EMPLOYMENT TRIBUNALS

Heard at:	London South	**On:**	2nd to 6th October 2023
Claimant:	Ms N Gray		
Respondent:	Surrey & Borders Partnership NHS Foundation Trust		
Before:	Employment Judge Ramsden		
With members	Mr A Fairbank		
	Mr R Singh		
Representation:			
Claimant	Mr A Johnston		
Respondent	Mr A Ross, Counsel		

RESERVED JUDGMENT

1. The Claimant's claims are not well-founded and are dismissed.

REASONS

Background

2. The Respondent is an NHS trust which provides healthcare service to the population of Surrey and beyond.

3. The Claimant worked for the Respondent for 28 years, ultimately in a senior position within the Violence Reduction (**VR**) team. The Claimant's employment as a Senior VR Trainer ended on 18 May 2022. Early conciliation started and ended on 26 May 2022, and the Claimant presented her claim form on 15 August 2022. She has brought various complaints against the Respondent, of:

a) Constructive unfair dismissal; and

b) Disability discrimination.

4. The issues to be decided in the substantive hearing to determine the Claimant's claims were set out in the Case Management Orders of EJ A Frazer on 24 April 2023.

5. The essence of the Claimant's claims are that the Respondent failed to manage her disability, namely the breast cancer with which she was first diagnosed in 2017. She says that the Respondent failed to heed the recommendations in occupational health (**OH**) reports, failed to make reasonable adjustments and did not provide redress to her grievance. She resigned, on notice, in circumstances which she says amounted to a fundamental breach of her contract by the Respondent.

6. More specifically, the Claimant alleges:

a) Constructive unfair dismissal;

b) Direct disability discrimination, under section 13 of the Equality Act 2010 (the **2010 Act**);

c) Discrimination arising from disability, under section 15 of the 2010 Act;

d) Failure to make reasonable adjustments, under section 21 of the 2010 Act;

e) Harassment related to disability, under section 26 of the 2010 Act; and

f) Victimisation, under section 27 of the 2010 Act.

7. The Respondent denies these claims, and says that the Claimant's employment was terminated by way of her resignation.

The hearing

8. The Respondent was represented in the hearing by Mr Ross. The Claimant presented was represented by her partner, Mr Johnston, a lay representative.

9. The Respondent served hearing bundle of 750 pages on the parties, in accordance with the case management order of EJ A Frazer. It became clear that the Claimant had not disclosed evidence relevant to remedy, and so this hearing was converted to a liability-only hearing, with considerations of remedy to follow if any of her claims are made out.

10. The Claimant had applied for a witness order in respect of her trade union representative, Andy Doran, but that application was made only days before the hearing commenced, on 19 September 2023, after the date for exchange of witness evidence had passed. The Tribunal refused that Order, on the basis that:

a) Mr Doran's evidence would only go to what happened in a couple of meetings which he attended with the Claimant, which the Claimant is able to speak to; and

b) it would not be in the interests of justice to postpone the hearing to await that evidence, given the parties were present and five days booked out in this busy Tribunal's time. Moreover, any postponement would mean this matter would likely wait for 18 months or more for a hearing slot, which is not proportionate when it would only be to hear evidence from a witness whose evidence the Claimant says will duplicate parts of her own.

11. Each of the Claimant and the Respondent had made applications for specific disclosure, but there was no need for the Tribunal to determine those, as the parties cooperated to share the documents in their possession on the following matters, each of which was added to the Bundle:

a) Email correspondence concerning the Claimant's invitation to attend a development day with her now partner, Mr Johnston, and his team, on 24 January 2020, during her employment by the Respondent;

b) A job advertisement for the post of VR Lead at the Respondent, posted on 3 July 2023;

c) Email correspondence between Peter Stevens (the Claimant's line manager from August 2020) and Kim Stonebridge (Mr Stevens' line manager) on 4 October 2021 about Personal Safety and Conflict Management Training;

d) Email correspondence between Mr Doran and (among others) Victoria Bishop (a member of the Respondent's HR team) about concerns raised by Mr Doran on the Claimant's behalf that the Claimant was mismanaged and disregarded during the latter part of her employment with the Respondent;

e) The learning objectives for a two-day refresher VR training course;

f) The learning objectives for a four-day VR training course; and

g) An email from Gareth Heighes to Mette Laszkiewicz, of 2 October 2023, summarising when the Respondent delivered a course on Personal Safety externally (on two dates: 18 November and 1 December 2021).

These were entered in as pages 751 to 772 (inclusive) of the Bundle.

12. Mr Johnston and the Claimant gave evidence in support of her case, and the Tribunal heard from Ms Badmus, Ms Stonebridge, Ms Newsome, Ms Laszkiewicz and Mr Stevens for the Respondent.

13. Mr Ross made oral and written submissions on the conclusion of evidence. The Claimant chose not to make oral or written submissions, but Mr Johnston had obtained a copy of an Employment Tribunal decision in *McKenzie v University*

Hospitals of Leicester NHS Trust, a decision from 2022 with case number 2603829/2020 from the charity Macmillan Cancer Support, and the Tribunal was asked to consider that as part of its deliberations, which it did. That case is not, of course, binding on this Tribunal, but the relevance of that case was not clear to the Panel, as:

a) The claimant in that case was dismissed by the Respondent, and so the tribunal examined whether the decision to dismiss was a reasonable one. On the facts here, the Claimant here resigned alleging constructive dismissal;

b) The tribunal in that case considered that it would have been a reasonable adjustment for the respondent in that case to have discounted some of the claimant's absences for non-disability-related absences. On the facts in this case, the Respondent's absence management process never reached a conclusion, so we do not know what the Respondent would or would not have done in that regard; and

c) The respondent in that case departed from OH's recommendations in deciding to dismiss the claimant. The tribunal was of the view that the respondent was not obliged to follow OH's recommendations, but that a reasonable employer would put forward some explanation for not doing so. That (as per our conclusion on the Second Disputed Fact below) is not applicable to the facts here, as there were no OH recommendations that were made that were not followed by the Respondent (albeit some recommendations were never applicable because they related to arrangements to be applied when the Claimant returned to work, which she never did).

The Claimant's complaints

14. The complaints made by the Claimant were set out in the Case Management Orders of Employment Judge A Frazer on 24 April 2023, and aspects of those complaints were clarified on the first day of this hearing. Those complaints are as set out below.

Constructive unfair dismissal

15. The Claimant avers that:

a) Between October 2020 and March 2021 the Respondent had discussions about the redeployment of the Claimant, saying:

(i) "*the Trust needs value for money of a band 6 role*";

(ii) "*trying to find work that doesn't exist*"; and

(iii) (in an email from Ms Laszkiewicz of 18 March 2021) "*she cannot deliver face to face training, the fact is that if/when Nikki [the Claimant] returns in April we have no work for her to do*";

b) On 22 February 2021, Mr Stevens asked the Claimant to return to face-to-face training in circumstances where she was awaiting surgery;

c) The Respondent failed to act on recommendations in OH reports or consult with the Claimant about them;

d) The Respondent failed to have regard to the Claimant's GP sick notes which cited "*stress at work*" in that it failed to carry out a stress prevention assessment;

e) Between February 2021 and May 2021, Mr Stevens and Ms Stonebridge made comments that the Claimant was not "*working to capacity*", and that she was "*stressing the team*" by her absence, saying that support would only be forthcoming if management supplied "*additional trainer resources*" and emphasising that her disability was having an impact on the team budget;

f) The Respondent instigated formal sickness absence procedures against her instead of first carrying out a risk assessment further to her mentioning this in an email on 10 May 2021; and

g) The Respondent required the Claimant to attend a return to work/sickness absence meeting with Mr Stevens and Ms Stonebridge, who were the subject of her grievance, before having arranged a grievance meeting.

16. The Claimant says that these actions cumulatively amounted to a fundamental breach of her contract of employment, breaching the implied term of trust and confidence, with the incident described in g) above cited as the 'last straw'.

17. The Claimant says that she resigned, on notice, in response to that breach, without affirming her contract of employment.

18. The Respondent disagrees. It says that, in respect of each of the allegations above (with a) below responding to the allegations at a) above, b) below responding to the allegation at b) above, etc.):

a) The Claimant has not provided evidence that (i) or (ii) was said. It agrees that (iii) the email from Ms Laszkiewicz was sent;

b) Mr Stevens did refer to the Claimant returning to face-to-face work;

c) There were no recommendations in OH reports that it had not acted upon, save for those that did not apply until the Claimant was fit to work (and she left her employment before that situation arose);

d) The Claimant's fit notes did not mention stress at work until after her resignation. While OH reports did mention stress at work, the Respondent's position is that it understood this to stem from the Claimant's

grievance, which it attempted to resolve but the Claimant refused to cooperate with that process. As regards the alleged failure to carry out a stress prevention assessment, it says that there were several OH reviews, and that it would have been OH who would have made any stress prevention assessment;

e) Ms Stonebridge was not asked by the Claimant about these points when giving her evidence. Mr Stevens denies that he referred to her "*stressing the team*" by her absence. Mr Stevens denied the suggestion put to him under cross-examination that he wanted to move the Claimant out of the team for funding reasons;

f) It did instigate formal sickness absence procedures in respect of the Claimant, in accordance with its policy. It says that it did carry out a risk assessment on the Claimant proximate to and in connection with the start of the pandemic, in June 2020, and that there were five OH assessments conducted in respect of the Claimant; and

g) It agrees that the Claimant was required to attend a return to work/sickness absence meeting with Mr Stevens and Ms Stonebridge, but it says that it was not clear to it that Ms Stonebridge was a subject of the Claimant's grievance. It also says that the failure to progress the Claimant's grievance was a result of the Claimant's request to postpone it, and then her resistance to participate in the grievance process.

19. The Respondent says that there was no breach by it of the implied term of the Claimant's employment contract of trust and confidence, but rather that the Claimant had, by the time of her resignation, moved to Nottinghamshire, and she was looking to end her employment with the Respondent and bring an Employment Tribunal claim.

Direct disability discrimination

20. The Claimant says that between April and August 2020 the Respondent failed to consult with her about the development of a band 7 VR role, and failed to encourage her to apply for it. In oral evidence, the Claimant accepted that the Respondent had consulted with her about the development of the role (a development she supported), but said that her complaint is that she was not encouraged, either as part of that consultation or after it had concluded, to apply for the position. This, she claims, was less favourable treatment than that received by Mr Stevens, and she asserts that this less favourable treatment was because of her disability.

21. The Respondent says that the Claimant was asked by Ms Laszkiewicz if she was interested in applying for the band 7 role, but that when she said she was not, the Respondent did not press the point by encouraging her to apply. The Respondent says its lack of encouragement was a response to her lack of interest. It also says

that it did not encourage Mr Stevens to apply for the role. The Respondent says that there was no unfavourable treatment of the Claimant in comparison to Mr Stevens.

Discrimination arising from disability

22. The Claimant says that the Respondent treated her unfavourably by:

    a) In September 2020, Mr Stevens stated to the Claimant that in not returning to provide face-to-face training she was not working to capacity, that he wished to remove her from his team and off his budget, and that her absence was causing stress on the team;

    b) On 16 October 2020, Mr Stevens informed the Claimant that there was a new way of working in that the Claimant's role would be primarily face-to-face and delivering a lot of physical training. The Claimant says that the Respondent failed to consult with her about any new way of working;

    c) Between November and December 2020 the Claimant was not invited to any of the planning meetings to deliver face-to-face training or asked to contribute;

    d) In December 2020, the Respondent ignored the Claimant's request to participate in training and/or failed to carry out any risk assessments that might enable her to participate;

    e) On 11 February 2021, the Respondent declined the Claimant's request for a compassionate day to attend a hospital appointment and instead requested her to take a day's annual leave; and

    f) On 9 March 2021, Mr Stevens told the Claimant that he wanted to redeploy her out of the team.

