the Claimant advanced the following complaints:
 - a. Constructive unfair dismissal;
 - b. Wrongful dismissal;
 - c. A failure to make reasonable adjustments;
 - d. Direct disability discrimination;
 - e. Indirect disability discrimination; and
 - f. Discrimination arising from disability.
2. Before the hearing before us there were two Preliminary hearings. The first took place before Employment Judge Hutchinson on 22nd October 2021 where the complaints were identified. At that stage the Claimant identified reliance on three conditions which it was said amounted to disabilities for the purposes of the discrimination complaints. Those were knee problems, mental health issues as a result of personal circumstances and Aspergers/autism.
3. A further Preliminary hearing took place on 18th October 2022 before Employment Judge Camp. That hearing was to deal with whether the Claimant was at the material time with which the disability discrimination complaints were concerned, a disabled person within the meaning of Section 6 Equality Act 2010. At that point the Claimant appeared to have abandoned reliance on the first two conditions identified above and seemed only to rely on autistic spectrum disorder/Aspergers syndrome as being a disability. We raised that with Mr. Uduje who indicated that the conditions remained relevant to the constructive dismissal claim and the requirement to consider adjustments in that regard but they were not relied upon as being disabilities for the purposes of the complaints of a failure to make reasonable adjustments.
4. At the Preliminary hearing Employment Judge Camp had determined that at all relevant times from January 2020 onwards the Claimant was disabled within the meaning of Section 6 Equality Act as a result of autistic spectrum disorder/Aspergers syndrome. That was not therefore an issue that remained live before us although it remained the Respondent’s position that they did not have either actual or constructive knowledge of disability.
5. At the hearing before Employment Judge Camp the Claimant also abandoned all complaints of disability discrimination other than a failure to make reasonable adjustments. Therefore, the only complaints that we were required to determine were constructive dismissal, wrongful dismissal and a failure to make reasonable

adjustments. Mr. Uduje confirmed that there was no objection to those complaints being dismissed on withdrawal.

6. At the outset of the hearing we also raised with Mr. Uduje whether the Claimant was still pursuing a complaint of wrongful dismissal given what had been said in recent correspondence from the Respondent's solicitors. After initially indicating that that complaint did not make legal sense, after an adjournment to take instructions it was confirmed that the Claimant wished to proceed with it and that her position was that she was entitled to be paid for four weeks' notice irrespective of having given a shorter notice period. We were told that the Claimant would explain the position in her evidence.
7. We also raised with Mr. Uduje whether the Claimant was relying on the last two acts as set out in her Claim Form, which did not feature in her further and better particulars and which appeared to post date her resignation in the context of the constructive unfair dismissal complaint. On the basis that it was agreed that those matters did come after the Claimant had resigned, Mr. Uduje confirmed that no reliance was placed on them for the purposes of the constructive dismissal complaint. That left reliance on the following matters in respect of that complaint:
 - a. Referring the Claimant to occupational health for a telephone assessment in January 2020 despite knowing that she faced difficulties speaking on the telephone because of her disability;
 - b. Maxine Cuthbert failing to respond to the Claimant's email of 28th February 2020 regarding a transfer to Halifax;
 - c. Emma Wright failing to question why the Claimant wanted a transfer to Halifax on 28th February 2020 and instead telling her that there were currently no vacancies and providing her with a contact telephone number for the Halifax site;
 - d. Referring the Claimant to a further telephone occupational health assessment when she was not always able to answer or return the call because of her mental health;
 - e. On 23rd October 2020 Cliff Stubbs and Emma Wright failing to acknowledge receipt of the Claimant's diagnosis of Aspergers along with a fit note in respect of her knee problems despite the Claimant having requested that they do so;
 - f. Cliff Stubbs ignoring the Claimant's email of 16th November 2020 regarding a transfer to Halifax;
 - g. Maxine Cuthbert refusing to deal with issues which the Claimant had raised and/or failing to pass them onto Cliff Stubbs on 14th December 2020 despite having promised to do so;
 - h. An email forwarded to the Claimant by Maxine Cuthbert on 23rd December 2020 which caused her to experience a full breakdown to the extent that she spent Christmas in bed not eating or showering due to the Respondent's failure to address the concerns that she had raised about her mental health;
 - i. Cliff Stubbs meeting with the Claimant on 8th January 2021 to discuss only Covid related points and not discussing her mental health. On the same

- date Mr. Stubbs informing the Claimant that Maxine Cuthbert had never mentioned her mental health to him;
- j. The Claimant seeing an email on 10th January 2021 from Emma Wright of Human Resources to Tony Blackwell of occupational health in which she had stated that the Claimant was autistic and then that being ignored by Ms. Wright when the Claimant raised it with her;
 - k. The Claimant's discussion with Maxine Cuthbert on 18th January 2021 in which the Claimant further expressed her concerns and said that Ms. Cuthbert was acting in an ableist way;
 - l. Cliff Stubbs ignoring the Claimant's email on 23rd February 2020 after the Claimant no longer had anywhere to live near to the Tutbury site where she was located. The Claimant had expressed that she had requested a transfer to Halifax over a year ago but had heard nothing and management were not assisting her with a very critical situation;
 - m. Cliff Stubbs ignoring the Claimant's further email on 27th February 2021 about her urgent situation;
 - n. Cliff Stubbs insisting on 11th March 2021 that he deal with the Claimant's grievance despite her having expressed to him that this was not appropriate as the grievance was about him;
 - o. Cliff Stubbs telling the Claimant on 13th March 2021 to reconsider allowing him to conduct the grievance meeting which led to her experiencing a panic attack at work on that date; and
 - p. The Respondent telling the Claimant on 12th April 2021 that they could not facilitate a transfer for her to the Halifax site.
8. We also raised with Mr. Uduje how it was proposed that he would deal with the complaints of a failure to make reasonable adjustments and point 35(h)(i) on the Claimant's further and better particulars because none of those matters were touched upon in the Claimant's witness statement. Mr. Uduje initially proposed that this was dealt with by way of supplemental questions but fairly accepted that he would realistically be unable to do that without leading the Claimant. We rejected the alternative suggestion that the Tribunal ask the Claimant about those matters as we did not consider that to be appropriate. We permitted an adjournment of just under two hours for Mr. Uduje to take further instructions from the Claimant in respect of the matters that we had raised at the outset. Mr. Uduje indicated that the question of a failure to make reasonable adjustments was proposed to be dealt with by way of provision of additional documentation – most notably a medical report - and we allowed those into evidence so as to deal with the omissions from the Claimant's witness statement although as we remarked at the time those did not appear to fully plug the gaps that were in her evidence in that regard and particularly with regard to the question of substantial disadvantage.
9. We had also discussed how, in respect of the complaints of a failure to make reasonable adjustments how it was said that the Respondent had a policy of doing the things that were said to amount to PCP's. The further and better particulars were clear that the Claimant was asserting that there was a policy in that regard. After the adjournment that we have already referred to, Mr. Uduje confirmed that the Claimant no longer wanted to rely on the first three of the PCP's (paragraph 4(a) to (c) in the further and better particulars). As to the remaining PCP's, Mr. Uduje

said that the factual basis that there was a policy in place for the PCP at paragraph 4(e) of the further and better particulars that was on the basis that there was no policy or explanation provided to the Claimant and so by inference she had concluded that there must be a policy. Upon further discussion it was clear that the Claimant wanted to instead rely on there being a practice and not a policy. Mr. Uduje made an application to amend the claim on that basis. That was opposed by the Respondent. Ultimately, we granted the application with reasons given orally at the time. Neither party has asked for those reasons to be included within this decision and so we do not need to say more about them.

10. There were also a number of page references in the Claimant's witness statement which did not appear to match up to the relevant pages of the hearing bundle. We were able to work through and amend those with Mr. Uduje before the evidence commenced.
11. Finally as to preliminary matters, we discussed the Claimant's schedule of loss which was seeking compensation for loss of earnings of over a year. It did in fact transpire after the adjournment that the Claimant had in fact secured alternative employment for which no credit had been given in the schedule of loss. Mr. Uduje had no instructions as to how the schedule had come to be prepared in the form that it had which suggested that the Claimant had not engaged in any alternative work save as that he told us that she had given all necessary information to his instructing solicitors. Given that there needed to be an understanding of the realistic value of the claim, we asked that the schedule be revised to set out the correct position.

THE HEARING

12. The claim was allocated six days of hearing time. However, the evidence and submissions were able to be concluded in the afternoon of day four. The Tribunal spent the fifth day dealing with our deliberations.
13. We discussed with the parties that as the Claimant had made it plain that she struggled with processing information given verbally as a result of her disability whether it would be preferable for us to deliver a written judgment. The Claimant expressed a strong preference for that. The Judge had hoped to finalise the Judgment in early course but regrettably that was not possible as a result of other Judicial work and commitments and periods of leave. The patience of the parties in awaiting the Judgment has been much appreciated.

WITNESSES

14. During the course of the hearing we heard evidence from the Claimant on her own account. We had discussed with Mr Uduje at the outset of the hearing what adjustments might be required for the Claimant. It was confirmed that she would ask for breaks when necessary which we accommodated and that she would prefer to use an electronic version of the hearing bundle rather than hard copies. There was no objection from the Respondent and accordingly the Claimant used her own laptop to access the hearing bundle.

15. On behalf of the Respondent, we heard from the following witnesses:

- a. Mr. Thomas Brown – the Claimant’s line manager between June 2017 and September 2019;
- b. Mr. Clifford Stubbs – the Claimant’s line manager between October 2019 until the termination of her employment;
- c. Mr. Sean Bagnall – a manager who dealt with a grievance raised by the Claimant at the first stage; and
- d. Mr. Emerson Favrin – a factory manager with the Respondent who dealt with the Claimant’s appeal in respect of a grievance that she had raised.