23. The Claimant asserts that this unfavourable treatment was because of her sickness absence that arose in consequence of her disability.

24. The Respondent accepts that much of the Claimant's sickness absence arose in consequence of her disability, but only a few days of that sickness absence occurred at the time of the complaints above. The Respondent says that it was not the Claimant's sickness absence that prompted the treatment the Claimant alleges.

25. If the Tribunal finds that the Claimant was treated unfavourably because of her sickness absence, the Respondent's position is that its treatment was a proportionate means of achieving its aim of maintaining an effective and fully-functioning workforce, which it says was a legitimate aim.

26. As to the detail of whether the alleged treatment in a) to f) above occurred, the Respondent says (respectively) that:

a) Mr Stevens did express the need for the Claimant to return to face-to-face working once she had been vaccinated and once shielding had ended, but it denies that he said he wished to remove her from the VR team, off his budget, or that he said that her absence was causing stress on the team;

b) There was no new way of working introduced, but rather there was a return to pre-pandemic face-to-face working;

c) It agrees that the Claimant was not invited to meetings relating to planning the delivery of face-to-face training, which it says was because she was not able to provide face-to-face training. It says that she was invited to other team meetings;

d) The Claimant did not ask to participate in training in December 2020, and it says that the OH assessments examined her ability to participate in training;

e) It did decline the Claimant's request for compassionate leave, as compassionate leave is given in response to a bereavement, which was not applicable to the Claimant's request to attend a medical appointment; and

f) Mr Stevens did not tell the Claimant that he wanted to redeploy her out of the team.

Failure to make reasonable adjustments

27. The Claimant says that the Respondent had the provision, criterion or practice (**PCP**) of requiring the Claimant to physically demonstrate VR interventions to delegates as part of her job role. The Respondent agrees that it applied that PCP to those in the Claimant's role.

28. The Claimant further alleges that this PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was unable (because of her breast cancer) to carry out the physical elements of her role or attend the various work venues of the Trust in person, and that the Respondent knew of this fact.

29. The Claimant has suggested various steps that the Respondent could have taken to avoid the disadvantage, those being:

a) From March 2020 onwards, the Respondent could have carried out risk assessments;

b) From the time covid shielding ended in September 2021, the Claimant could have been allowed to work remotely from home;

c) The Claimant could have been allowed to attend hospital appointments in work time. The Claimant clarified that this is a reference to a single

appointment that she was not allowed to attend in work time, being a mammogram scheduled for 17 February 2021;

d) From March 2020 onwards, the Claimant could have been given ten minute rest breaks every hour;

e) From March 2021 onwards, the Claimant could have been permitted to deliver project work;

f) From March 2021 onwards, the Claimant could have been permitted to deliver theoretical components of the VR programme;

g) From March 2021 onwards, the Claimant could have been permitted to support the Respondent's sites (wards and community teams) with advice, consultancy and additional online training;

h) From March 2021 onwards, the Claimant could have been permitted to develop online refresher training;

i) From March 2021 onwards, the Respondent could have provided the Claimant with transport to attend sites when her driving herself to those sites was too painful for her;

j) From October 2020 onwards, the Respondent could have permitted the Claimant to use mannequins in training demonstrations online and in-person; and

k) When shielding ended, from September 2021 onwards, the Respondent could have removed the requirement for the Claimant to attend training physically in-person from her job role.

(The Claimant had also suggested, in the 23 April 2023 Case Management Hearing, that a further reasonable adjustment would have been for the Respondent to review performance targets, but that suggestion was withdrawn at this hearing.)

30. The Claimant says that it was reasonable for the Respondent to take those steps, and that it failed to do so.

31. The Respondent:

a) Denies that the PCP put the Claimant at a substantial disadvantage, because it disapplied the PCP at the material times of March 2020 to February 2022, in that she was permitted to work from home up to the point that she commenced her sickness absence beginning 15 March 2021, from which she did not return;

b) Says that it took reasonable steps; and

c) In relation to the specific steps the Claimant asserts is was reasonable for the Respondent to take, it:

i. Denies that a failure to conduct risk assessments (set out in a) above) is a reasonable adjustment (and in any event, says it carried out all risk assessments it was appropriate to conduct);

ii. Says it allowed the Claimant to work remotely from home (see b) above), so there was no "failure" to make this adjustment; and

iii. Avers that the remaining steps (i.e., those set out at c) to k) inclusive above) are "*vague*" and "*unrelated to the PCP alleged to have caused the Claimant substantial disadvantage*".

Harassment related to disability

32. The Claimant says that the Respondent did the following things:

a) Allocated a male line manager to her during her sickness absence and while she was awaiting surgery;

b) Made comments, which the Claimant discovered when the Respondent responded to her subject access request, such as:

(i) "*we need value for money from our band 6's*";

(ii) "*when and if Niky returns to work there is no work for her*"; and

(iii) "*the majority of her role is face to face training which she cannot deliver*";

c) Ms Stonebridge placed two meetings a day in the Claimant's diary for a two-month period without prior discussion with her;

d) When the Claimant questioned Ms Stonebridge about those meetings, Ms Stonebridge said that it was "*part of the process*", and when the Claimant questioned her further about that response, she did not reply;

e) In March 2022, Ms Bishop of the Respondent's HR team responded to the Claimant's union representative saying that management disagreed with the Claimant's assertions that she had not been supported or well-managed; and

f) Failed to respond to the Claimant's question, raised in email to Shane Badmus on 19 April 2022, "*if the Trust is treating my email to Victoria as an extension of my existing grievances, why haven't you gathered information about the whole thing?*"

33. The Claimant says that these things amount to unwanted conduct, relating to her disability, which had the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

34. By contrast, the Respondent, while agreeing that most of the above took place, puts a different complexion on events. The Respondent's position is that:

a) The day after the Claimant requested a change of nominated contact person (as she was finding it challenging to discuss the sensitive nature of her condition) she was assigned Ms Stonebridge in place of Mr Stevens for that purpose. In terms of the prior assignment of Mr Stevens as the Claimant's line manager, that pre-dated her sickness absence and the period when she was awaiting surgery. The Respondent says that it is unreasonable to characterise this as having the prescribed purpose or effect;

b) It would be unreasonable to characterise the comments cited by the Claimant in b) as having the prescribed purpose or effect;

c) The Claimant did not explore these allegations with Ms Stonebridge in cross-examination, and the Claimant has not done enough to shift the burden of proof;

d) The same as for c);

e) The Claimant has failed to articulate how this allegation relates to her disability; and

f) The opposite is true: rather than the Respondent failing to respond to the Claimant's question, the Claimant would not engage with the Respondent in relation to these matters. Furthermore, the Respondent says that the Claimant has not provided evidence on whether this asserted occurrence had the prescribed purpose or effect.

Victimisation

35. The parties agree that the Claimant did a protected act when she raised a grievance on 25 May 2021.

36. The Claimant goes on to say that the Respondent did the following things:

a) Emailed the Claimant on 7 June 2021 in response to her grievance (an email from Ms Stonebridge);

b) Telephoned the Claimant when she was off sick to ask why she was not in a meeting with her (again, the Claimant says this was done by Ms Stonebridge);

c) Upon learning that the meeting had been rescheduled, failed to apologise to the Claimant (again, the Claimant says this was done by Ms Stonebridge);

d) Requested that the Claimant attend a joint stage 2 sickness absence management meeting with Mr Stevens and Ms Stonebridge in circumstances where they were the subjects of the Claimant's grievance, when that grievance had not yet been heard and/or they did not have a full OH report;

e) Failed to conduct any stress risk assessment of the Claimant; and

f) Fail to provide redress to the Claimant's concerns/grievance, or was dismissive of them/it,

which she says were detrimental and were done because the Claimant did, or the Respondent believed the Claimant had done or might do, a protected act.

37. The Respondent agrees that the matters described in a) to d) above occurred, but it disputes both that they were detrimental and that they were done because of the Claimant had raised a grievance. In relation to e) and f), the Respondent says that these did not occur.

38. In all cases, the Respondent says that the Claimant has failed to establish the requisite link between the matter complained of and the protected act.

39. The Respondent generally makes the point that the Claimant's complaints about:

a) Direct discrimination;

b) Discrimination arising from disability;

c) Failure to make reasonable adjustments; and

d) Harassment,

are out of time, and the Tribunal does not have jurisdiction to consider them.

The agreed facts

40. Much of the factual background is not in dispute.

41. The Claimant commenced employment with the Respondent in October 1994, and continued in the Respondent's employ until 18 May 2022. The Claimant had risen to a senior, band 6, role by the time of the events with which her claims are concerned.

42. The Claimant was diagnosed with breast cancer in 2017, and underwent a related surgical procedure in that same year. The Respondent accepts that at all relevant times for the purpose of the complaints in these proceedings that the Claimant was disabled by reason of breast cancer, and that it knew about her breast cancer at those times.

43. A formal consultation was conducted within the Respondent's Education Department about restructuring in the period 10 February to 13 March 2020.

44. On 16 March 2020, the Claimant started shielding, in accordance with the Government guidance for people who were clinically extremely vulnerable at the time because of the Covid-19 pandemic.

45. Shortly thereafter, on 23 March 2020, the country went into Covid-19 lockdown, at which point all face-to-face VR training was temporarily paused.

46. On 27 April 2020, the Claimant and her team were told the outcome of the restructuring consultation process, one consequence of which was the creation of a band 7 VR Lead role (i.e., a role one band higher than the Claimant's), which was to be advertised.

47. On 12 June 2020, the Claimant was asked, along with all other employees of the Respondent, to carry out a Covid-19 risk assessment. The results of the Claimant's assessment were reviewed by Julie Gray, her line manager at that time.

48. Government guidance changed for clinically extremely vulnerable groups with effect from 1 August 2020. The new guidance issued on 29 September 2020 stated that that group no longer needed to shield unless they were in a local lockdown area.

49. The Claimant was referred to OH in September 2020, and the resultant report was produced on 13 October 2020 (the **First OH Report**). The First OH Report said that she was well, save for an encapsulated breast implant (the formation of a "capsule" of scar tissue around the implant which becomes unusually hard and starts to contract around the implant) which had impacted the range of movement she had. It advised that she needed to take all reasonable precautions to stay safe and to avoid working in an environment that was not COVID secure. OH said that if the Respondent could continue to accommodate her working remotely on a temporary basis until she had had her surgery, this would be beneficial.

50. In December 2020 the Claimant and her partner, Mr Johnston, purchased a house in Newark-upon-Trent in Nottinghamshire.

51. The Claimant was absent from work for four days for reasons connected to her disability in the period 1 to 4 March 2021 (inclusive).

52. On 2 March 2021, Mr Stevens produced a proposal for VR team cover in light of the Claimant's ongoing absence. It observed that:

    a) The assignment of alternative work to the Claimant once face-to-face VR training had resumed "*had disproportionately negative consequences for the rest of the team and on training delivery*";

    b) Mr Stevens had explained to the Claimant "*that once face to face training resumes, any further adjustment would not be considered reasonable if it meant that [the Claimant] continued to work remotely, as the team, service and organizational need would require the whole team to be available to conduct face to face duties. [Mr Stevens] stated that [his] preferred goal would be to bring in adequate cover for [the Claimant's] face to face responsibilities, and retain the service of [the Claimant] in a remote capacity. However, if the funding for this is not available, then consideration would have to be made about alternative duties or*

redeployment. [The Claimant] indicated that the latter option would not be favourable"; and

c) The Claimant's recovery from the surgery scheduled for June was estimated to be four-to-six months, followed by a phased return with limited duties – meaning that it appeared that her performance of the role would be significantly impacted for a further year.

The report proposed that cover should be sourced immediately "*so as to have the necessary staff resources available for the imminent return of face to face working*", initially as a one-year fixed term contract or secondment, at band 5.

53. On 9 March 2021, Mr Stevens held a return-to-work meeting with the Claimant, following a four-day period of absence. The Claimant had said (via text message) at the time that her absence was due to 'flu, but the notes of the meeting record that she revealed in the course of the meeting that he absence was really a result of a very distressing hospital appointment and she was awaiting results due to possible cancer.

54. On 15 March 2021 the Claimant was deemed unfit to work for one month by her GP, on account of "*low mood and awaiting breast surgery*", and a further two-week absence was signed off by her GP for the same reason on 13 April 2021.

55. On 18 March 2021, the Claimant emailed Ms Laszkiewicz saying that she needed to be taken "*out of the equation for face-to-face training*".

56. Ms Laszkiewicz forwarded the Claimant's email on to an HR colleague on the same day, which email included:

"*The fact is that when/if Nikki returns in April we have no work for her to do. The training is an essential part of Nikki's job, and we have nothing further in the VRT team that we can offer her. There is not enough online work (in fact for her role this is minimal now that we are back to deliver this training in person).*

Please can you help us think about redeployment opportunities for Nikki".

57. The HR colleague recommended a referral to OH to "*give us parameters to work within and be guided by*" before exploring redeployment opportunities.

58. A further OH report was produced on 19 April 2021 (the **Second OH Report**), which said, in summary, that:

a) she was suffering with muscular pain in her chest, and anxiety caused by workplace stresses and her impending surgery;

b) she was unable to drive due to the chest pain;

c) she felt unsupported by her manager and excluded from the team;

d) the fact that she may be redeployed due to her inability to perform the physical part of her role was causing her an enormous amount of stress and anxiety;

e) the Claimant would like to return to work, but from home, as she was concerned that if she contracted Covid it could cause delay to her impending surgery;

f) she was not physically fit to return to safely perform her role, in particular, the face-to-face mat work, or to drive; and

g) it recommended that she be permitted to work from home.

59. On 27 April 2021, the Claimant was signed off work for two weeks because of "*Pectoral muscle pain*

Awaiting breast surgery/further breast team intervention".

60. On 10 May 2021 Mr Stevens invited the Claimant to a stage one absence meeting, as she had been absent for eight weeks. The trigger under the policy for inviting an employee to a stage 1 absence meeting was four weeks' absence. On the same day, the Claimant wrote to Mr Stevens to request a female "*nominated person*" for her to keep in touch with.

61. On the following day, 11 May 2021, Mr Stevens informed the Claimant that Ms Stonebridge would be her "*nominated person*".

62. The stage one absence meeting was held on 14 May 2021 via Teams. The Claimant attended, accompanied by Mr Doran, and Mr Stevens attended on the Respondent's behalf.

63. The outcome of that meeting was communicated to the Claimant the next day, which included the following:

"*You informed us that you are due an imminent appointment with your GP, where it will be discussed whether you will remain under certified sickness absence, or can return to work in some capacity from Monday 17th May… When you do return to work, a follow up appointment with OH will be scheduled, which will form the basis of any temporary reasonable adjustments that could be made to your role, or alternative duties.*

However, should your absence continue we may be in contact to arrange a meeting under stage two of the above policy".

64. On 17 May 2021 the Claimant was signed off work for three weeks (from 14 May) due to "*severe pectoral muscle pains*".

65. On 25 May 2021, the Claimant was again assessed by OH.

66. Also on 25 May 2021, the Claimant raised a grievance. This was done in the form of an email to Ms Stonebridge, and it concerned the stage one absence meeting with Mr Stevens. The Claimant's email included the following complaints:

a) The Absence Management Policy was not followed;

b) She was made to feel that she was a continued burden to the Respondent, with Mr Stevens referring on several occasions to the 'stress' caused to

the team by her disability. The Claimant observed that Mr Stevens was intent on moving her out of the VR Team's budget;

c) The discussion did not include any reference to the Second OH Report;

d) Mr Stevens failed to discuss the recommendations made by OH which would have supported the Claimant's return to work before she underwent surgery, and resisted attempts by Mr Doran to discuss these; and

e) Mr Stevens did not know that she was disabled and covered by the 2010 Act.

67. Ms Stonebridge acknowledged receipt of the grievance on the same day, noting that some points raised by the Claimant would require her to look into those matters further, and she committed to revert as soon as possible.

68. In oral evidence, the Claimant confirmed that in June 2021 the parties were engaged in ACAS early conciliation, which is earlier conciliation than the certificate provided by the Claimant in respect of her claims in these proceedings (which is dated 26 May 2022).

69. A further OH report (the **Third OH Report**) was produced on 2 June 2021. It said that:

a) the Claimant was signed off work until 9 June 2021;

b) the Claimant felt well in herself, but she had restrictive movement with her left arm and shoulder and was unable to undertake various activities of daily living; and

c) it was anticipated that, following her surgery due to take place on 9 June 2021, her expected recovery was three-to-four months.

70. On 4 June 2021, the Claimant was signed off work by her GP for nearly five weeks on account of "*Severe pectoral muscle pains; Will be having reconstructive surgery within the next week*".

71. On 7 June 2021, Ms Stonebridge emailed the Claimant with a three-page response to her grievance. Among other things, Ms Stonebridge noted that:

a) Mr Stevens' recollection of the meeting was that the OH report "*formed a significant basis for the discussions he had with [the Claimant] in the meeting*", including "*in a response to [the Claimant's] wish to discuss redeployment*";

b) "*any return to work that enabled [the OH-recommended] reasonable adjustments, would likely mean temporary redeployment or other duties outside the VR team*";

c) "*Peter and I have discussed on several occasions the complexity to identifying tasks for you to complete from home which will cover the required 30 hours a week in a Band 6 role. This is beyond the VRT Team and across the Education Team. On speaking with HR we cannot look at*

adjustments until you return to work and any recommendations in the OH report are for Peter and I to make our judgements against based on your Senior Violence Reduction Trainer role and the components of that role which you could undertake at this time. When we escalated this to Mette Laszkiewicz, the Director of Education, she asked Peter to discuss with you the possibility of a temporary redeployment in order to be able to meet the recommendations made by OH and keep you in a Band 6 role";

d) "*We have to be fair to you and to the team in our decisions on how you could fill your hours each week. Can I kindly ask you Nikki, looking at your Job Description (attached for your reference) what tasks do you think you could be completing over 30 hours a week when not actively training in the classroom? I only address this at this time due to your grievance. It is a discussion I would prefer to have with you once you are recovered*"; and

e) "*I would really hope that we can resolve your grievance informally in the format of this email and attached letter* [written in similar terms] *and move forward together.*"

72. On 9 June 2021, Mr Doran confirmed to the Respondent that the Claimant wanted to resolve her grievance informally.

73. The Claimant was signed off work for a month from 3 August 2021, because of "*recovery from surgical treatment for Breast Cancer*".

74. During August 2021 the Claimant went onto half pay, having exhausted her entitlement to sickness absence on full pay. Mr Doran had requested that the Claimant be paid in full, but this request was refused.

75. On 3 September 2021 the Claimant was again signed off for three weeks for "*recovery from surgical treatment for Breast Cancer*". On 24 September this was repeated as the reason for a further eight weeks of sickness absence.

76. A further OH report, following assessment on 21 September 2021, was produced on 27 September 2021 (the **Fourth OH Report**). That said that:

a) she was unfit for work;

b) her cancer had recurred;

c) the Claimant had raised a grievance, which had been paused while she was having surgery, but she would now like to be resolved as soon as possible;

d) she was making good recovery from her surgery;

e) she was feeling anxious, sad and upset about her treatment by the Respondent, and felt bullied, ostracised and pushed out;

f) she was then unfit to return to her role, but was hopeful of being fit shortly, with some adjustments, as she was unable to do any physical restraint work;

g) she would like to work remotely as she did during the pandemic and the shielding programme;

h) the Claimant reported three areas that needed to be resolved to render her fit for work: recovery from surgery (in which respect she was making excellent progress), an understanding of her future treatment plan (yet to be determined) in light of the recurrence of her cancer, and resolution of her grievance;

i) the Claimant was reluctant to consider alternative work, as she believed she could undertake her role with reasonable adjustments; and

j) OH suggested several reasonable adjustments which might help the Claimant with the duties of her job:

(i) A planned phased return to work over four weeks;

(ii) Extended planned phased return to work using accrued annual leave;

(iii) To work remotely from home;

(iv) To attend hospital appointments in work time; and

(v) To ensure rest breaks every hour for ten minutes.

These adjustments would be temporary, but would depend on her treatment plan going forward.

77. On 1 October 2021, the Claimant, along with her trade union representative, Mr Doran, together with Ms Stonebridge and Jo Meek (the latter from the Respondent's HR team), attended a stage two absence review meeting, via Teams. A letter setting out the outcome of that meeting was sent by Ms Stonebridge to the Claimant on the same date, which included:

a) "*I informed you of how the virtual training is being reduced as we slowly move in line with the Government's roadmap out of lockdown in its entirety. I talked about the VRT returning to a 4 day classroom course in July and informed you that the Personal Safety Training is no longer being delivered virtually, but transferred to an e-Learning module*";

b) In relation to the decision to move this training back to a face-to-face format, "*I explained that … it was a joint decision between Education and the wider business as we had evidence and concerns about the level of engagement*";

c) "*With regards to the temporary reasonable adjustments referenced I am happy that we can accommodate them but working remotely 30 hours a week in a trainer role requires wider and further discussion upon your return to work. We are unable to make any firm plans until you have sight of a treatment pathway and the decisions from the MDT review*"; and

d) "*We agreed that until a treatment pathway is forthcoming and what that will entail is known it would be difficult to gauge when you will be in a position to return to work*".

78. On 20 November 2021 the Claimant was signed off work for nine weeks from 19 November on account of "*Breast cancer treatment*", and she had further surgery in December 2021.

79. Emails were exchanged between the Claimant and Ms Stonebridge on 9 and 10 January 2022, which included the following:

a) From the Claimant to Ms Stonebridge: "*Although I have indicated my intention to return to work and to commence planning for this, my return is absolutely predicated on reaching a satisfactory outcome to the grievances I have submitted… My grievance was 'paused' due to my ill-health and pending surgeries. I would like to propose that we 'un-pause' my grievance procedure and arrange a meeting to discuss my grievances and potential outcomes as soon as possible*"; and

b) From Ms Stonebridge to the Claimant: "*Since we spoke on Friday I have reached out to Andy to arrange a meeting and Jo Meek. As discussed I have contacted OH to see if we should have a review in January or April/May time and await their advice.*"

80. On 20 January 2022 the Claimant was again assessed by OH, and they produced a report the same day (the **Fifth OH Report**). That noted that:

a) the Claimant reported "*experiencing stress from the perceived work situation and has felt there has been a significant breakdown in trust between employee and employer. She tells me she has felt marginalized by the employer*";

b) her post-surgical symptoms were slowly improving, but were expected to take at least several more months;

c) "*She tells me she is keen to resolve the workplace issues constructively, recover further and start work again*"; and

d) "*She is now in a position that if she can resolve the perceived stress surrounding the grievance issues and put in place an agreed and supported return to work plan, then I think she can return to work*".

81. The Fifth OH Report recommended several "reasonable adjustments":

a) A phased return to work starting with reduced hours but building up to a full hourly contractual commitment over four weeks, starting with site-based work nearer home initially, before extending to more distant locations;

b) After the grievance issues are resolved, a supported return to work plan should be devised, followed by site-based risk assessments where the

Claimant could demonstrate what she could and could not do safely and comfortably, which may enable the identification of other adjustments which could be helpful; and

c) Direct physical combative mat work with a physical opponent should be avoided for at least eight months. It may be that a soft mannequin model could be used.

82. A meeting was scheduled between the Claimant, Ms Stonebridge and Mr Doran on 27 January 2022, but that did not take place and was rescheduled for 9 February 2022.