16. In addition to the witnesses from whom we have heard we have paid careful attention to the documentation within the hearing bundle before us and to the helpful submissions received on behalf of the Claimant and the Respondent. We should observe that if we fail to make specific mention in this Judgment of something that we have seen or heard that does not mean that we have not considered it as the parties can be assured that we have taken into account everything that we have been told before reaching our decision.

THE LAW

17. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be.

Constructive dismissal

18. Section 95 provides for a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer’s conduct – namely a constructive dismissal situation.

19. Tribunals take guidance in relation to complaints of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA:-**

“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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

20. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will almost always inevitably be repudiatory by its very nature.
21. The question of whether or not there has been a repudiatory breach of the term of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee is only relevant insofar as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.
22. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no unconnected reasons for the resignation, such as the employee having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).
23. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions, including continuing to accept pay or a lengthy delay before resigning. In those circumstances, an employee may affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.
24. Tribunals are also assisted by the guidance in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] I.R.L.R. 833** which requires consideration of the following matters when determining a complaint of constructive dismissal:
- (i) 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?
 - (ii) Has he or she affirmed the contract since that act?
 - (iii) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? and
 - (iv) Did the employee resign in response (or partly in response) to that breach?

Failure to make reasonable adjustments – Sections 20 and 21 EqA 2010

25. Section 20 EqA 2010 provides that:

“Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply;

and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

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

(4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a)removing the physical feature in question,

(b)altering it, or

(c)providing a reasonable means of avoiding it.

(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a)a feature arising from the design or construction of a building,

- (b) a feature of an approach to, exit from or access to a building,*
- (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or*
- (d) any other physical element or quality.*
- (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.*
- (12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.*
- (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column”.*

26. Section 21 provides that:

- “A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.”*

27. It will therefore amount to discrimination for an employer to fail to comply with a duty to make reasonable adjustments imposed upon them in relation to that disabled person (paragraph 6.4 of The EHRC Code of Practice).

28. However, the duty to make reasonable adjustments will only arise where a disabled person is placed at a substantial disadvantage by:

- An employer's provision, criterion or practice (“PCP”);
- A physical feature of the employer's premises; or
- An employer's failure to provide an auxiliary aid.

29. Where the claim relates to a PCP, this *“should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions”* imposed by the employer (paragraph 6.10 of The EHRC Code of Practice).

30. Matters resulting from ineptitude or oversight on the part of the employer will not, however, amount to a PCP (see **Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley UK EAT 0417/11**).

31. The duty to make reasonable adjustments only arises insofar as an employer is required to take such steps *as it is reasonable to take* (our emphasis) in order to avoid the substantial disadvantage to the disabled person. A Tribunal is required to take into account matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

Jurisdiction

32. Section 123 provides for the time limit in which proceedings must be presented in “work” cases to an Employment Tribunal and provides as follows:

“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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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”.

33. Therefore, Section 123 provides that proceedings must be brought “*within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable*”. That three month time limit is subject to an extension for the period of ACAS Early Conciliation which also “stops the clock” for period that the parties are engaged in that process.

34. If a complaint is not issued within the time limits provided for by Section 123 Equality Act, that is not the end of the story given that a Tribunal will be required to go on to

consider whether it is “just and equitable” to allow time to be extended and allow the complaint(s) to proceed out of time.

35. In doing so, the Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension. A Tribunal has the same wide discretion as the Civil Courts and will usually have regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**). The burden is firmly upon a Claimant to persuade the Tribunal that it is just and equitable to extend time, not on the Respondent to show that it is not.

36. In considering whether to exercise their discretion, a Tribunal will often consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.
- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

37. The emphasis is on whether the delay has affected the ability of the Tribunal to conduct a fair hearing and all significant factors should be taken into account. The guidance above should not be used as a steadfast or rigid checklist. Instead, the best approach for a Tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular, the length of, and the reasons for, the delay (see **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23**).

38. The burden is upon a Claimant to satisfy a Tribunal that it is just and equitable to extend time to hear any complaint presented outside that provided for by Section 123 EqA 2010.

Wrongful dismissal

39. Complaints of wrongful dismissal are ones of breach of contract and Tribunals are seized of jurisdiction to consider such claims by virtue of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

FINDINGS OF FACT

40. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of the issues in this claim. We have therefore invariably not made findings in respect of each and every area where the parties are in dispute with each other on the evidence if it is not necessary to do so.

The Respondent and the commencement of the Claimant's employment

41. The Respondent is a large food and beverage manufacturer with sites in various locations in the United Kingdom. The Claimant commenced her employment with the Respondent on 8th August 2016 as a Line Operator. She continued in employment until 30th April 2021 when her employment ended by reason of her resignation.
42. Shortly after the commencement of the Claimant's employment she was issued with a statement of main terms and conditions of employment. Amongst other things that set out that the Claimant would work out of the Respondent's Tutbury site (see page 73 of the hearing bundle) which is just outside Burton-upon-Trent.

Line management 2017 to 2019

43. In June 2017 Thomas Brown became the Claimant's line manager. The Claimant suggested in her evidence that Mr. Brown was not particularly supportive of her. We do not accept that. In a number of messages that we have seen between the Claimant and Mr. Brown it is clear that he did his best to support her including indicating that she could speak to him at any time, arranging for her to have time off at short notice on more than one occasion for personal issues when that would normally not be permitted, asking after her welfare and offering to speak to those that she was on shift with about issues that made her feel uncomfortable in the workplace and to ask them to avoid those sorts of actions (see pages 350 to 367 of the hearing bundle).
44. The issues that the Claimant was experiencing in that regard were that she did not like loud and sudden noises which we accept would be commonplace in the sort of environment that she was working. Mr. Brown asked the workforce to be mindful of that when communicating and also that the Claimant required structure so that she would more often than not work on the same line, lines 33 and 34, with the same people.

Occupational health referral July 2018

45. In July 2018 the Claimant was referred to occupational health by Mr. Brown after she told him that she believed that she had autism. The referral recorded that the reason for the referral was that the Claimant believed that she was autistic although it was noted that there was no formal diagnosis in that regard. The referral response indicted that the Claimant had a diagnosis of moderate anxiety and depression for which she was receiving counselling from her General

Practitioner (“GP”). No adjustments or arrangements were said to be necessary in respect of that condition. In regard to the issue of autism the report said this:

“There is nothing OH can do regarding a referral for assessment re autism though I have given her some information to share with you on what the ‘typical’ traits are and how people might best be supported in work to play to their strengths (and attached same to this report).”

46. What was attached to the report was a one page leaflet about autism. As far as Mr. Brown was concerned at that time the Claimant was awaiting a private assessment for autism. She did, however, express to him that she believed that she had autism/Aspergers.
47. We accept the evidence of Mr. Brown that during the time that he was line managing the Claimant she did not express that she had any difficulty in using the telephone although she had reported to him, and he had dealt with, the fact that she preferred to work on the same line, with the same colleagues and disliked loud noises and people shouting over her.

Change in line management

48. In 2019 the Claimant’s line management changed to Clifford Stubbs. That was not due to any issue with Mr. Brown but because the Claimant wanted to remain working on the same line which was now under the management of Mr. Stubbs. A change in line manager therefore made logical sense.

Occupational health referral January 2020

49. In January 2020 the Claimant had a further referral to occupational health. That was undertaken by Mr. Stubbs. It is common ground that it was arranged as a telephone assessment. The Claimant did express to Mr. Stubbs that she would prefer a face to face appointment although he was not told that that was because of her disability or for other health reasons. Mr. Stubbs made occupational health aware that the Claimant had expressed that preference but had explained to her that the Respondent’s practice had changed to adopt telephone appointments because that meant that the assessment could be conducted more swiftly (see page 117 of the hearing bundle). We accept that there would have been a delay in the Claimant attending a face to face appointment and Mr. Stubbs wanted to avoid that.
50. By this stage absences that the Claimant had had for various conditions had led to a triggering of the Respondent’s attendance management policy and so the purpose of the referral was to allow Mr Stubbs to understand if there was any underlying medical reasons for her absence before the matter moved to a second stage attendance review.

51. As a result of the referral occupational health produced a report and the relevant parts of the report said this:

“Angelika stopped the talking therapy in 2018 as she felt it was not helping as she knew all of the information which was being supplied and has chosen to access a Polish therapist who has an understanding of autism, this starts this year. She is paying for this privately.

There is still no diagnosis for this ongoing mental health issues nor current active treatment, but again Angelika is making plans to go to Poland for an assessment and will bring the findings back. Accessing this privately.

I have advised any confirmed diagnosis means what reasonable adjustments could be considered – which the autistic traits would have advised generically as supplied by my colleague.

Angelika reports she has not accessed support via the EAP as she struggles with the telephone. She has managed today but reports it is a struggle.

The chest issues and gastric absences are not related to mental health, however there are lifestyle choices Angelika can make which would either reduce instances of ill health or prevent them. It is her prerogative to implement these changes”.

52. The report did note that the Claimant struggled with using the telephone indicating that she had managed with the assessment that day but it had been a struggle. The report did not set out the reasons that the Claimant had struggled in that regard and we accept that Mr. Stubbs was aware that the Claimant was having telephone consultations with her General Practitioner and that was particularly the case after March 2020 when England went into lockdown as a result of the Covid-19 pandemic.

Sickness absence March 2020

53. On 6th March 2020 the Claimant commenced a period of ill health absence as a result of a fall which had caused damage to her knees. She was unable to return to work as a result of that condition until 10th January 2021 and we come to her return further below.