83. On 7 February 2022, the Claimant resigned by email to Ms Stonebridge. That included the following:

a) "*At no time during [the period February 2017 to March 2020] was I referred to Occupational Health, were any risk assessments carried out in order to support me in fulfilling my role or were any reasonable adjustments considered required under the Equality Act 2010*";

b) "*My relationship with Peter Stevens has often been strained over the years and I have repeatedly experienced his approach to me as bullying and undermining*";

c) "*… my situation noticeably changed when face to face training was reintroduced in late 2020. It was clear from discussions with Peter Stevens around this time that he saw no value in the work I had been tasked with and wanted a 'full complement' of trainers working on the mats. Despite my suggestions as to how I could contribute to the training remotely as an integrated member of the team it was clear from his language and behaviour that he wanted me replaced and off the budget so he 'employ' another trainer. I noticed in Outlook Calendar that meetings were occurring which I was omitted from, and it became very clear I was being excluded from discussions and meetings 'because he did not deem my input necessary'. Essentially, I was being eased out*";

d) "*I feel that I have experienced a systematic failure of Managements inability to see me a person with a long employment history and support me through 2 cancer diagnoses… The final straw was your response to my grievance Kim (informed by discussions with Peter) which was inaccurate, defensive and failed* [to] *portray the reality of my, or my union representatives experience of my stage one sickness meeting. How dare Peter say that my illness and absence was placing stress on his team!*";

e) "*an irretrievable breakdown of trust and confidence exists*";

f) "*From Department Director down and with HRs knowledge, have conspired to remove me from my post, without considering reasonable adjustments required under the Equality Act 2010 or consultation and a continued lack of adherence to Trust policy*"; and

g) "*The Trust has conducted itself in such a manner that I feel it has seriously damaged the relationship of trust and confidence. As a consequence of the Trusts conduct, I now consider my position at work untenable, leaving me with no option but to resign in response.*"

84. The Claimant did not attend the (rescheduled from 27 January) grievance meeting on 9 February 2022. In oral evidence to the Tribunal the Claimant said that she had started to receive documents in response to a data subject access request she had made, and she felt she needed more time to consider those documents before attending a meeting.

85. On 8 March 2022 the Claimant was signed off work for ten weeks on account of "*Work Related Stress; Following Recovery from breast Cancer treatmen*t".

86. Mr Doran emailed Ms Newsome, the Respondent's Director of Workforce, on 10 March 2022 following the responses received by the Claimant to her data subject access request. Mr Doran observed that it was those responses that the Claimant perceived as:

"[demonstrating] *how, through mismanagement and disregard for Nikki and her disability she felt there was no alternative but to resign her position… The Trust has not met it's legal, ethical or moral obligations throughout Nikki's complex cancer diagnoses and it should be reflected upon as a sad day that she is leaving the Trust's employ in such a manner.*"

87. Ms Bishop, a member of Ms Newsome's team, responded to Mr Doran on 11 March 2022, emphasising that:

"*management strongly disagree with NG's assertion, and the team were very much looking forward to her returning to work… the concerns raised* [are] *in effect… a continuation of her grievance. We would therefore need clarity as to how she believes she has been mismanaged and unsupported to allow management to respond and for the organization to address her concerns.*"

Ms Bishop then provided a link to the Respondent's grievance policy.

88. On 15 March 2022 the Claimant emailed Ms Bishop in the following terms:

"*I cannot in good conscience not respond to you directly in relation to your email … I am unsure what the management team disagrees with?*"

The Claimant then proceeded to set out 23 questions about things that she was asking if management disagreed with.

89. On 19 April 2022, Shade Badmus, a member of the Respondent's HR team, wrote the Claimant by way of response to the Claimant's email to Ms Bishop. Ms Badmus' letter was more than five pages long, and endeavoured to respond to the Claimant's 23 questions. That letter included:

"*There was no reason to resign as there were attempts to meet with you and discuss adaptations to your role and support*"; and

"*I would also reiterate that the grievance route remains open to you and we can progress your concerns to a Stage 2 Hearing should this be your preference*".

90. On 17 May 2022 the Claimant wrote a lengthy challenge of Ms Badmus' letter in reply. That included:

"*I am confused Shade, is your response a 'Grievance' response? If the Trust is treating my email communication with Victoria as an 'extension' to my grievance. Why haven't you 'gathered additional information' about the whole thing?*"

91. The Claimant's employment with the Respondent terminated on 18 May 2022.

92. The ACAS early conciliation relied upon by the Claimant in connection with these proceedings started and ended on 26 May 2022.

93. On 31 May 2022, Ms Badmus wrote to the Claimant to invite her to a meeting to discuss her ongoing concerns.

94. On 9 June 2022, Ms Badmus wrote to the Claimant, in response to the Claimant's 17 May communication. Ms Badmus' letter included:

"*In our previous correspondence, we asked how you would like us to manage your complaints and gave you the option of resolving your concerns informally by arranging a meeting with a manager, or whether you would prefer for it to be addressed as a formal grievance.*

You stated you wanted a reply to your letter, which is why I went ahead with gathering information in order to provide responses to your letter as you had requested. I did not reach out to discuss further with you or Andy because you had already given your account of the issues in your initial letter to Victoria Bishop.

I am sorry if I have misunderstood, but the grievance procedure is the appropriate framework to address your concerns…

As per Section 13 of the Grievance Policy, which remains open to you as an ex-employee, you can;

a) Proceed to a formal Stage 2 Hearing (you would have right of appeal);

b) Attend a meeting (virtual) to discuss your grievance with an independent manager who will then provide a response within 10 working days (this will conclude the process);

c) If you do not wish to meet with anyone, then a written response to your recent letter will be provided within 28 days (this will conclude the process).

I hope the above gives clarity to ensure all concerns are addressed in a timely manner. Please advise me on how you would like to proceed…".

The Claimant did not reply to that email.

95. On 15 August 2022, the Claimant lodged a Claim Form commencing these proceedings with the Tribunal.

The facts in dispute

*The First Disputed Fact: Did the Respondent have discussions with the Claimant whereby words to the effect that "*the Trust needs value for money of a band 6 role*" and that the Respondent was "*trying to find work that doesn't exist*" for the Claimant were said?*

96. The Claimant says that words to the effect of these statements were said by the Respondent in internal correspondence obtained by her in response to one of her data subject access requests. Unfortunately, the relevant documentation has not been included in the hearing bundle.

97. What does seem clear from the Claimant's evidence is that her position is that these comments were not communicated *to her* until provided in response to her data subject access request – these were in fact communications between other members of the Respondent about the Claimant and her inability to return to a face-to-face training role in-person.

98. As the Claimant simply has not produced any evidence that these disputed statements were communicated to her, the Tribunal cannot find that they were.

The Second Disputed Fact: Did the Respondent fail to act on recommendations in OH reports or consult with the Claimant about them?

99. Despite being questioned about this by Mr Ross and the Employment Judge as part of the Panel's questions, the Claimant could not point to any recommendation in any of the five OH reports that was not acted on by the Respondent.

100. Taking each OH report in turn:

    a) The First OH Report of 13 October 2020 advised that the Claimant needed to take all reasonable precautions to stay safe and to avoid working in an environment that was not COVID secure, and said that if the Respondent could continue to accommodate her working remotely on a temporary basis until she had had her surgery, this would be beneficial. The Respondent did this.

    b) The Second OH Report of 19 April 2021 observed that the Claimant was not physically fit to return to safely perform her role, in particular, the face-to-face mat work, or to drive, and recommended that she be permitted to work from home – which she was.

    c) The Third OH Report of 2 June 2021 observed that she was signed off work until 9 June 2021. It did not make recommendations.

d) The Fourth OH Report of 27 September 2021 said that she was, at that time, unfit for work. It identified three areas that the Claimant said needed to be resolved to render her fit for work: recovery from surgery, her future treatment plan in light of the recurrence of her cancer (which was, at that time, awaited), and resolution of her grievance. The Fourth OH Report suggested several temporary reasonable adjustments which could be put in place to help the Claimant with the duties of her job *when she was in a position to return* (such as a phased return to work over four weeks), but the Claimant was never in fact in a position to return to work, so the opportunity to make or fail to make these adjustments never occurred. It is possible that, when alleging that the Respondent failed to act on OH recommendations she is contending that the Respondent failed to take steps to resolve her grievance – the question as to whether, as a matter, the Respondent did fail to do so is dealt with below.

e) The Fifth OH Report of 20 January 2022 recommended several "reasonable adjustments":

i. A phased return to work;

ii. After the grievance issues were resolved, the creation of a supported return to work followed by site-based risk assessments; and

iii. Avoiding direct physical combative mat work with a physical opponent for at least eight months.

Again, the opportunity to make or fail to make the first of those did not arise because the Claimant was never in a position to return to work. The second, involving a return to work plan and site-based risk assessments, was dependent on resolution of the Claimant's grievance, which did not occur. The third was, again, predicated on the Claimant returning to work, and she was never in a position to return to work after this report was produced.

101. The Tribunal considered whether the Claimant was asserting that, despite the Fourth OH Report of 21 September 2021 stating that she was not fit to work, the Respondent's invitation to her to take part in a meeting on 1 October 2021 (the virtual stage two absence review meeting) was the failure that the Claimant was referring to – but firstly, the Claimant has not said this, and secondly nor has she offered any evidence that she said she was unfit to attend at the time.

*The Third Disputed Fact: Did the Respondent fail to have regard to the Claimant's GP sick notes which cited "*stress at work*" in that it failed to carry out a stress prevention assessment?*

102. As the Respondent has pointed out, the Claimant's GP sick notes only cited work-related stress after the Claimant had resigned (the first such Statement of Fitness

to Work was dated 8 March 2022). The Respondent's evidence is that its stress prevention assessments are carried out by OH (or some other specialist if OH recommended that), and that the preceding OH report of 20 January 2022 had confirmed that the Claimant was not, at that time, fit for work, but recommended that when she was a supported return to work plan should be devised. That never occurred, and the Respondent's position is that such a return to work plan may well have included consideration of stress prevention, if OH had recommended that.

103. The second point made by the Respondent is that, by the time the Claimant's GP fit notes cited work-related stress, the Claimant had un-paused her grievance and the Respondent had tried to arrange an investigation meeting concerning that grievance, which the Claimant blocked, thereby inhibiting resolution of the work-related stress.

104. The evidence supports the Respondent's contentions, and so we find that the Respondent did not fail to have regard to the Claimant's GP sick notes by not carrying out a stress prevention assessment.

*The Fourth Disputed Fact: Did Mr Stevens and Ms Stonebridge, between February and May 2021, make comments to the Claimant that she was "*not working to capacity*", and that she was "*stressing the team*" by her absence, saying that support would only be forthcoming if management supplied "*additional trainer resources*" and emphasising that her disability was having an impact on the team budget?*

105. The Claimant says that these things were said. The Respondent denies this, but it acknowledges that, in the time relevant period, Mr Stevens did communicate to her that the resumption of face-to-face training meant that:

a) he needed the whole team to be available to conduct that face-to-face training;

b) he was, therefore, seeking budget approval to bring in cover for her role and keep her retain as part of the team working remotely; and

c) if that funding was not available, they would need to explore what alternative duties could be undertaken by her, or if none were available then consider temporary redeployment.

106. When giving oral evidence, Mr Stevens repeated the denial in his witness statement that he had said anything to the Claimant to the effect that her absence was causing stress for the team, but he also acknowledged that in fact it was. Consistent with the evidence of Ms Laszkiewicz and Ms Stonebridge, Mr Stevens was clear that a business decision had been taken by the Trust to bring the VR training programme back to in-person training, and that drove him to seek the budget approval for cover. Mr Stevens said that the Claimant's absence was having a negative impact on the rest of the team - that team was experiencing

stress connected to significant workload and being temporarily "down" one very experienced member of its team from that "on the mats" training (as the Claimant and the Respondent referred to in-person training).