Occupational health referral August 2020

54. Mr. Stubbs made a further referral to occupational health about the Claimant and she attended a telephone assessment with a practitioner on 13th August 2020. That was again for difficulties that the Claimant was having with her knees following her fall. It is common ground that this was arranged as a telephone assessment.
55. The physiotherapist who the Claimant had spoken to, Mr. Blackwell, emailed Mr. Stubbs on the same day as the telephone assessment to say that she was not fit for work in any capacity and that he had advised her to engage with physiotherapy

via her GP and the NHS and had sent her some exercises to do. He had invited the Claimant to contact him in two weeks but had a further follow up if she had not done so two weeks later. The Claimant did not make contact and so a further telephone assessment with the physiotherapist took place on 14th September 2020. An email to Mr. Stubbs followed on the same day with the physiotherapist reporting that there had been no real progress on symptoms and capabilities but a return to work may be facilitated more promptly if a sedentary role could be found for the Claimant. The Claimant had been scheduled for a four week follow up if she had not been in contact before that time.

56. The physiotherapist emailed Mr. Stubbs on 16th October 2020 (see page 143 of the hearing bundle) explaining that he had not been contacted by the Claimant and she had not responded to messages that he had left and that he was therefore closing the file.
57. Occupational health made contact with Mr. Blackwell on 25th November 2020 indicating that the Claimant had agreed that she would re-engage with him and asking him to make contact with her.
58. Mr. Blackwell sent a further email to the Respondent on 30th November 2020 indicating that he had been unable to speak with the Claimant despite having tried to contact her by telephone call, messages and two texts. He therefore indicated that he was required to discharge her.
59. That was followed up by Emma Wright of Human Resources on 2nd December 2020, the day after a meeting with the Claimant. Ms. Wright's email said this:
*"Angelika came (sic) in to see us yesterday as her GP (at that point) would not issue her with another note.
It was apparent that she is still in discomfort and not yet in a position to return to work.
She advised us that she has not taken your call and told us that she has autism and struggles with phone calls. We discussed the importance of her taking your call and she accepts that she needs to speak with you.
We discussed that Cliff, her manager would let her know the time of the call and outlines some of the questions that she may be asked to put her mind at rest.
Angelika now sees the importance of the call.
Would it be possible to reopen the case and Cliff will support her."*
60. We accept that at the meeting of 1st December that was the first time that the Claimant had made any reference to the Respondent to a difficulty with telephone calls being because of autism following having received a formal diagnosis which had been sent to the Respondent in October 2020. We come to that further below.
61. Mr. Stubbs followed up on the issue the following day and asked that the referral be continued and asked that notice be given of the next appointment day and time so that he could speak to the Claimant about it. Mr. Blackwell replied to say that the preferable option would be for the Claimant to call him and that he would text

her some dates and times so that she could choose one to make contact. A telephone appointment subsequently took place on 5th January 2021.

62. The Claimant had been copied into the email to Mr. Blackwell from Ms. Wright. She emailed Ms. Wright over a month later on 10th January 2021 – that being her first day back at work after her sickness absence - to say that her mental health was private and confidential and asked her to ask permission before she shared that information because she did not feel that everybody had to know about it. It does not appear that Ms. Wright replied to the Claimant's email.
63. We have not heard from Ms. Wright but there is no reason to suggest that she had any ill intent in sharing the information that the Claimant had shared with her about the reasons for not having answered/returned Mr. Blackwell's calls. It appears from the email that that was simply to provide context as to the difficulties that he had experienced in relation to appointments with her and provide an explanation. It would clearly have been better for Ms. Wright to have replied to apologise but given her other interactions with the Claimant there is nothing to suggest that she was ignoring her or the issues that she had raised.

Request for a transfer to Halifax

64. On 28th February 2020 the Claimant asked for the first time about the possibility of a transfer from the Tutbury site to Halifax. She made that request to Maxine Cuthbert. The Claimant says that that was done by email and that her email was ignored although unusually we have not been provided with a copy of it during the course of these proceedings.
65. Although Ms. Cuthbert has a Nestle email address we accept that she is not employed by the Respondent and her role is as a full-time trade union official albeit based at the Respondent's premises. Ms. Cuthbert advised the Claimant to speak to one of the Respondent's Human Resources Business Partners ("HRBP"), Jemma Greaves. It is plain that that advice was given because the Claimant's email to Ms. Greaves referenced it (see page 131 of the hearing bundle). It is therefore not accurate as the Claimant contends that Ms. Cuthbert ignored her request for assistance be that by email or otherwise because the Claimant was emailing Ms. Greaves at Ms. Cuthbert's suggestion on the same day.
66. The Claimant emailed Ms. Greaves about the issue of a transfer on 28th February 2020. In her email to Ms. Greaves the Claimant asked what the process for a transfer was, whether she needed to send the request to her or apply to Halifax. She referred to having looked on the website and there being no vacancies but that there might be an internal vacancy at a later stage. Finally, she asked if she should contact Human Resources ("HR") at Halifax or whether Ms. Greaves would do that for her (see page 131 of the hearing bundle). The Claimant did not explain why she wanted to transfer to another site – and indeed she was not obliged to – but it is common ground that the request related to her personal circumstances and not to any issues that she was experiencing at work.

67. The Respondent was not, however, at any stage before the Claimant's employment terminated told that there were any compelling reasons behind her wanting to transfer away to another area. As we understand it, the Claimant was experiencing significant difficulties with her ex-partner and wanted to leave the area. It was her intention, as she later did in December 2020, to relocate to Bradford and so she was seeking a transfer to Halifax which was the nearest site to that area. That was not explained to the Respondent at the time, however, and the most that the Respondent knew was on the day of her resignation when Sean Bagnall was told that the Claimant wanted a transfer for personal reasons. The Claimant did not expand on what those personal circumstances were.
68. Ms. Greaves replied on 2nd March 2020 to thank the Claimant for her email. She asked her to leave the matter with her and that she would let her know the process concerned (see page 130 of the hearing bundle). A few days later the Claimant chased the matter up and the issue was subsequently passed on to another HRBP, Emma Wright, to look into. She replied to the Claimant on 9th March 2020 to say that she had been in touch with HR at Halifax and that any vacancies would be advertised on the intranet. She set out that she had been told that at that time there was not much recruitment for operators due to ongoing projects.
69. The Claimant is critical that Ms. Wright did not question why a transfer to Halifax was required. Whilst that is the case there is nothing to say that had she done so the Claimant would have said anything else than that which she later told Mr. Bagnall when he asked that question – that she required the transfer for personal reasons. Moreover, even if Ms. Wright had made that enquiry and the Claimant had been more forthcoming about the reasons that she wanted a transfer that would not have altered the position that there were no vacancies.
70. The Claimant is also critical that she was not told what the process or policy was in relation to transfer requests. We accept that there was no policy and it was explained to the Claimant what the process was – i.e. that she should continue to look on the Respondent's internal systems and could contact Halifax directly about vacancies. Moreover, Ms. Wright went beyond that because at times when the Claimant raised the matter of a transfer with her she contacted Halifax directly to check the position on suitable vacancies and reported back to the Claimant.
71. The Claimant emailed Ms. Wright again in April 2020 asking if anything had changed and whether there were any operator roles which would see her be able to transfer to Halifax. She advised Ms. Wright that she had applied for a Quality Assurance Coordinator role at Tutbury and asked if there were any vacancies of that nature at Halifax that she would be able to apply for. Ms. Wright replied on 14th April 2020 to say that she had checked on the intranet and with Halifax and there were no advertised positions.
72. On 3rd June 2020 the Claimant emailed Ms. Wright again asking if she had any updates for her and asking if there was anyone in Halifax that she could contact to keep an eye on vacancies. Ms. Wright replied the same day to say that she was not aware of any vacancies in Halifax at that time and advised her to check on the intranet where all vacancies would be advertised. The Claimant replied on

8th June to say that she did not have access to the intranet (she was off sick at this time) and to copy a link into her email where she had seen a vacancy on the internet and asking if she could apply and the process to do that.

73. Ms. Wright replied the same day saying that she could not see the vacancy from the link but that if additional details were provided then she would look into the matter. The Claimant sent a further link and asked how she could locate details of vacancies that were not advertised either on the intranet or the internet.
74. Ms. Wright replied early the next day to say that it may be best for the Claimant to contact Halifax directly to discuss any vacancies and the position with them. The Claimant replied to indicate that that was fine and asked for the relevant contact details. Those were provided by Ms. Wright an hour and a half after the Claimant requested them (see page 125 of the hearing bundle).
75. On most occasions that the Claimant raised the position with Ms. Wright she made appropriate enquiries for her and informed her of the results. Ms. Wright had also given the Claimant at her request contact details to make her own enquiries and there is nothing to suggest that there was ever any vacancy that could have seen her transfer to Halifax.
76. Although the Respondent was not aware at the time, they later came to understand that the Claimant had moved to Bradford. That move took place in December 2020 and was as a result of her personal circumstances arising from difficulties that she was experiencing with her ex-partner.
77. The Claimant returned to work from a period of ill health absence because of damage to her knee on 10th January 2021. By this time the Claimant was still living in Bradford albeit at the point of her return to work and into the end of February 2021 she was able to stay with a friend near to the Tutbury site. After that point travelling to Tutbury would involve something in the region of a 200 mile round trip or overnight stays in hotels. We accept that that would be time consuming and expensive for the Claimant. At this point on her return to work the Claimant had, however, arranged to stay with a friend so that she was closer to work as we have already set out above.
78. Due to the fact that the Claimant had relocated to Bradford she again raised the possibility of a transfer to a factory located nearer to that area – i.e. Halifax. The Claimant raised the matter in a grievance and, particularly, in a grievance meeting with Mr. Bagnall. We come to that below along with references to a transfer that the Claimant raised with Mr. Stubbs.
79. Shortly before that time the Claimant had attended a meeting with Maxine Cuthbert on 14th December 2020 to discuss the transfer issue. That was in Ms. Cuthbert's capacity as Senior Shop Steward. The Claimant complains that Ms. Cuthbert ignored the issues that she had raised and/or failed to pass them onto Mr. Stubbs but as we shall come to below, she did in fact raise them by email. Whilst there was a nine day delay in her doing so the issues were plainly not ignored or not passed on.