107. While we do not consider that these points were made to the Claimant in the blunt way that she alleges or using the precise words alleged, we find that the Respondent would have said to her that:

a) there was insufficient home-based work for the Claimant to do. We find this was communicated to her as part of discussions about encouraging her to consider temporary redeployment options (it certainly was communicated to her by Ms Stonebridge outside of the period alleged, in her response to the Claimant's grievance on 7 June 2021). We consider that it was said by Mr Stevens in the stage one absence meeting on 14 May 2021. Mr Stevens' witness evidence says that "*Whilst advice from HR had said not to discuss redeployment at a stage one meeting Nikki did push the conversation onto this and I felt it appropriate to confirm at that stage that following our review and the return to full face to face training that it wasn't possible for the VR team to accommodate the reasonable adjustment of working from home. On this basis, if she wanted to continue to work from home this would likely mean we would need to look at redeployment or other duties outside the VR team.*" That discussion would necessarily have involved Mr Stevens communicating to the Claimant that that requested adjustment could not be accommodated because there was insufficient work within the VR team for her to do from home; and

b) there was a significant degree of pressure on the VR team to catch-up on backlogged in-person training (due to Covid-19 in-person training suspension), and this contributed to the need to seek budgetary approval for cover, or to why they would encourage her to consider temporary redeployment options if that extra budget was not forthcoming. Mr Stevens' oral evidence was clear that there was that significant pressure on the VR team. He said that:

"*once it was clear that training in more of a traditional form needed to happen, it became apparent that the options were to do that role, or other options – redeployment was the only real solution left – through no fault of her own she could not do the job she was employed to do – no engagement was had and each conversation was met with another barrier to being able to engage in the team and the role as required – we did have discussions about it in the stage 1 absence meeting… I recall even the union rep accepting by the end of it that temporary redeployment was an acceptable option even if it was not one that Nikki wanted*".

Again, we consider that it would have been a natural part of that discussion about why she needed to be redeployed that the other members of the

team were facing significant pressure in light of the Claimant's inability to be delivering training "on the mats".

The Fifth Disputed Fact: Did the Respondent fail to carry out a risk assessment in respect of the Claimant further to her mentioning this in an email on 10 May 2021?

108. The email this refers to from the Claimant to Mr Stevens on 10 May 2021 included the following:

"*In my preparation of this meeting [the Stage one absence meeting scheduled for 10 May 2021] can I draw your attention to the following:*

1. I understand from the Absence Management Policy that as my line manager you are responsible for completing a Risk Assessment (section 6.5). As I have kept you informed throughout my cancer treatment, impending surgery and ongoing complications caused by a rarer cancer, could you forward me any Risk Assessments you may have completed since you became my line manager, related to my cancer and my work. As I have not participated in this process previously, I request that I am involved in any future Risk Assessment process you undertake relating to my present condition."

109. The relevant part of the policy referred to read:

"*Line Managers are responsible for:- …*

- *Undertaking risk assessments for their staff.*"

110. Mr Stevens replied to the Claimant by email on 11 May 2021, and in relation to this point he wrote:

"*No further risk assessment has been deemed necessary to carry out by myself, as you have continued to work from home throughout the entirety of this period, and have done so under the guidance and conditions set by your GP, Consultant Oncologist, the Occupational Health team at SABP [the Respondent] and, in the case of Covid, the government. You will of course be included in any future risk assessment process when you return to work, in collaboration with a further OH follow up.*"

111. The Tribunal agrees with the Claimant that a risk assessment was not carried out on the Claimant after 10 May 2021, but the Claimant was assessed as not fit for work by her doctor:

a) For the period 27 April 2021 to 14 May 2021 (a Saturday);

b) For the period 17 May 2021 (a Tuesday) to 7 July 2021; and

c) For the period 3 August to 28 January 2022,

and she resigned from her employment on 7 February 2022. This meant that there were only 24 working days between her 10 May 2021 email and her resignation.

112. The Claimant did not return to in-person working for any of those working days, and Mr Stevens' explanation of 11 May 2021 would apply to those days. We therefore do not consider that there was a "failure" to carry out a risk assessment on any of those 24 days, but rather that a risk assessment was not carried out because Mr Stevens did not deem it necessary to do so.

The Sixth Disputed Fact: Was Ms Stonebridge the subject of the Claimant's grievance?

113. The Claimant's initial grievance concerned the content of the stage one absence meeting with Mr Stevens on 14 May 2021, and so that clearly did not include Ms Stonebridge (and nor does the Claimant contend that it did).

114. The Claimant resigned on 7 February 2022, and as part of her resignation complained about Ms Stonebridge's response to her initial grievance ("*The final straw was your response to my grievance Kim (informed by discussions with Peter) which was inaccurate, defensive and failed* [to] *portray the reality of my, or my union representatives experience of my stage one sickness meeting. How dare Peter say that my illness and absence was placing stress on his team!*").

115. The Claimant complained to Ms Bishop of the Respondent's HR team on 15 March 2022, raising 23 points, some of which concerned Ms Stonebridge.

116. The Tribunal finds that Ms Stonebridge's actions/inactions became part of the Claimant's grievance from 7 February 2022.

The Seventh Disputed Fact: Did the Respondent encourage Mr Stevens to apply for the band 7 VR Team Lead role in the run-up to his appointment to that position in August 2020?

117. The Claimant has asserted that the Respondent encouraged Mr Stevens to apply for the band 7 role leading the Violence Reduction team, but she has offered no evidence to support this assertion, besides the fact that Mr Stevens was in fact appointed to the position.

118. The relevant Respondent witnesses, Ms Laszkiewicz (who the Claimant believes did the encouraging) and Mr Stevens, both deny that the Respondent encouraged him to apply.

119. We have no basis (besides the Claimant's bare assertion) for finding that this encouragement happened. We find that it did not.

The Eighth Disputed Fact: On 9 March 2021, did Mr Stevens tell the Claimant that he wanted to redeploy her out of the VR team?

120. The Claimant's witness statement includes the following:

"*On Tuesday the 9th of March 2021 I had a return-to-work meeting on the phone with my line manager [Mr Stevens]… [Mr Stevens] made it very clear in this meeting that he had decided that as I was unable to train people face to face, he wanted to redeploy me as I was not functioning as part of the team, and he needed to replace me so that the team had its fill capacity, and he could be referring me again to occupational health… My partner [Mr Johnston] had listened to this call on loudspeaker on my phone and was dismayed at [Mr Stevens'] uncaring and ill-informed attitude to me and my condition.*"

121. The Claimant's oral evidence similarly asserted that:

"*I remember the conversation very clearly. He [Mr Stevens] said to look at it in a positive way – he wanted to redeploy me out of the team, as it was in my best interests.*"

122. The relevant part of Mr Johnston's witness statement reads:

"*I recall that [the Claimant] had a return-to-work meeting on the telephone with [Mr Stevens] sometime at the beginning of the week commencing the 8th of March 2021… [The Claimant] became distressed during the call as [Mr Stevens] had listened to her divulge [medical information which could indicate areas of concern] and [Mr Stevens'] response to this was to state that she would need redeploying out of the VRT team and another referral to occupational health.*"

123. Mr Johnston was apparently so concerned that he persuaded the Claimant to permit him to contact Ms Laszkiewicz, which he then did. Ms Laszkiewicz's witness statement recollection of that conversation is that it was concerned with redeployment:

"*Mr Johnston opened the call by saying he thought the Trust should be offering [the Claimant] alternative work in the department. I tried to reassure him that this was being looked into but I did explain that [the Claimant]'s role was to train and if this could not be done there was little else she could do as a trainer in the team.*"

124. The notes of the return to work meeting on 9 March 2021 so not mention possible redeployment, but do record that further OH and HR advice was awaited.

125. Mr Stevens' witness statement says:

"*[The Claimant] submitted a sick note on March 2021… and so we had to then move quickly to consider how we would avoid serious long term pressures due to her absence from the team and the full return of face to face training… I don't recall speaking to [the Claimant] about redeployment on 9 March 2021; however… redeployment was discussed as a potential option in the short term whilst she was restricted in her ability to carry out her role. This was always supportive and unpressured.*"

126. It is also clear that, without the Claimant being present, Mr Stevens and Ms Stonebridge had a meeting with a member of the Respondent's HR team on the same day, 9 March 2021, regarding redeployment of the Claimant. In

summarising the advice they received to Ms Laszkiewicz on 18 March 2021, Ms Stonebridge said:

"*Jo kindly advised that the OH report will be helpful… in relation to Nikki's ability and the requirements in her Job Description… Jo advised we looked at the percentage of the role, if any, that can be completed with remote working… This is my summary of where we are at and I await Pete's as he has had other contacts with Nikki.*"

127. Mr Stevens replied on the same date:

"*I don't have much else to add to what Kim has explained, and I agree with her summation of the situation…*"

His email does not mention any discussion with the Claimant about possible redeployment on 9 March 2021.

128. Again, in determining this disputed fact, the Tribunal is left with the accounts of the Claimant and Mr Johnston on the one hand with the not very definitive account of Mr Stevens and the email correspondence of 18 March 2021 on the other. We are also very conscious of how the two sides would each have approached the matter from a different sensitivity, with the Claimant and Mr Johnston naturally very distressed and anxious about the whole situation, and Mr Stevens likely concerned to strike the right balance between supporting the Claimant and supporting the needs of the Respondent for a backlog in in-person VR training to be cleared quickly.

129. The way this allegation is put by the Claimant is that Mr Stevens "*wanted*" to redeploy her out of his team.

130. The Claimant, through subject access requests made and responded to much later on (the earliest subject access request response received by her was 30 September 2021, and she only received copies of emails pertaining to the same on 20 October 2021 – both dates significantly after the 9 March 2021 date with which this allegation is concerned), has seen that Mr Stevens put together a proposal for covering the Claimant's role on 2 March 2021. That proposal was focused on accessing additional resource for the VR team (his focus was not on what should happen to the Claimant). That paper stated:

"*I propose an initial 1-year fixed term contract or secondment, 37.5 hours per week at band 5.*"

131. In light of the evidence summarised above, the Tribunal considers that Mr Stevens, in his return to work meeting with the Claimant on 9 March 2021, would have discussed the need to ensure that the Claimant was sufficiently occupied for 30 hours per week, and that he would have mentioned redeployment as a possibility for some or all of that time, depending on the content of the awaited OH report. We do not consider that he would have been definitive (as he was clearly awaiting the OH report), and nor do we consider that Mr Stevens would have communicated it as something that he "wanted" to do.

The Ninth Disputed Fact: On 16 October 2020, did Mr Stevens inform the Claimant that there was a new way of working in that the Claimant's role would be primarily face-to-face and delivering a lot of physical training?

132. The Claimant conceded, when giving oral evidence, that (as the Respondent avers) this was not in fact a new way of working, but a reversion to the pre-pandemic way of working.

133. It is clear from the documentary evidence that Mr Stevens did say, in an email to the Claimant on this date, that:

"*Now that the primary role of the Violence Reduction team is face to face and delivering a lot of physical training, it is particularly important that we have measures in place that protect you, and also to support the rest of the team.*"

134. The Tribunal finds that this was said, but that this was not a new way of working.

The Tenth Disputed Fact: Between November and December 2020, did the Respondent fail to invite the Claimant to attend any of the planning meetings to deliver face-to-face training, or ask her to contribute to those meetings?

135. The Claimant's witness statement records:

"*I was aware that [from mid-October 2020] the Trust and [Mr Stevens] were planning the re-introduction of face-to-face training and I was concerned that [Mr Stevens] as my line manager was not having conversations with me about what I could be doing to support the team and the wider Trust as I had been doing.*

At this time, I felt the communication with me had ceased and I was concerned that due to my cancer and my inability to provide face to face training at that time I was being eased out of my team and my role."