80. In this regard, Ms. Cuthbert emailed Mr. Stubbs on 23rd December asking him about whether the intention for the Claimant's return to work was to be on a phased return. She also raised the issue of a transfer and that part of her email said this:

"Angelika was very upset when she came to see me, she doesn't seem happy on the shift that she is on at the moment, she was looking into applying for a role in Halifax as that is where she is currently living and she commutes to Tutbury each day.

Please can you advise ASAP".

81. The Claimant complains that that email did not reference her mental health and that that made her feel mortified that she had not taken her mental health concerns seriously (see paragraph 15 of the Claimant's witness statement). However, that cannot be something for which the Respondent was responsible given that Ms. Cuthbert is a trade union employee and not an employee of the Respondent.

82. Mr. Stubbs replied to Ms. Cuthbert's email the same day. The relevant parts of his email said this:

"Currently as you are aware Angelika is currently signed off sick by her Doctor due to pains in her knee, with her latest sick note expiring on the 2nd January.

As to planning for her return to work this is currently difficult as we have neither a diagnosis of the cause of her knee pains nor a recommendation from her Doctor of her current capability for work should she return to work on a reduced hours (phased) basis. Clearly we wouldn't want to plan for a phased return to work that would cause her additional pain in her knee and potentially risk increased long term damage to the knee.

In addition to contact with myself and Emma¹, Angelika has been referred to our OH team and has been contacted by our physiotherapist. Unfortunately in October Angelika didn't answer Tony's call not return to (sic) causing the referral to lapse. I asked for this to be restarted with Angelika's approval however again he (sic) didn't answer his call.

As to the point of being unhappy on the shift I can't comment on this as she hasn't raised this before to myself. I am aware that Angelika is now living in Bradford and has applied for a role in Halifax. Clearly it is a concern for me that when she returns to work she will be living 100 miles away from her place of work. She has said that while she is rostered at work she will stay with a friend however with the COVID measures that are in currently and those that will be in place in the New Year, I am unsure of how viable an option this will be.

I trust that this answers most if not all of your questions Maxine. I am also back at work on the 4th so can catch up then if you want to. By this point I should have had some contact with Angelika confirming her wellness to work, a fit note either

¹ A reference to Emma Wright of HR.

continuing her absence or one detailing her ability to work. When I have this I can plan a way forward”.

83. Ms. Cuthbert replied to thank Mr. Stubbs for his email and to indicate that she would let the Claimant know that he would be in touch with her in the New Year. Her email also said this:

“Just to let you know, Angelika wouldn’t talk to me over the phone, she wanted to see me face to face because she struggles with being diagnosed with autism. I wonder if that’s a factor why she didn’t answer the occupational health call? Just a thought”.

84. Ms. Cuthbert was in contact with the Claimant after this exchange as the Claimant was seeking updates about a return to work. By that time, she was unable to get a further Fit Note and was understandably concerned about her financial position. In reply to the Claimant Ms. Cuthbert forwarded on a copy of the email from Mr. Stubbs. The Claimant complains that that caused her to have a complete breakdown with the result that she could not shower or eat over Christmas. Whilst we have not heard from Ms. Cuthbert there is nothing to say that the email was forwarded with any ill intent or that it could be foreseen that such a reaction would result. It appears to us that the email was simply sent in consequence of the Claimant’s request for an update (see page 152 of the hearing bundle) and in all events it could not be something that the Respondent was responsible for as Ms. Cuthbert was not their employee but an employee of Unite and Mr. Stubbs would not have been aware that it was to be forwarded on.

Diagnosis of Autism/Aspergers

85. The Claimant sought an assessment as to whether she had neurodiversity issues in Poland. As we understand it, she had difficulties accessing such assessment in the United Kingdom and therefore travelled abroad to deal with that on a private basis.
86. The Claimant sent a copy of a translated certificate that she had obtained to Mr. Stubbs on 23rd October 2020 which made a diagnosis of Aspergers (see page 140 of the hearing bundle). Within her cover email she also asked if there was any news about her transfer. It appears to be common ground that Mr. Stubbs did not reply to that email. However, he was aware that it had already been explained to the Claimant that any transfer depended upon a vacancy being available at Halifax and she had the contact details to enquire directly about any vacancies as well as the ability to check on the intranet for them. Whilst it would plainly have been better for Mr. Stubbs to have replied to acknowledge receipt of the medical certificate and remind her of the position about a transfer, there was nothing material that he would have been able to tell her that would have altered the position on that transfer and we are satisfied that he was not deliberately ignoring her.
87. The Claimant sent a further email to Mr. Stubbs on 16th November 2020 updating him about a doctors appointment that she had in relation to her knees and that

she would provide an update after that time. She also referenced her transfer request and that part of her email said this:

*“Do you have anything regarding my transfer please?
I have not heard from you for a long time, but I need to have it sorted ASAP.”*

88. It is not in dispute that there does not appear to have been any reply to that email from Mr. Stubbs. Again, whilst it would plainly have been better for Mr. Stubbs to have replied and remind her of the position about a transfer, there was nothing material that he would have been able to tell her that would have altered the position on that transfer because there were no vacancies and we are satisfied that he was not deliberately ignoring her.

89. As part of a series of emails between the Claimant and Mr. Stubbs relating to health assessments she again raised the issue of a transfer. That was on 28th February 2021. The relevant parts of the Claimant’s email said this:

“I asked for a transfer nearly a year ago since then I did not hear anything about transfer policy or there were no movements done to make it happened (sic). I have been asking everywhere I could, however with no results. I sent the application to Halifax, however they did not contact me back. The only problem is I am in quite a critical situation now and I really need this transfer to happen”.

90. There does not appear to have been any reply to that email from Mr. Stubbs. Once again, whilst it would plainly have been better for Mr. Stubbs to have replied and remind her of the position about a transfer, there was nothing material that he would have been able to tell her that would have altered the position on a transfer and we are satisfied that he was not deliberately ignoring her.

91. The Claimant also forwarded on to Mr. Stubbs a reply to her trade union representative which she had received from HR and which said this:

“I cannot locate any specific criteria with regard to internal moves however on the Nest under me as an employee there is a section on internal moves and the process of applying for jobs at other sites. Hope this helps. Let me know if you need anything more. I have checked and unfortunately there are no jobs available at the moment”.

92. The Claimant also updated Mr. Stubbs as to a vacancy that she had applied for as a Quality Assurance Coordinator role at Halifax. That was a more senior role than that of Line Operative. It was not therefore a situation where the Claimant would be transferring into an existing vacancy. Maxine Cuthbert had contacted a manager at that site to ask them to look out for the Claimant’s application (see page 182 of the hearing bundle) but unfortunately she was not successful in being appointed to the role because her background did not match the job (see page 185 of the bundle). The manager at Halifax had agreed, however, that he would monitor any suitable vacancies and notify the Claimant about them (see also page 185 of the hearing bundle).

Return to work – 10th January 2021

93. The Claimant returned to work on 10th January 2021. That was on a phased return of reduced hours to accommodate the Claimant's knee condition (see page 171 of the hearing bundle).
94. Shortly before that time she had a meeting with Mr. Stubbs. That was primarily in relation to arrangements for a return to work and also discussion of Covid measures which were in place by that time and Mr. Stubbs had taken advice from occupational health before the meeting as to whether there was anything else that needed to be done.
95. We accept that discussion about Covid measures would have been necessary because the Claimant had been absent from work during the pandemic and had not therefore been in the factory to know what measures had been put in place in respect of PPE, social distancing etc. The Claimant complains that Mr. Stubbs did not specifically discuss with her issues about her mental health. However, the cause of her absence had of course been related to her knees and the focus therefore was understandably on making appropriate arrangements to ensure that adjustments were in place to assist with that condition. We accept the evidence of Mr. Stubbs that the Claimant did not make reference to her mental health or indicate that she wanted to discuss it but that had she done so he would have been open to that conversation taking place.
96. Moreover, there was discussion about other necessary adjustments and Mr. Stubbs agreed that the Claimant could be exempt from the requirement to wear a face covering. He also arranged for there to be a further referral to occupational health on the day of the Claimant's return to work. Within that referral there was a specific reference to an earlier referral and period of absence for mental health issues concerning anxiety and depression and that she now had a diagnosis of Aspergers. The referral asked for details of any adjustments that might be necessary (see page 172 of the hearing bundle).
97. Occupational health compiled a report on 26th January 2021. That dealt with adjustments in respect of the Claimant's knee condition and also addressed the diagnosis of Aspergers. The report noted that ongoing support and treatment may be more easily accessible in the United Kingdom and made reference to support which could also be accessed via the Respondent's Employee Assistance Programme and that should be considered in the event that further support was required.
98. The Claimant had of course relocated to Bradford in December 2020. Given the distance from Tutbury she had made arrangements to stay with a friend in that area. However, after the end of February 2021 that was no longer going to be possible and when the Claimant returned to work after a block of 9 days off she would either have to travel or stay in a hotel. We understand the Claimant to have done the latter. The Claimant notified Mr. Stubbs that she would not be able to stay with her friend anymore on 27th February 2021. Again, it does not appear to be in dispute that Mr. Stubbs did not reply to that email. Whilst again it would

plainly have been better for Mr. Stubbs to have replied to the Claimant we accept that he was not deliberately ignoring her and that in all events there was nothing that would have altered the position on a transfer because there were no vacancies.

Communications between the Claimant and Maxine Cuthbert - January 2021

99. Following on from the Claimant's meeting with Ms. Cuthbert and their exchange of messages concerning her return to work, that communication continued after the Claimant had commenced her phased return.
100. The Claimant contacted Ms. Cuthbert by email on 18th January 2021 to say that she had contacted Unite two weeks previously and they had said that she would call her but that she was still awaiting that contact. She asked Ms. Cuthbert if they could meet that day or on 21st January. Ms. Cuthbert replied the same day to say that she was free and inviting the Claimant to call her. The Claimant replied to say that she would prefer to see her in person and that she could call into her office to deal with that.
101. Ms. Cuthbert replied to say that she was working from home but that she could be on site early in the morning on Sunday. The Claimant responded to Ms. Cuthbert's email and it is worth setting that reply out in full which said this:

"Oh, ok.

I might be able to sort it here.

There is something what (sic) bothers me a lot.

I came to see you as a Union Senior Rep because I felt like Junior is not able to help me handle my case as I need it.

On the meeting I had prepared a list of situation what (sic) made me feel bad, ignored and misunderstood. And I am sure I was clear about it and you got my intentions. You asked if I would like to change shifts and I refuse immediately and said this is a last thing I am happy to do.

You assure me you would contact Cliff, which you did. However, after you sent me a replay (sic) you got from Cliff, I crushed. My brain went down and I needed extra session with my therapist. Not to deal with people misunderstandning (sic) me, but to help me prepare with making official complaint due to ableism and disability discrimination. I was totally angry and I could not calm down for a few days, which cost me insomnia and eating issues.

I have called Union and was told you will contact me, which never happened.

Then I have met Cliff and he told me than (sic) you advice (sic) him to let me move shifts permanently. I can't even express what I felt at that moment, it's beyond my mind. It could cost me a lot if Cliff have listened to you. The last thing I asked for and you forward that to my manager.

My mental condition is not in its place because of this. Instead of getting help I ask for, I get disappointment and misunderstanding, which puts me in bad position. I do not know how I can talk to you again if I am in need, if you do opposite to my

needs. And then I would need to talk to someone else, from other shift, so more people will know about my state, and this is not my goal.

That situation cost me a lot and I will be working it out on my therapy (sic) for a while.

All I need from you now is to answer me a question – What happened? Why did you put me in it?”

102. Ms. Cuthbert replied the following day and that reply said this:

“Firstly when Unite contacted me I was on annual leave and did not pick up any messages until you text me. So I apologise for the delay.

You sent me a mail on Monday 18th January asking to see me, however, I was working from home and asked if you wanted to call me at 13.00 when I was free. You replied you wanted to see me in person, so I sent you an email and a text to your mobile phone on the same day, Monday 18th January stating that I would be on site on the Sunday from 5.00 a.m. to meet you prior to you finishing your night shift. You did not respond to either email or text. I did attend work on that Sunday early morning at 5am and waited for you, however, you did not turn up.

You have taken the situation out of context, all that I emailed Cliff was that you were unhappy and looking into applying for a role in Halifax. Which incidentally and as you will remember, I contacted Stuart Bond at Halifax who said that you could apply for the role in question and that he would look out for your application. I also asked Cliff that because you had been off work for a while, was there a plan in place for you to return, is it phased and had anyone been keeping in contact with you.

I understand the situation is difficult for you, however, I feel I have done everything possible that I could do for you.”

103. The Claimant replied on 11th February 2021 as follows:

“I would turn up if I was at work. In addition, I have never confirmed to meet with you other than Sunday.

I explained everything to you in good faith, with no double meanings. My words, both in the meeting and in my email, were straight and forward. And for being open and honest, for complaining about something you are giving me a good dose of ableism and gaslighting.

The rest of your email doesn’t have anything to do with my complain (sic), so I will just leave it with no comment. It just confirms my feelings are right”.

104. It does not appear that there was any reply to that email from Ms. Cuthbert. However, as we have already referred to above anything said or done by Maxine Cuthbert cannot be the responsibility of the Respondent given that she was an employee of Unite.

The Claimant's grievance

105. On 7th March 2021 the Claimant wrote a letter of grievance. She addressed that to Emerson Favrin who was the Tutbury factory manager. The Claimant's grievance said this:

"I am writing to raise a formal grievance.

I have a complaint about the way my requests and problems have been handled over long period of time. However, due to complexity of the issue and explanations I would like to ask to meet you face to face, so I can provide you with details and evidence, and then you could proceed with the procedure and investigation.

I have evidence in the form of emails and text messages.

I would be grateful if you could let me know when I can meet you to talk about my grievance. I would like to be accompanied at the meeting by Martin Eckersley".

106. Mr. Favrin emailed the Claimant the following day to acknowledge receipt of the grievance and to say that HR would be in touch to discuss the next steps.
107. On 11th March 2021 Mr. Stubbs emailed the Claimant seeking to arrange a meeting to discuss her grievance. Although the grievance had been addressed to Mr. Favrin, under the Respondent's grievance policy at the first stage any formal written grievance was to be addressed to the employees' line manager (see page 85 of the hearing bundle). In this case that was not Mr. Favrin but Mr. Stubbs and there was nothing in the Claimant's grievance letter which suggested that her complaints were directed against him. He was not named in it and the Claimant accepted in cross examination that there were no dates or details of the complaints that she was making. We accept that the Respondent did not know at that stage that the grievance had anything at all to do with Mr. Stubbs and it is therefore unsurprising that he was asked to deal with the matter because that was in accordance with the Respondent's grievance policy. The same policy provided that if a grievance was about the employee's direct line manager then it should be addressed to their line manager. That was not Mr. Favrin either but a manager by the name of Sean Bagnall. As such, Mr. Stubbs could not know that way either that he might be the subject of the grievance such that it would be inappropriate for him to deal with it.
108. The Claimant replied to Mr. Stubbs to ask him why he was holding the meeting, explaining that she had raised the matter with Mr. Favrin for a reason. She did not elaborate on that reason, however, or suggest that it was because Mr. Stubbs was part of the subject of her grievance.
109. Mr. Stubbs replied to the Claimant to say that he had been asked by HR to deal with the matter and explained that all grievances should be raised in the first instance with the relevant line manager. He explained that if the grievance concerned the line manager then the policy required the matter to be raised with the second line manager and he set out that that was Mr. Bagnall. He further

explained that it was not appropriate to the next line manager up – in that case Mr. Favrin – to hear the grievance. He attached a hyperlink to the relevant policy for the Claimant and said that he hoped that the Claimant would accept his invitation for a meeting. He asked that if the Claimant was not happy to do that for her to confirm stating the reasons why.

110. The Claimant contends that this was an insistence from Mr. Stubbs that he deal with the grievance despite her having explained to him that it would not be appropriate as it was about him. We do not accept that to be the case. Firstly, Mr. Stubbs did not insist to the Claimant that he would be dealing with the grievance, he merely explained to her that he had been asked by HR to do so and the reasons why. It was clearly set out to the Claimant that she could say that she was unhappy with the arrangement with the implication being that Mr. Stubbs would then not deal with the matter. Secondly, the Claimant had not at any point by this stage explained that she did not want Mr. Stubbs to deal with the matter because the grievance was about him nor was there anything from which that could have reasonably been inferred. We accept that Mr. Stubbs was simply doing what he could to try and resolve the matter for the Claimant as he had been asked to by HR and at no point did he insist or in fact ever carry out a grievance meeting.
111. The Claimant replied to say that the case was urgent and complex and that it would not be appropriate for it to be raised either with Mr. Stubbs or Mr. Bagnall. She referred to the situation being stressful and so no further explanation was required. She asked for a meeting to be arranged urgently with Mr. Favrin so that she could be sure that the procedure had been followed.
112. The following day the Claimant replied again to say that having thought about matters further she was content for Mr. Bagnall to deal with the grievance. That is in the event what happened.
113. Mr. Stubbs replied to the Claimant on the same day and his email said this:
- “Thanks for the replies. I can tell that this is a very difficult time for you.*
- Although the nature of your grievance is as you say “difficult and urgent”, that doesn’t necessarily mean it’s not appropriate for it to be raised to me in the first instance. Although I probably won’t be personally able to resolve it I can facilitate in raising its urgency and getting it progressed quickly.*
- I ask that you consider my offer over your time off work. I’ll leave the time clear in my calendar at 10.30 on Wednesday to see you in the Nescafe Purpose room”.*
114. We accept that at that stage Mr. Stubbs still did not realise that he was part of the subject of the grievance and there was no reason for him to think that he was based on what the Claimant had said by that stage. The most that she had said was that it was complex and urgent and whilst she had said that it was not

appropriate for Mr. Stubbs to deal with it she had also initially said the same in respect of Mr. Bagnall who was not the subject of the grievance.

115. We accept the Claimant's evidence that when she received the email from Mr. Stubbs she had a panic attack. However, we do not accept that Mr. Stubbs did anything wrong in sending the email because he did not realise that the grievance had anything to do with him and was simply attempting to follow the grievance procedure and resolve matters for the Claimant. He could not have foreseen that the Claimant would be caused distress by the email response back to her.
116. In fact, the meeting between the Claimant and Mr. Stubbs never took place and as had been accepted by the Claimant the matter was passed to Sean Bagnall to deal with.