136. In oral evidence, the Claimant said:

"*When we were going back [to in person training], the focus was for me to be there in person – that was really difficult for me – I was vulnerable and waiting for surgery. I requested to continue online – to be there, alongside two other trainers in the room. I could do break-out sessions, but I was at home and still participating in a fulfilling way… [but] They deemed it couldn't happen, that I needed to be there… I did feel I could participate… they would be able to deliver it face-to-face, but I could still be part of it and still be a senior instructor delivering the programme as I had done through covid.*"

137. When asked what aspects of her role she could continue to deliver, the Claimant said:

"*Continuation of the personal safety programme, and my support of social care, and the reason I was putting a lot of emphasis on that was because it was something I could do. I wanted to be in the room, but I couldn't do that.*"

138. The crux of this allegation became clearer from Mr Johnston's cross-examination of Mr Stevens, when Mr Johnston asked Mr Stevens "*Isn't it right that as [the Claimant] was not delivering face-to-face training, you did not invite her to meetings related to face-to-face training?*" - that seemed to be the Claimant's concern. Mr Johnston continued: "*Isn't it right that at this time on at least two occasions she said 'take me with you', so she could be present virtually while you were delivering face-to-face training?*" Mr Stevens replied: "*I don't recall that request at all.*"

139. Mr Stevens' written witness statement contained the following, when describing this time period:

"*Given [the Claimant]'s need to shield, the OH advice, and her confirmation that she couldn't undertake face to face training (which I understood), I then had to step in and deliver the training. [The Claimant] was instead tasked with compliance matters and delivering virtual training. Having reviewed meeting invites when I was an employee at the Trust, I could not see any meeting that [the Claimant] wasn't invited to that would have been relevant for her to attend towards the end of November and December 2020. The vast majority of the meetings were with those delivering face to face training and took place in person. There weren't any planning meetings in November and December 2020 as training would have already commenced then. Any online meetings she would have been invited to.*

I am aware that [the Claimant] suggests that the Trust ignored her request to participate in training in December 2020. This is not the case, there was no request in December 2020. Nikki was at that time doing online training to new starters delivering half day training."

140. The Tribunal is faced with two conflicting accounts on this point. The Claimant has failed to point to any specific meetings that she was not invited to. Mr Stevens is more specific, saying that there were no such planning meetings in the time period the Claimant alleges she was not invited, as training was underway by that time. Mr Stevens' greater specificity is, on balance, more convincing, given that he refers to having reviewed the meeting invites from this period. The Tribunal finds that the Claimant has failed to prove this allegation on the balance of probabilities.

The Eleventh Disputed Fact: In December 2020 did the Respondent ignore the Claimant's request to participate in training and/or fail to carry out any risk assessments that might enable her to participate?

141. This is, in fact, two distinct questions.

142. Firstly, as regards the Claimant's request to participate in training, this appears to refer to the Claimant's request to participate in the VR training programme remotely. The Claimant was very clear in her evidence that she could not participate in physical training "on the mats", by which she meant that she did not believe that she could be in the same physical room as the delegates, engaging in the physical part of VR training. The Claimant believed, though, that she could still participate remotely, by viewing the training using technology, and offering feedback from home.

143. Ms Laszkiewicz expressed the Respondent's position on this most clearly. While acknowledging that the Respondent was "*very innovative*" in its approach to VR training during the Covid-19 pandemic, Ms Laszkiewicz was resolute that the changes made during the pandemic were not permanent, and that they resulted in a much inferior system of working for VR training. Ms Laszkiewicz spent some time explaining what she meant, talking about the subtlety of safe VR practices. From this, the Tribunal understood that VR training is designed to protect staff, patients and others in the vicinity if a patient of the Trust becomes violent. Ms Laszkiewicz outlined that it is of critical importance that VR training is in-person, as lives and the health of the people involved depend on "*seeing how you hold, how you support an individual in order not to do any damage – you as a trainer need to be quite close to the individual*". Ms Laszkiewicz was definite and emphatic that the Claimant "*wouldn't have been able to observe the detail*" of how a delegate performed VR techniques without being physically in the room.

144. The background explanation Ms Laszkiewicz gave about the actual training environment helped the Tribunal understand what was being talked about. Ms Laszkiewicz said:

"*we have a purpose-built environment which has a seclusion room… we have beds available – the camera would have to pan around – often the trainers have to play the service user in distress*".

145. When asked in oral evidence whether the Respondent could have had two or three trainers in the room with the Claimant participating remotely from home, Ms Laszkiewicz said:

"*Not practical at all. The two or three trainers in the room will be moving the staff around, [the Claimant] couldn't see what's going on. We will have questions from the floor about how to use equipment, etc. [The Claimant] would have to sit and intersperse that communication with the theory on this… I have never known violence reduction being delivered virtually. We only did it through covid because we had no choice. We did our utmost best to ensure staff remained safe. Clinical managers and directors asking us to bring course back in face-to-face, because we know that's how our staff learned best. Delivering safe service for NHS patients. Our staff need to be safe.*"

146. Mr Stevens expressed a similar view. When asked "*Please explain to the Tribunal whether the Claimant training online would have worked*", Mr Stevens replied:

"*… Regarding the physical side of the practical training, two trainers within the classroom would have spent the majority of the time role-playing. They were only able to assess and observe by that way. The third person had to be in the vicinity [to safely assess what was going on]*".

147. While Ms Stonebridge's evidence was that she had never been a VR trainer (unlike Ms Laszkiewicz and Mr Stevens), her oral evidence was that she understood that management had taken the decision that VR training was one of the priority training programmes to return to in-person face-to-face training. She also said that people dialling-in to training remotely in the way suggested by the Claimant just does not work, as the remote attendees cannot hear properly. "*I tried it that year with a bespoke course of children and young people – it didn't work – we didn't have adequate [audio visual] equipment with speakers to enable us to deliver it very successfully*".

148. It is also far from clear that the Claimant requested to participate in the VR training remotely at this time. The Bundle, arranged chronologically, jumps from emails exchanged on 2 and 3 November 2020 to a Supervision Record Sheet dated 22 February 2021 – there is no written request from the Claimant about her participation in training in December 2020 (or indeed, any correspondence from anyone in December 2020 in the Bundle). The Claimant's witness statement, again arranged chronologically, does not mention any request made by the Claimant to participate in training in December 2020. The Claimant's oral evidence was unspecific:

"*They [i.e., the Respondent] deemed it [the Claimant's participating in VR training remotely from home] couldn't happen, that I needed to be there. I wanted to be part and parcel of the VR team, but I was unable to be face-to-face because I was shielding… I did feel I could participate through the VR programme – they would be able to deliver it face-to-face, but I could still be part of it and still be a senior instructor delivering the programme as I had done through covid.*"

149. When asked by Mr Johnston whether the Claimant had asked him on at least two occasions to "*take me with you*" so she could be virtually present while the remainder of the VR team were delivering face-to-face training, Mr Stevens' evidence was that he did not recall that request "*at all*".

150. There is simply an absence of evidence to support the first allegation, and the Tribunal finds it is not made out.

151. As for the second part of the allegation, that the Respondent failed to carry out any risk assessments that might enable her to participate, in light of the fact that the Respondent was of the firm view that the training needed to take place in-person, and the Claimant was equally clear that she could not participate "on the mats", risk assessments were not applicable.

152. These allegations made by the Claimant fail.

The Twelfth Disputed Fact: Did the Respondent allocate a male line manager to the Claimant during her sickness absence and while she was awaiting surgery?

153. The Claimant has been non-specific about the date/period that this allegation relates to, but it is accepted that Mr Stevens was appointed to be the Claimant's line manager at some point in August 2020, when he was successful in his application for the newly-created band 7 role, and that Ms Stonebridge was identified as the Claimant's point of contact from 11 May 2021.

154. In light of the information about when the Claimant's sickness absence began and the date of her surgery, this allegation appears to relate to the period of 1 March to 10 May 2021.

155. No "allocation" of line manager occurred in this period, save that when the Claimant expressed a desire to have a female point of contact (on 10 May 2021), this was immediately acted upon, and Ms Stonebridge was designated that point of contact (on the next day, 11 May 2021).

156. We find this disputed fact not made out.

The Thirteenth Disputed Fact: Did the Respondent fail to respond to the Claimant's question posed in her email to Ms Badmus on 19 April 2022: "if the Trust is treating my email to Victoria as an extension to my existing grievances, why haven't you gathered information about the whole thing?"

157. It is clear that the Trust did respond to this on 31 May 2022 – the relevant letter from Ms Badmus is included in the Bundle, and suggests a meeting is held to discuss the Claimant's concerns - so this allegation fails.

The Fourteenth Disputed Fact: Was the Respondent dismissive of the Claimant's concerns/grievance, and/or did it fail to provide redress to them?

158. The Claimant raised her grievance on 25 May 2021 by email to Ms Stonebridge. Ms Stonebridge acknowledged receipt and emailed to say that she would need time to digest and respond in full. On 7 June 2021, Ms Stonebridge provided that fuller and considered reply. On 9 June 2021, the Claimant (via her trade union representative, Mr Doran), requested that her grievance be paused until she had sufficiently recovered from her surgery on that date.

159. On 9 January 2022 the Claimant wrote to Ms Stonebridge saying that she wished to "un-pause" her grievance. Ms Stonebridge replied the next day to the effect that she had reached out to Mr Doran and to Ms Meek in the Respondent's HR team to schedule a meeting.

160. That meeting was scheduled for 27 January, but was then rearranged due to the availability of the Claimant or Mr Doran, to 9 February 2022. The Claimant did not attend the rescheduled meeting, and (as noted above), confirmed in oral

evidence to the Tribunal that she had started to receive documents in response to a data subject access request she had made, and did not feel ready to attend that meeting. The Claimant had resigned on 7 February 2022.

161. The Tribunal finds that it was legitimate for the Respondent to agree to Claimant's request that her grievance be paused due to her health. When it was "un-paused" by the Claimant, Ms Stonebridge attempted to progress the hearing of the grievance, but was prevented from doing so by the Claimant or her representative's inability to attend the 27 January 2022 meeting, and thereafter by the Claimant's admitted reluctance to attend that meeting until she felt she had sufficient understanding of documentation provided to her pursuant to a subject access request.

162. We find that the Respondent was far from dismissive of the Claimant's concerns, and nor did it fail to address them. It could not provide redress until the grievance had been determined and then only if her complaints were upheld – it never got that far because of the Claimant's lack of cooperation with that process from January 2022 onwards.

The Law

Constructive unfair dismissal

163. The concept of constructive dismissal is set out in section 95(1)(c) of the Employment Rights Act 1996:

"*For the purposes of this Part an employee is dismissed by his employer if… (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*"

164. The act of dismissing an employee is capable of founding a complaint of discrimination (or victimisation) under the 2010 Act - section 39(2)(c) (and section 39(4)(c)), and the 2010 Act states clearly that references to dismissal include constructive dismissal (section 39(7)(b)).

165. This treatment of the employee's resignation as "constructive dismissal" pre-dates the 1996 Act, and Lord Denning MR in the Court of Appeal decision in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 described the nature of the contractual breach which entitles the employee to accept that breach and treat the employer's conduct as dismissing them:

"*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."

166. Therefore there are three elements that an employee needs to prove so as to demonstrate that they have been constructively dismissed:

a) A fundamental breach of the contract of employment between them on the part of the employer;

b) A causal link between the employee's resignation and that employer breach; and

c) Evidence of the employee accepting that breach before any affirmation of the contract.

(i) Fundamental breach

167. An employer may, in the words of Lord Denning MR in *Western Excavating*, "[*show*] *that* [*they*] *no longer* [*intend*] *to be bound by one or more of the essential terms of the contract*" through a course of conduct, which may cumulatively amount to a fundamental breach of contract. This is so even if the 'last straw' incident does not, by itself, amount to a breach of contract (*Lewis v Motorworld Garages Ltd* [1986] ICR 157), although that 'last straw' must contribute to the course of conduct relied upon. A blameless act by the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer (*Omilaju v Waltham Forest London Borough Council* [2005] ICR 481). The test of whether the term of the contract has been breached is an objective one.

168. Where there has been a 'course of conduct' and the employee has continued to work, the employee may still rely on that course of conduct where it is continuing, despite the fact that the employee has continued to work under the contract, seemingly affirming it in spite of the employer's breaches – the effect of the 'last straw' is to revive the employee's right to resign (*Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1). Whether the 'last straw' doctrine is engaged on the facts depends on what prompted the employee to resign: should the 'last straw' act rightly be seen as part of a cumulative breach, or should it properly be regarded as a single act which prompted the employee's resignation? Only the former engages the 'last straw' doctrine, not the latter.

169. The term breached may be an express term of the contract, or an implied one. As the House of Lords held in the case of *Malik (A.P.) v Bank of Credit and Commerce International S.A. (In Compulsory Liquidation)* [1997] UKHL 23, there is an implied term of trust and confidence between an employer and an employee that is characteristic of an employment relationship. That term requires that an employer will "*not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*". Such a breach is capable of founding a complaint of constructive dismissal.

170. Whether the implied term has been breached is a question of fact for the tribunal – it does not require the employer to intend to destroy or damage the relationship (*Leeds Dental Team Ltd v Rose* [2014] IRLR 8).

171. "*Not without reasonable and proper cause*" is a relevant part of the test, and so it will be necessary to assess the reasons for the employer's conduct (*Sharfugeen v T J Morris Ltd* UKEAT/0272/16).

(ii) Causal link

172. There must be a causal link between the breach by the employer and the employee's resignation (one case example is that of the Court of Appeal decision in *Meikle v Nottinghamshire County Council* [2005] ICR 1).

173. If there is a different reason for the employee's resignation besides the employer's conduct, such that the employee would have left the employer's employment in any event regardless of the employer's conduct, then there has not been a constructive dismissal (*Walker v Josiah Wedgwood and Sons Ltd* [1978] ICR 744). However, that does not mean that the employer's conduct needs to be the sole reason for the employee's resignation – it is sufficient if the employer's conduct is *a substantial part* of mixed reasons for resigning (*United First Partners Research v Carreras* [2018] EWCA Civ 323).

(iii) *Acceptance of that breach without affirming the contract*

174. By resigning, the employee accepts the employer's repudiatory breach. As provided for expressly by section 95, the employee need not resign with immediate effect – resignation on notice may still suffice as acceptance by the employee of the employer's repudiatory breach. However, if the employee waits too long after the breach before resigning, they will be taken to have affirmed the contract and consequently to have lost the right to claim constructive dismissal. As Lord Denning MR put it in *Western Excavating*, the employee:

"*must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*".

175. However, this does not necessitate that the employee terminates the contract immediately. In *Cockram v Air Products plc* [2014] ICR 1065 the employee resigned giving seven months' notice when he was contractually only required to give three. The question arose as to whether, by giving longer than his contractually-required notice, the employee affirmed the contract. The EAT decision of Mrs Justice Simler DBE explained that:

"*Whereas at common law the giving of any notice to terminate the contract would amount to affirmation of it, under s.95(1)(c), the fact of giving notice does not by itself constitute affirmation. This is a limited variation of the common law position to allow only for the giving of notice. Accordingly, to satisfy the requirement that their resignation with or without notice is "in circumstances in which he is entitled*

to terminate without notice by reason of the employer's conduct" the employee must not affirm the contract – whether by prolonged delay before resigning, by implication, by an equivocal election or by conduct that is consistent only with the continued existence of the contract. There is no basis for inferring that s.95(1)(c) provides an inflexible rule that post-resignation affirmation as a concept (however rare as a matter of fact) is excluded from consideration. Where an employee resigns on notice and despite doing so, his conduct is inconsistent with saying that he has not affirmed the contract, that conduct must be capable of consideration by a fact-finding tribunal. Where he gives notice in excess of the notice required by his contract, he is offering additional performance of the contract to that which is required by it. That additional performance may be consistent only with affirmation of the contract. ***It is a question of fact and degree whether in such circumstances his conduct is properly to be regarded as affirmation of the contract.***" (Our emphasis.)

176. There is no set period after which the employee will be taken to have affirmed the contract – the length of the delay before affirmation will be deemed to have occurred will be fact-and-circumstance-specific.

"*… there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of* Buckland v Bournemouth University Higher Education Corporation *[2010] EWCA Civ 121, [2011] QB 323, [2010] 4 All ER 186, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.*"

(*Chindove v William Morrisons Supermarket plc* UKEAT/0201/13)

177. Provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purpose is merely to enable him to find another job (*W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443 and *Marriott v Oxford and District Co-operative Society Ltd.* (No. 2) [1970] 1 QB 186).

178. A constructive dismissal is not necessarily an unfair one (*Savoia v Chiltern Herb Farms Ltd* [1982] IRLR 166).

Direct discrimination

179. Section 13(1) of the 2010 Act describes the prohibited conduct of direct discrimination as follows:

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

180. In other words, two conditions must be satisfied for a direct discrimination complaint to be made out:

1. The employer must have treated the claimant less favourably than it treated or would treat others; and
2. The reason for that difference in treatment is a protected characteristic.

181. The assessment of whether treatment is less favourable is an objective one, i.e., whether the tribunal finds it so, not whether the claimant perceived it as such.

182. Section 13 involves the comparison of treatment afforded the claimant against a named or hypothetical comparator ("*than A treats or would treat others*"), and section 23(1) provides that:

"*there must be no material difference between the circumstances relating to each case*", i.e., there must be no material difference between the circumstances of the claimant and the comparator,

and where the protected characteristic in question is disability, the "*circumstances*" that should be considered are the abilities of the claimant and the comparator (section 23(2)).

Discrimination arising from disability

183. Section 15 of the 2010 Act provides that:

"*(1) A person (A) discriminates against a disabled person (B) if-*

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

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

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

184. This, as Simler J summarised in *Secretary of State for Justice v Dunn* UKEAT/0234/16/DM, means there are four elements that must be made out in order for a claim for discrimination arising from disability to succeed:

a. There must be unfavourable treatment;

b. There must be something that arises in consequence of the claimant's disability;

c. The unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability; and

d. The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

185. In addition, as per subsection (2), the respondent must have known, or should reasonably have known, that the claimant had the disability.

186. Section 136(2) and (3) provide that:

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

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

This means that the process of proving discrimination arising cases can be broken down into two stages.

187. Stage 1: Unfavourable treatment because of "something arising":

a. The burden of proving a *prima facie* case of discrimination sits on the claimant. They need to prove facts from which the tribunal could decide, in the absence of any other explanation, that:

i. They were subjected to unfavourable treatment;

ii. They were disabled at the relevant time;

iii. The respondent knew, or should reasonably have known, that the claimant was disabled at the relevant time;

iv. "Something arises" from the claimant's disability; and

v. The reason for the claimant's unfavourable treatment was the "something arising".

b. While there is no definition of what it means for a disabled person to be treated "*unfavourably*" in the legislation, the Code (at paragraph 5.7) sets out that:

"*This means that [the disabled person] must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment…*"

c. As HHJ Richardson put it in the EAT decision of *T-Systems Ltd v Lewis* UKEAT/0042/15/JOJ:

"*Unfavourable treatment is that which the putative discriminator does or says or omits to do or say which then places the disabled person at a disadvantage*".

d. "*Unfavourably*" means something like disadvantage or detriment, and represents a "*relatively low threshold of disadvantage*" (*Trustees of Swansea University Pension and Assurance Scheme v Williams* [2019] 1 WLR 93).

e. The causative link between the unfavourable treatment and the something that arises in consequence of the claimant's disability should be approached by way of a two-stage enquiry:

   i. What caused the unfavourable treatment? This focuses on the subjective reason in the mind of the alleged discriminator, which may require an examination of the conscious or unconscious thought processes of that person; and

   ii. Was the cause "*something arising in consequence of the claimant's disability*"? This is an objective question, which does not depend on the thought-processes of the putative discriminator.

   (*Pnaiser v NHS England* [2016] IRLR 170)

f. There may be more than one reason for the employer acting in the way that it did. For it to be "*something arising in consequence of the disability*", that something arising must have operated on the mind of the employer, consciously or unconsciously, to a significant extent (*T-Systems v Lewis*). That "*something arising*" need not be the sole reason, but it must be a significant or at least more than trivial reason (*Dunn*).

g. The cause of the unfavourable treatment is a question of fact for the tribunal.

h. "*[T]he more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact*" (*Pnaiser*).

188. Stage 2: Justification defence

a. If a claimant establishes a *prima facie* case (stage 1), the analysis shifts to whether the unfavourable treatment can be justified, and the burden of proving justification sits on the respondent (*Starmer v British Airways* [2005] IRLR 862).

b. Justification involves a three-staged analysis:

   i. Did the respondent have a legitimate aim?;

   ii. Did the respondent's treatment of the claimant achieve a legitimate aim?; and

iii. Was the respondent's treatment of the claimant a proportionate means of pursuing that legitimate aim? In other words, was the adverse impact on the claimant reasonably necessary to achieve the legitimate aim? This is an objective assessment as to whether the appropriate balance has been struck by the respondent on the given facts (*Hardys & Hansons plc v Lax* [2005] IRLR 726). Could a lesser measure have achieved the aim?

Failure to make reasonable adjustments

189. The duty to make reasonable adjustments is set out in section 20 of the 2010 Act, and for the purposes of this case the relevant part of that duty is as follows:

"*where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a matter in comparison with persons who are not disabled,* [A is] *to take such steps as it is reasonable to have to take to avoid the disadvantage*".

190. Elias P in the EAT decision of *Project Management Institute v Latif* [2007] IRLR 579 confirmed that the claimant must not only establish that the duty has arisen, but also that it has been breached.

191. A "*prospect*" of an adjustment removing a disabled employee's disadvantage would be sufficient to make the adjustment a reasonable one, it need not be a "*real prospect*" (*Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10).

192. This effectively involves four questions:

1. Did the respondent know (in fact, or by reason of knowledge being imputed to them because they could reasonably be expected to know) that the claimant was disabled at the relevant time?
2. If yes, did the respondent apply a provision, criterion or practice (the **PCP**)?
3. If yes, did that PCP cause the claimant (a disabled person) a substantial disadvantage?
4. If yes, was there a step that could reasonably have been taken that had a prospect of ameliorating the disadvantage?

193. The terms "*provision*", "*criterion*" and "*practice*" are to be construed widely. Although determined under the predecessor legislation, the conclusion of the House of Lords in *Archibald v Fife Council* [2004] ICR 954 that the term PCP encompasses the disabled person's terms, conditions and arrangements relating to the essential functions of their employment still applies.

194. The determination of whether the disadvantage is substantial (defined in section 212(1) of the 2010 Act as something that is "*more than minor or trivial*") is made by way of comparison with "*persons who are not disabled*". In other words, the

application of the PCP must cause greater disadvantage to disabled people than to non-disabled people. This necessarily means that the PCP applies, or is capable of applying, to non-disabled people as well as to disabled ones. An arrangement will not amount to a "PCP" if it applies, and would only ever apply, to the claimant alone (*Ishola v Transport for London* [2020] ICR 1204). It may not always be necessary to identify the non-disabled comparators if that is obvious from the nature of the PCP, and if the disadvantage to the disabled person is clear (*Fareham College Corporation v Walters* [2009] IRLR 991).

195. There must be some causative nexus between the claimant's disability/ies and the substantial disadvantage (*Thompson v Vale of Glamorgan Council* EAT 0065/20).