Grievance meeting - 12th April 2021

117. On 12th April 2021 the Claimant attended a grievance meeting with Mr. Bagnall. She was accompanied by her trade union representative, Mr. Eckersley. A notetaker and a HRBP were also present. The Claimant had previously made a request to record the meeting. Mr. Bagnall confirmed at the outset that the request would not be permitted but that there was a note taker present who would be making notes of the meeting and so there would be a record. Those notes were provided to the Claimant and they appear at pages 205 to 208 of the hearing bundle. We accept that they are an accurate record of the meeting and that the main points that the Claimant was complaining of was a general issue of not being treated well but, more importantly, the issue of a transfer. The majority of the things that the Claimant relies on in the context of her constructive dismissal claim were not mentioned and as such were not investigated by the Respondent during the grievance process.
118. In addition to discussing the grounds for the grievance Mr. Bagnall asked the Claimant what she wanted as an outcome. The Claimant replied that she could not work "there" anymore. We find that that was a reference to no longer being able to work in Tutbury and that that was because she had moved to Bradford rather than her saying that she was no longer able to work for the Respondent. That is clear because the context of what immediately followed was a discussion about where the Claimant had moved to and it was plain from later conversation that the Claimant was still keen to arrange a transfer to another site and if that was facilitated was content to remain in employment with the Respondent.
119. The Claimant told Mr. Bagnall that she was living in Yorkshire over 100 miles from Tutbury and that it was costing her £600.00 to travel to work each month. By this time the Claimant was no longer able to stay with the friend who we have referred to above. As from around 11th March 2021 the Claimant had been staying in a hotel at the times that she was working.
120. The Claimant referred to the situation being tiring and making no sense and that she had emailed Mr. Stubbs requesting a transfer. Mr. Bagnall asked the Claimant

what had prompted her to move to Yorkshire and she had replied that it was for personal reasons. The Claimant did not elaborate further on that.

121. After a brief adjournment the Claimant asked if there was any chance of being transferred to Halifax within the next three or four weeks. The Claimant was told by the HRBP present that the Respondent could not promise that that could happen because it was dependant upon their being a vacancy in Halifax. She indicated that she could ask that branch again but reminded the Claimant that she had previously sent emails enquiring about a transfer but that was dependant upon Halifax having a vacancy and that they could not commit to anything on their behalf. We are satisfied that that was the reality of the situation and it is not unreasonable that the Respondent could only facilitate a transfer to another site if there was a vacancy for a line operative there. There is nothing to suggest that at any point there was a vacancy for such a position that was not offered to the Claimant. The Claimant had also been given the contact details for Halifax herself so that she would have been able to telephone to make her own enquiries and a manager there had also told her that he would keep her informed if anything arose.
122. Upon being told that there could be no guarantee of a transfer within a three to four week timescale the Claimant sad that in that case she would be handing in her notice that day. The Claimant was asked if it was her final decision which she confirmed that it was. The Claimant asked about her notice period and it was confirmed that she was required to give four weeks notice although in fact she was only required to give one week (see page 79 of the hearing bundle). Mr. Bagnall asked the Claimant if she was happy to serve out that notice period or if she would prefer not to and he referred to knowing that it cost her time and money to get to Tutbury.
123. The Claimant referred to having 15 days off as from the end of her shift that day and asked if she could end her employment by the “next block”. We understand that the relevant date in that regard was 30th April 2021 which was when the Claimant’s employment terminated. She therefore returned to work after her 15 days off and worked one week of nights before her employment terminated.
124. There was nothing said by Mr. Bagnall or anyone else that gave any impression that if the Claimant chose to end her employment early and not work her full notice period that she would be paid regardless. If the Claimant did form that impression, it is not possible for us to see how she reached that conclusion and her evidence did not assist us on that point.

The Claimant’s resignation

125. Shortly after the meeting the Claimant wrote to Mr. Bagnall confirming her resignation. The resignation letter is at page 204 of the hearing bundle and it is worth setting out the pertinent sections which are below:

*“Please accept this letter as notice of my resignation from the position of **Line Operator at Nestle Tutbury.***

*As per the terms of my employment contract I will continue to work for the company for the next **four weeks**, completing my employment on **12th May 2021**.*

I have enjoyed working here and would like to say thank you for the opportunities I've been given. If there is anything I can do to make the transition easier, please let me know.

I hope that I can rely on you for a positive reference in future.

I would also like to make a request for a shorter notice period and complete my employment on 30th April 2021. Please let me know if there is a possibility to make it happened (sic)".

126. The Claimant's request for a shorter notice period was agreed by the Respondent and accordingly her employment terminated on 30th April 2021 and that was the date that she was paid up to. We have found it difficult against that background to understand the basis of the wrongful dismissal complaint. We had originally believed that it might be parasitic on the success of the constructive dismissal claim but Mr. Uduji indicated at the outset that the Claimant sought payment of the balance of the notice that she had given until 12th May 2021 as that was what she had been led by the Respondent to believe that she would receive.
127. We do not accept that. As we have already indicated above we are satisfied that there was nothing said or done by the Respondent in the grievance meeting or otherwise that could have left the Claimant under the impression that by agreeing to a request that she had made to leave employment earlier that she would nevertheless be paid up until 12th May 2021. She specifically asked to leave on 30th April, that was agreed and she was paid up until that date.
128. We are satisfied that the reason for the Claimant's resignation was the fact that the Respondent had indicated in the grievance meeting that there was no guarantee that she could definitely be given a transfer to Halifax within a set period of time. That was clear from what was said at the grievance meeting to which we have already referred above.

Grievance investigation and outcome

129. Despite the Claimant's resignation Mr. Bagnall continued to investigate the grievance. That included meetings with both Mr. Brown and Mr. Stubbs. At the conclusion of his investigation the Claimant was invited to a grievance outcome meeting.

130. After the meeting Mr. Bagnall sent a copy of his letter to the Claimant confirming that he was not upholding her grievance. The letter that he sent explaining his reasons was a lengthy one and so we do not set it out in full here but it made the following points:
- a. That there had not been a lack of support in relation to the Claimant's mental health and recent diagnosis of Aspergers and that the information provided to Tom Brown had only been very vague and that a specific diagnosis would have helped;
 - b. That Mr. Brown was awaiting a medical assessment to confirm a diagnosis to identify any support that the Claimant would benefit from;
 - c. That support was given by Mr. Brown in relation to behaviours from other colleagues on shift that the Claimant did not like and felt uncomfortable about;
 - d. That consideration was given to the area that the Claimant worked in so that she had limited interaction with other colleagues;
 - e. That Mr. Brown had attended a mental health awareness workshop with the specific intention of supporting the Claimant;
 - f. That Mr. Brown had supported the Claimant in relation to making arrangements to assist her to attend classes for a law degree² that she had enrolled upon by offering unpaid leave and, when that was not acceptable to her, making arrangements to change her shifts;
 - g. That when her line management changed to Mr. Stubbs he was made aware of her mental health and made arrangements for her to remain on her preferred line (line 23/24);
 - h. That when the Claimant had made Mr. Stubbs aware that she had received a diagnosis of Aspergers he had made a referral to occupational health who had confirmed that she was receiving outside treatment;
 - i. That there had been two meetings since the Claimant returned to work and during which time she had worked 12 shifts. The first meeting was to familiarise the Claimant with operations on site and a catch up and the second with a Mr. Gregory when the Claimant had shared information about her mental health, and specifically panic attacks and how support could be given in that regard;
 - j. That there was an acknowledgement of the Claimant's request to know in advance which line she was working on, whilst that was not always operationally possible the Respondent had taken steps to ensure that she

² We understand from the Claimant's evidence that it was not a law degree but that was simply an error on Mr. Bagnall's part.

was kept on line 23/24 which had been for a large proportion of the time and other colleagues had been redeployed to accommodate that;

- k. That in terms of the request to transfer to Halifax, Maxine Cuthbert had made contact with that site to see if there were any positions available but there had not been any;
- l. That HR had also been in touch with the HRBP at Halifax who had confirmed that they were not recruiting and that any positions that did arise would be advertised on the Nest (an internal system of the Respondents) and that the Claimant had been informed about that;
- m. That further email communications between the Claimant and the HRBP when she had indicated that she did not have access to the Nest had seen the HRBP make further contact with Halifax and confirm that there were no vacancies advertised;
- n. That the HRBP had provided contact details for Halifax and advised the Claimant to get in touch with them regarding any vacancies that she saw that were advertised;
- o. That he had seen email communications to Mr. Stubbs that indicated that the Claimant had been unsuccessful in an application for a Quality Assurance Coordinator post at Halifax and that they were going to let her have details of any other vacancies;
- p. That there had been guidance about the transfer process but a transfer was not possible because there were no suitable positions available; and
- q. That there could be no guarantee of a transfer to another location and that depended upon whether there were vacancies and whether the applicant had the correct skill set required for any position.

131. The letter concluded by advising the Claimant of the way in which she could appeal the decision if she did not agree with it. That appeal was to be directed to Emerson Favrin, the Tutbury factory manager.

Grievance appeal and appeal outcome

132. The Claimant submitted an appeal to Mr. Favrin on 20th May 2021 (see pages 233 to 238 of the hearing bundle). It is a detailed letter and so we do not set out the content here but it covered most of the points in the original grievance and also a reply to a number of points in the outcome letter. In respect of the issue of the transfer, the Claimant accepted that a transfer could not be guaranteed but set out that she had asked what the process was and that the Respondent had never provided a clear understanding of how things would work to her (see page 237 of the hearing bundle).

133. The Claimant supplemented her appeal with a schedule of loss and a letter from Autistic Nottingham which raised a number of issues and set out a belief that barriers were placed in her way when she asked for a transfer, that her needs as an autistic employee had not been taken into account and that it appeared that that may have been a deliberate attempt to marginalise and exclude her from the workplace.
134. An HRBP acknowledged the Claimant's appeal on 21st May 2021 and indicated that she and Mr. Favrin would review the information provided and revert to her with the next steps and timescales. The HRBP wrote again to the Claimant on 27th May indicating that the information provided appeared to be the same as the original grievance which had been closed out and asking for a summary document with specific points of appeal and the additional information to support it.
135. There were further communications between the Claimant and the HRBP about the appeal on 7th June. Whilst that was primarily about the Claimant's pay for April 2021, the HRBP also chased up the information that had been requested from the Claimant. The Claimant replied to say that the appeal statement had been sent to the Respondent and asserting that the investigation had been closed, her appeal had been ignored and that there was nothing further that she could do to sort matters out. She also sent a further email to say that what she had originally provided was what was being asked for and asking that they proceed with that statement, conduct a proper investigation and get back to her with a result (see page 242 of the hearing bundle).
136. In the absence of further information there was no further meeting with the Claimant. Instead, on 6th July 2021 Mr. Favrin wrote to the Claimant with his outcome about the appeal against the outcome of her grievance (see pages 252 and 253 of the hearing bundle). The letter recorded that Mr. Favrin had reviewed the information discussed at the original hearing and throughout the earlier investigation and that he had considered that against the information that the Claimant had provided to him.
137. The relevant parts of the outcome letter said this:

"I have reviewed the Grievance policy and procedure and the FAQ's documentation that is published on the me@Nestle intranet page (enclosed) and I am satisfied that the grievance was carried out in line with the policy and in a fair and proper manner. I note that you first had an informal discussion, you then were invited to a formal grievance hearing where you were advised of the right to representation. I can see that Sean spoke with a number of witnesses including Tom Brown, Cliff Stubbs and Chris Gregory (attached). Following this you were invited to an outcome meeting, again with the right of representation and that decision was provided to you both verbal (sic) and in writing. In this outcome you were offered the right of appeal, and the details of how you submit this appeal. I also note that notes of all meetings were taken and were provided to you as a record of the discussion.

From the information that you have provided to me I have been unable to find anything where you have challenged the content of the meeting minutes or where you disagreed with the course of action. You have also not specified individuals that you believe should have been spoken to but were not.

You have specified that you feel a proper investigation needs to be conducted, but as you have been unable to suggest why the initial investigation was improper, I can only assess the information and evidence before me and I can see no suggestion that the investigation was 'improper'.

Having reviewed the content of the Grievance investigation I believe that the decision taken by Sean Bagnall was fair and reasonable in all the circumstances and that the investigation was carried out in accordance with Nestle policy and in a proper manner. Without further evidence to support the points you have raised, I am rejecting your appeal."

138. Prior to that point the Claimant had entered into early consolidation via ACAS between 27th May and 9th June 2021 and presented her Claim Form to the Tribunal the following day. This is the claim that is now before us for consideration.

CONCLUSIONS

139. Insofar as we have not already done so we now turn to our conclusions in respect of this claim.
140. We begin with the complaint of constructive dismissal. As set out in the agreed list of issues which these conclusions should be read in conjunction with, the first question is whether any of the following were terms of the Claimant's contract of employment:
- a. To refer her for face to face occupational health appointments;
 - b. To reply to emails within a reasonable timeframe;
 - c. To acknowledge receipts of emails when requested to do so;
 - d. To make enquiries about the reasons for any transfer requests made;
 - e. To address and pass on information to her line manager when requested to do so;
 - f. To assist and facilitate transfers to different sites;
 - g. To address health concerns when they were raised; and
 - h. To escalate grievances above the first line manager as soon as there was objection to their involvement.
141. We are satisfied that none of those were terms of the Claimant's contract and we have not been taken to anything which suggests that to be the case. Instead, the real issue is whether either singularly or cumulatively the acts that the Claimant relies on amounted to a breach of the implied term of mutual trust and confidence.
142. Although we have already made findings in relation to each of the 16 acts that the Claimant relies on above, it is necessary for us to briefly repeat those here in our conclusions.

143. The first act is referring the Claimant to occupational health for a telephone assessment in January 2020 despite knowing that the Claimant would have difficulties with that because of her disability. We are satisfied that that is not factually accurate and that Mr. Stubbs did not know that the Claimant had difficulties with telephone assessments because of her disability (our emphasis) until the meeting on 1st December 2020. After that point, he put in place arrangements to assist the Claimant in understanding what she was going to be asked and scheduling specific times and dates for the assessments to take place.
144. Whilst Mr. Stubbs was aware that the Claimant's preference was for face to face appointments (see for example page 117 of the hearing bundle) the reason(s) for that were not discussed with him at that time despite him having had a dialogue with the Claimant to explain that telephone assessments were the routine so as to avoid delay with the appointment taking place. We are satisfied that Mr. Stubbs was simply following the normal course and seeking to expedite an assessment for the Claimant and that he was not aware at the time that she required a face to face appointment because of disability or for any other medical condition.
145. We can deal with act two along with acts seven, eight and 11 because they all involve the actions of Maxine Cuthbert. Aside from our specific findings set out above as to what occurred in respect of each of those acts the more important issue is that Ms. Cuthbert was not an employee of the Respondent. She was an employee of Unite the Union. The Respondent accordingly cannot be responsible for any acts done or not done by Ms. Cuthbert.
146. The next act relied upon is Emma Wright failing to question why the Claimant wanted a transfer to Halifax on 28th February 2020 and instead telling her that there were currently no vacancies and providing her with a contact telephone number for the Halifax site. We are satisfied that there was no obligation on Ms. Wright to have asked the Claimant what her reasons were for wanting to transfer to Halifax. Had it been important for Ms. Wright to have known that it was in the Claimant's gift to tell her. Moreover, we find it more likely than not that if that enquiry had been made the Claimant would have simply cited personal reasons as she later did to Sean Bagnall. It is also worthy of note that even if Ms. Wright had made those enquiries that would not have altered the fact that there was no vacancy at Halifax that the Claimant could be transferred into. All that Ms. Wright was doing on 28th February was relaying that position to the Claimant and providing her with a contact telephone number that she had herself requested.
147. The next act is referring the Claimant to a further telephone occupational health assessment when she was not always able to answer or return the call because of her mental health. We are satisfied that at the time that this referral was made in August 2020 Mr. Stubbs was not aware that the Claimant experienced any difficulties in respect of taking telephone calls because of either her mental health (as per the list of issues) or Aspergers (as per the complaint of a failure to make reasonable adjustments). He was not aware of the latter until the meeting with the Claimant on 1st December 2020.

148. Moreover, whilst Mr. Stubbs was aware that the Claimant preferred face to face appointments and had struggled with an earlier telephone assessment in January 2020, by this point the country was in the midst of the Covid-19 pandemic and Mr. Stubbs could well have been criticised for arranging a face-to-face appointment which would have put the Claimant, who was unable to wear a face covering, at risk of contracting coronavirus. Mr. Stubbs was also aware at this time that the Claimant was undertaking telephone assessments with her GP and so was not unreasonably under the impression that she was able to manage despite her preferences for face-to-face contact.
149. We turn then to the next act which is that on 23rd October 2020 Cliff Stubbs and Emma Wright failed to acknowledge receipt of the Claimant's diagnosis of Aspergers along with a fit note in respect of her knee problems despite the Claimant having requested that they do so. There is no doubt that happened and plainly it would have been much better for them to have replied. Mr. Stubbs conceded that fact in his evidence but was not able to recall given the passage of time the reason that he did not reply. We accept, however, that he was not deliberately ignoring the Claimant and we note that, despite the way in which this part of the complaint is phrased, the Claimant did not actually request any acknowledgment. She simply asked if there was any news of a transfer which there was not. Whilst it would have been better to reinforce that there were no vacancies and to remind the Claimant of how she could monitor that position, there was no detriment caused to a potential transfer because by her own evidence there were never any vacancies. Moreover, at that time the Claimant remained unfit for work for unrelated reasons and was not in a position to commence work at Halifax for some weeks even had there been a vacancy.
150. We can again group act six with acts 12 and 13 because they all relate to Mr. Stubbs failing to reply to emails from the Claimant about a transfer to Halifax. Those emails were dated 16th November 2020; 23rd February 2021 and 27th February 2021. Again, Mr. Stubbs accepted that in hindsight he should have replied but again we are satisfied that he was not deliberately ignoring the Claimant and the same conclusions apply as immediately above because there was no news to impart regarding a transfer because there were never any vacancies at Halifax for a line operator.
151. To any degree that the next act which was an email forwarded to the Claimant by Maxine Cuthbert on 23rd December 2020 is said to relate to the content of the email penned by Mr. Stubbs rather than the act of forwarding it (which we have already addressed above) and which it is said led the Claimant to experience a full breakdown due to the failure to address the concerns that she had raised about her mental health, then that is answered by the fact that Mr. Stubbs had not been told about any concerns raised about mental health in the emails sent by Ms. Cuthbert to which he was replying nor would he have known that his reply would be shared with the Claimant and have the effect that she described.
152. The next act is Mr. Stubbs' meeting with the Claimant on 8th January 2021 to discuss only Covid related points and not discussing her mental health and informing her that Maxine Cuthbert had never mentioned her mental health to him.

153. The latter part can be dealt with relatively swiftly in that Ms. Cuthbert's email did in fact make no mention of mental health, something which the Claimant appeared to acknowledge and take issue with in her own email exchanges with Ms. Cuthbert on and after 18th January 2021. As to the focus on Covid measures, that was understandable for the reasons that we have already given and had the Claimant wanted to discuss her mental health we are satisfied that Mr. Stubbs would have dealt with that. He had also facilitated a referral to occupational health to obtain details of any further adjustments which may be necessary, including in relation to her mental health and diagnosis with Aspergers.
154. We turn then to Emma Wright having informed occupational health about the Claimant's diagnosis of Aspergers without her permission. Whilst we have not heard from her, there is nothing to say that this was done with any ill intent by Ms. Wright and the content of her email is plain that she was including that information as an explanation for why the Claimant had not previously maintained contact with Mr. Blackwell. Whilst it would have been better for Ms. Wright to reply to the Claimant and apologise, there is nothing to say that the Claimant was being ignored.
155. The next act is what is said to be Mr. Stubbs insisting on 11th March 2021 that he deal with the Claimant's grievance despite her having expressed to him that this was not appropriate as the grievance was about him. Firstly, we are satisfied that Mr. Stubbs did not insist to the Claimant that he would be dealing with the grievance, he merely explained to her that he had been asked by HR to do so and the reasons why. It was clearly set out to the Claimant that she could say that she was unhappy with the arrangement with the implication being that Mr. Stubbs would then not deal with the matter. Secondly, the Claimant had not at any point by this stage explained that she did not want Mr. Stubbs to deal with the matter because the grievance was about him nor was there anything from which that could have reasonably been inferred. He was not named in the grievance and there were no dates or other details which could have led anyone to conclude that he might be the subject of it.
156. We turn then to the act of Cliff Stubbs telling the Claimant on 13th March 2021 to reconsider allowing him to conduct the grievance meeting which led to her experiencing a panic attack at work on that date. We are satisfied that, as we have already set out in our findings of fact above, Mr. Stubbs was only seeking to follow the grievance process and he did not know and could not have reasonably been expected to know that he was the subject of the grievance. He could not have foreseen that asking the Claimant to reconsider meeting with him to try and resolve the grievance would result in her having a panic attack.
157. The only matters which we have found to be made out factually and where the Respondent could have done better are the failures to reply to emails sent by the Claimant by Mr. Stubbs and Ms. Wright. The acknowledgment of the fit note and diagnosis should have been done but that is in our view a relatively minor oversight. Whilst it would clearly have been better for Ms Wright to have

apologised to the Claimant for any upset about the email to Mr. Blackwell there is again nothing to say that that was to ignore the Claimant.

158. Equally, whilst Mr. Stubbs should have replied to the Claimant's emails about a transfer to Halifax to reinforce the position that there were no vacancies, steps had been taken by Unite, HR and a manager at Halifax to look for vacancies and there were none available. Even if Mr. Stubbs had replied, that would not have altered the position that the Claimant needed a vacancy to open up at Halifax to transfer and no line operator positions arose prior to the termination of her employment.
159. In all events, we are satisfied that none of the above issues contributed to the Claimant's decision to resign. She made it plain in the meeting with Mr. Bagnall that if a transfer to Halifax could be arranged in the short term then she would be perfectly prepared to continue to work for the Respondent. We are satisfied that the reason that the Claimant chose to resign was because the Respondent could not facilitate a transfer to Halifax for her within a short period of time and that that made it difficult for her because she had moved to Bradford. That then brings us to the question of whether that event either in conjunction with a failure to reply to emails or of itself breached the implied term of mutual trust and confidence.
160. We are satisfied that it was not. There was no obligation on the Respondent to arrange a transfer of sites from Tutbury which was the location set out in the Claimant's contract of employment and from which she was therefore contracted to work. Had the reason for the transfer request been work related then the argument may have had more force but the reason that the Claimant wanted to transfer was purely for personal reasons. The Respondent took what steps it could to check vacancies for the Claimant, advise her how to go about that herself by providing the necessary contact details and she also had an agreement with the Halifax site that a manager there would let her know about any suitable vacancies. Any transfer was dependant upon there being a suitable vacancy for a line operative at Halifax and no such vacancy arose. The Tutbury site had no control over vacancies at Halifax and there was no obligation to create a role to accommodate the Claimant's personal circumstances.
161. Therefore, neither of itself or coupled with anything else did informing the Claimant that there could be no guarantee of a transfer within a three to four week period breach the implied term of mutual trust and confidence. Conveying that position was simply conveying a fact and, as we have already observed, there was no obligation to create a position for the Claimant at Halifax.
162. For all of those reasons the complaint of constructive dismissal fails and is dismissed.

163. We turn then to the complaints of a failure to make reasonable adjustments. The only PCP's on which the Claimant now relies are as follows:
- a. A policy of making telephone referrals to occupational health; and
 - b. A practice of not transferring staff who request a transfer for personal reasons.
164. We deal with each of those in turn. In each case the substantial disadvantage is said to be that she is placed in a situation which she finds more stressful because of her disability which cause her to suffer an exacerbation of her disability and a flare up of related symptoms.
165. In respect of the first PCP, we firstly have to consider if we have jurisdiction to entertain that complaint. It is not in dispute that the telephone assessments which were arranged with occupational health took place in January 2020, August 2020 and January 2021. The Claimant entered into early conciliation via ACAS on 27th May 2021. As that was more than three months after the date of the last act complained of (and assuming for those purposes that this amounted to a continuing course of conduct ending in January 2021) the Claimant does not benefit from the "stop the clock" provisions.
166. She did not present her Claim Form until 10th June 2021 and so the claim is two months out of time. For the avoidance of doubt, we do not accept any suggestion that there was a continuing course of conduct ending with the failure to transfer the Claimant to Halifax on 12th April 2021 because those were clear and distinct issues and, in all events, as we shall come to that complaint failed on its facts.
167. We begin by considering the reasons for the delay. The Claimant has not advanced any reason in that regard either in her witness statement or in her oral evidence for the delay in issuing proceedings. That in our view must be the starting point given that the onus is on the Claimant to persuade us that it is just and equitable to extend time. Absent any good reason for the delay we do not consider that it can be said to be just and equitable to extend time.
168. However, despite our conclusions in relation to jurisdiction we have nevertheless gone on to consider whether we would have found there had been a breach of the duty to make reasonable adjustments had we reached a different one.
169. There is no dispute that the Respondent had a policy and/or practice of arranging consultations with occupational health by telephone by January 2020 at least. The purpose of that was to expedite assessments taking place. The Respondent did therefore apply that PCP.
170. However, the Respondent denies that it had knowledge of the Claimant's disability. Whilst we accept that until 23rd October 2020 the Respondent had no confirmation of a diagnosis of Aspergers, we do consider that the Respondent had constructive knowledge of disability via information that the Claimant had given to

Mr. Brown when she was line managed by him and also to occupational health and HR (see for example page 123 of the hearing bundle).

171. The Claimant had referred to having Aspergers (albeit without a formal diagnosis) and had made reference to having a number of traits associated with that condition such as needing a structured routine involving the same lines and the same people to work with, not liking loud noises or people shouting over her. We are satisfied that that was enough that the Respondent could reasonably be expected to know that the Claimant was disabled.
172. However, the Respondent must also have had knowledge of the substantial disadvantage that is relied on by the Claimant. That is where the problem arises because it was not until 1st December 2021 that the Claimant made any reference to a difficulty with calls being that she had Aspergers. Before that time, there was no knowledge that the Claimant faced any difficulties with telephone calls because she was autistic. Therefore, the duty to make reasonable adjustments did not even potentially trigger before that point.
173. We say potentially because we were not satisfied that the Claimant did in fact suffer a substantial disadvantage on account of suffering from Aspergers. In fact, during her evidence before us it was plain that what the Claimant was actually saying was that it was her mental health that caused her to have difficulty with talking on the telephone. That was also reflected in the list of issues relating to the constructive dismissal claim as we have touched upon above. Mental health is quite distinct from Aspergers and reliance on that as a disability was abandoned earlier in the proceedings.
174. We are therefore not satisfied that the duty to make reasonable adjustments arose in these circumstances. However, even had it done so the duty is only to make reasonable adjustments and we accept that in respect of the August 2020 and January 2021 referrals face to face appointments would have been problematic because of the impact of Covid 19. The Claimant was unable to wear a face covering and to require her to attend face to face appointments would have exposed her to a far greater risk of contracting Covid.
175. Moreover, the Claimant's own evidence before us and as reflected in the medical report which was disclosed to attempt to plug the gap in her witness statement was that she struggled with verbal communication generally and not just on the telephone and her preference was for communication to be in writing. It would not therefore appear that the reasonable adjustment sought would have ameliorated any substantial disadvantage had we found there to have been one.
176. For all of those reasons, the complaint of a failure to make reasonable adjustments in respect of telephone assessments fails and is dismissed.
177. We turn then to the second complaint of a failure to make reasonable adjustments. There is no question that this complaint was presented within time. The PCP relied on is a practice of not transferring staff who request a transfer for personal reasons. This part of the claim fails for various reasons.

178. Firstly, we accept that the Respondent did not apply that PCP and there was no evidence to suggest that they did. There was no practice not to transfer staff who request a transfer for personal reasons and the Respondent did all that it could to facilitate a move to Halifax for the Claimant but that was dependant upon there being a vacancy which there was not. It also seems to us that the actual PCP was a requirement to work at the site to which an employee is contractually assigned.
179. However, even if that had been the pleaded PCP the Respondent could not have knowledge that the Claimant would suffer the claimed substantial disadvantage and in all events we were not satisfied that she suffered any such disadvantage as claimed.
180. There was no evidence from the Claimant to that effect and the medical evidence supplied did not support the suggestion that her Aspergers was impacted by not transferring her. Indeed, the focus of her complaint to Ms. Cuthbert focused on the impact on her mental health. We accept that the stress of not getting a transfer may well have exacerbated the Claimant's mental health but that is not the same as Aspergers and reliance on mental health as a disability had fallen away.
181. Moreover, even had that not been the case then the duty is only to make adjustments that are reasonable. It would not have been reasonable to create a position for the Claimant that was not required at Halifax. That is not least where the Claimant was fit to perform the same duties at her place of work and was seeking a transfer not for any reasons related to work or disability but for personal reasons as she had explained to Mr. Bagnall.
182. The complaints of a failure to make reasonable adjustments therefore also fail and are dismissed.
183. Finally, we deal with the complaint of wrongful dismissal. We can deal with that in fairly short terms given the findings that we have made above. The Claimant's resignation specifically requested a shortening of the notice period that she believed at that time from Mr. Bagnall that she was obliged to give to terminate her employment. That was accepted by the Respondent and her employment ended on the date that she had proposed, namely 30th April 2021.
184. She did not work any period of notice for which she was not paid and there was nothing said or done by Mr. Bagnall or anyone else which could reasonably have given the impression that the Claimant would be paid for four weeks notice that she had not given or worked. The complaint of wrongful dismissal therefore also fails and is dismissed.

185. For all of those reasons, the claim therefore fails and is dismissed.

Employment Judge Heap

Date: 5th June 2023

JUDGMENT SENT TO THE PARTIES ON

5 June 2023

FOR THE TRIBUNAL OFFICE

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