196. Once the claimant has proven a *prima facie* case that the duty arose (i.e., steps 1 to 4 above), the burden then shifts to the respondent to show that the adjustment was not a reasonable one for it to make. There is no requirement for the claimant to have identified with precision what adjustment it was reasonable for the respondent to make, but there must be some indication as to what adjustments it is alleged that the respondent should have been made:

"*Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.*"

(*Latif*)

197. The assessment as to whether the adjustment (or "*step*") is reasonable is an objective one (*Smith v Churchills Stairlifts plc* [2006] ICR 524). Paragraph 6.28 of the Code sets out some factors which might be taken into account when deciding what is a reasonable step for an employer to have to take, those being:

a) Whether taking any particular steps would be effective in preventing the substantial disadvantage;

b) The practicability of the step;

c) The financial and other costs of making the adjustment and the extent of any disruption caused;

d) The extent of the employer's financial or other resources;

e) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

f) The type and size of the employer.

A significant consideration will be the effectiveness of the proposed step (whether it would, or might, be effective in removing or reducing the disadvantage), but the relevant considerations in a given case will depend on its particular circumstances (paragraph 6.23 of the Code).

198. Discounting some or all of disability-related absence is potentially a reasonable step (*Griffiths v Secretary of State for Pensions* [2017] ICR 160).

Harassment related to disability

199. "Harassment" is defined in section 26, which includes, in subsection (1):

> "*A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*"

200. In other words, there are three elements to this test:

(a) There has been unwanted conduct;

(b) That has the proscribed purpose or effect; and

(c) That unwanted conduct relates to a relevant protected characteristic.

201. As for "*purpose or effect*", the requisite threshold is high – intending to or causing upset or offence is insufficient – the language used (e.g., "*violating*" and "*degrading*") points to purposes/effects which are serious and marked (*Betsi Cadwaladr University Health Board v Hughes* EAT 0179/13 and *Land Registry v Grant* [2011] ICR 1390).

202. Complaints of harassment will usually concern conduct persisting over a period of time, however this is not a requirement, provided that the conduct is sufficiently serious, such as physical assault (*Bracebridge Engineering Ltd v Darby* [1990] IRLR 3).

203. The question of whether conduct "*related to*" a relevant characteristic is determined by the Tribunal, not by the claimant's perception (*Tees Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495). It "*require[s] a broader inquiry and a more intense focus on the context of the offending words or behaviour; … although the mental processes of the alleged harasser would be relevant to whether the conduct complained of was related to a protected characteristic, evidence from the alleged harasser was not essential to the determination of that issue*" (*Bakkali v Greater Manchester Buses (South) Ltd (trading as Stagecoach Manchester)* [2018] ICR 1481).

204. Section 26(4) requires that:

> "*In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken account-*
>
> *(1) the perception of B;*

(2) the other circumstances of the case; and

(3) whether it is reasonable for the conduct to have that effect."

205. This is entails both subjective (the perception of B) and objective (whether it is reasonable for the conduct to have that effect) assessments of the effect of the conduct, as well as consideration of all the other circumstances of the case (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). The objective assessment is particular to the claimant – was it reasonable for the conduct to have the effect on that particular claimant?

206. The Code (at paragraph 7.18) indicates that the "*other circumstances of the case*" could be matters such as the personal circumstances of the claimant, such as their health, mental capacity, cultural norms, and previous experience of harassment, as well as the environment in which the conduct takes place.

Victimisation

207. Section 27 of the 2010 Act sets out that:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

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

208. This can be summarised by way of a three-stage test:

a) Did the claimant do a "protected act"?

b) If yes, did the respondent subject the claimant to a detriment?; and

c) If yes, was the claimant subjected to that detriment <u>*because*</u> they either did a protected act, or the respondent believed they had done or might do a protected act?

209. "*Detriment*" is not specifically defined in the 2010 Act (although section 212(1) provides that it does not include conduct which amounts to harassment), but the Code (at paragraphs 9.8 and 9.9) suggests that:

"*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards…*

210. The case law shows that detriment is assessed from the Claimant's point of view (*Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065), subject to that view being a reasonable one for a person in the claimant's position to hold (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337). An "*unjustified sense of grievance*" is not sufficient to amount to a detriment, but whether a grievance is justified or unjustified is assessed taking account of the particular circumstances of the claimant. The tribunal only needs to be satisfied that a reasonable worker ***might*** take the view that the conduct was to the worker's detriment (*Warburton v Chief Constable of Northamptonshire Police* [2022] EAT 42).

211. A failure to investigate a complaint of discrimination or harassment – provided there is a link between the making of the complaint and the failure to investigate it – is capable of amounting to detrimental treatment (*A v Chief Constable of West Midlands Police* EAT 0313/14).

212. Whether the detriment was "*because*" the claimant did (or the respondent believes the claimant did or might do) a protected act is a question of fact. The doing of (or the belief that the claimant did or might do) the protected act must be a conscious or subconscious reason for the respondent's action or inaction (similar to the "because of" element in section 15 complaints).

213. In the case of *Khan*, the claimant had brought a claim for unlawful race discrimination, and subsequently asked for a reference from the respondent, which the respondent refused. The fact that he had brought proceedings was ***a cause*** of that refusal (had he not brought proceedings, he would have been given a reference), but this causal link was not considered sufficient by their Lordships to make out his victimisation complaint – the protected act needed to be ***a reason*** (conscious or subconscious) for the detriment. The distinction is easier to see when considering the question posed by Lord Hoffmann, of whether the respondent would have refused the request whatever the outcome of the litigation: if no, the reason for the refusal was the existence of the proceedings (and the respondent's legitimate desire to protect its position in those proceedings) and not the fact that the employee had commenced them and the victimisation allegation failed; if yes, the reason was the bringing of the proceedings and the allegation was made out.

214. The question to be asked is whether the fact that the claimant had brought proceedings alleging, or made an allegation of, unlawful discrimination (etc.) amounted to a significant influence on the employer's decision-making resulting

in the detriment (*Nagarajan v London Regional Transport* [1999] IRLR 572) – an influence which does not need to be of great importance but which needs to be more than trivial (*Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* 2005 ICR 931).

215. Lord Nicholls *Khan* in considered that:

"*Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation... An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings. [The legislation protecting against victimisation – on the facts of Khan, the Race Relations Act 1976, a predecessor statute to the 2010 Act] cannot have been intended to prejudice an employer's proper conduct of his defence, so long as he acts honestly and reasonably. Acting within this limit, he cannot be regarded as discriminating by way of victimisation against the employee who brought the proceedings.*"

Time: discrimination and harassment complaints

216. Claims of unlawful discrimination and harassment under the 2010 Act are subject to a time limit stipulated in section 123(1), and:

"*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."

217. The primary time limit in section 123(1)(a) may be extended by ACAS early conciliation.

218. For these purposes, pursuant to subsection (3), "*conduct extending over a period is to be treated as done at the end of the period*".

219. In the case of a number of different acts of discrimination which do not amount to continuing discrimination, each distinct act will need to satisfy the time limit in section 123(1) in order for the Tribunal to have jurisdiction to consider them. Where, instead, the acts represent continuing discrimination, the series will be within the Tribunal's jurisdiction if the last of the series is "in time". Whether the acts are distinct or continuing involves looking at the substance of the complaints in question and examining whether they show that the respondent is responsible for an ongoing situation or a continuing state of affairs that is the subject of the allegation of unlawful discrimination (*Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530).

220. The starting point is the fact that Parliament has deemed a three month time limit appropriate, whilst recognising that it may be "*just and equitable*" to permit a longer period in a given case. This recognition, and wide discretion afforded the tribunal, is far wider than that applicable in other instances (e.g., complaints of unfair dismissal).

221. Assessing what further period of time it is "*just and equitable*" to permit involves the tribunal weighing up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other, having regard to all the circumstances of the case. Those circumstances include 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 respondent has cooperated with any requests for information; the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once they knew of the possibility of taking action (*British Coal Corporation v Keeble* [1997] IRLR 336).

222. There is no requirement to show a good reason for the delay. Time can be extended in the absence of an explanation of the delay from the claimant, though the absence of an explanation or apparent reason is a factor that should be taken into account in assessing whether the claim was brought within such further period as is just and equitable (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

Application to the claims here

Constructive unfair dismissal

223. As set out above, the Claimant avers that the Respondent did various acts, and was responsible for various omissions, which cumulatively amounted to a fundamental breach of contract.

224. Taking each allegation in turn:

a) The Respondent agrees that an email was sent by Ms Laszkiewicz (not to the Claimant) on 18 March 2021 which included the following:

"*she [i.e., the Claimant] cannot deliver face to face training, the fact is that if/when Nikki [the Claimant] returns in April we have no work for her to do*". The Claimant would likely have received a copy of that email as part of her data subject access request, and she received some emails by that means at the end of October 2021, ahead of her resignation.

The other two allegations made by the Claimant as part of the first limb of her constructive unfair dismissal complaint, that the Respondent had discussions about the redeployment of the Claimant, saying:

(i) "*the Trust needs value for money of a band 6 role*"; and

(ii) "*trying to find work that doesn't exist*",

were not evidenced by her, and so the Tribunal cannot find (the First Disputed Fact) that they were said as part of discussions with the Claimant (as she alleges);

b) The Respondent agrees that Mr Stevens did refer to the Claimant returning to face-to-face training on 22 February 2021, when she was awaiting surgery;

c) The allegation that the Respondent failed to act on recommendations in OH reports or consult with the Claimant about them fails (the Second Disputed Fact);

d) The allegation that the Respondent failed to have regard to the Claimant's GP sick notes which cited "*stress at work*" in that it failed to carry out a stress prevention assessment is not made out (see the Third Disputed Fact);

e) As for the allegation that, between February 2021 and May 2021 Mr Stevens and Ms Stonebridge made comments that the Claimant was not "*working to capacity*", and that she was "*stressing the team*" by her absence, saying that support would only be forthcoming if management supplied "*additional trainer resources*" and emphasising that her disability was having an impact on the team budget (the Fourth Disputed Fact), we have found that the Respondent would have said to her that there was insufficient home-based work for the Claimant to do, and that there was a significant degree of pressure on the VR team to catch-up on backlogged in-person training. We do not find that these points were made to the Claimant in the blunt way that she alleges or using the precise words alleged;

f) The Respondent did instigate formal sickness absence procedures against the Claimant, but we do not find that it should instead have carried out a risk assessment further to her mentioning this in an email on 10 May 2021. As set out in relation to the Fifth Disputed Fact, we find that there was no "failure" to carry out a risk assessment on the part of the Respondent further to the Claimant mentioning it on 10 May 2021; and

g) The Claimant has also alleged that the Respondent required the Claimant to attend a return to work/sickness absence meeting with Mr Stevens and Ms Stonebridge, who were the subject of her grievance, before having arranged a grievance meeting. The Claimant raised her grievance (or at least, her initial grievance) on 25 May 2021. The stage two absence review meeting to which this complaint seems to refer was scheduled for 27 January 2022 and then rescheduled for 2 February 2022, and the Tribunal has found that Ms Stonebridge's actions/inactions only became part of the

Claimant's grievance from 7 February 2022 (see the Sixth Disputed Fact), so the part of the complaint that relates to Ms Stonebridge fails. Moreover, the reason this meeting (which never in fact took place) preceded a grievance meeting is because the Claimant had asked for her grievance to be paused, which the Respondent agreed to. This allegation therefore fails.

225. This leaves: the email sent by Ms Laszkiewicz on 18 March 2021 (which appears to have been seen by the Claimant ahead of her resignation); the fact that Mr Stevens referred to the Claimant returning to face-to-face training in his meeting with the Claimant on 22 February 2021 when she was awaiting surgery; the Respondent having communicated to the Claimant that there was insufficient home-based work for her to do and that there was a significant degree of pressure on the VR team to catch-up on backlogged in-person training; and the fact that the Respondent instigated formal sickness absence procedures against the Claimant. The first legal issue for the Tribunal to determine is whether these matters, individually or cumulatively, amounted to a fundamental breach of her contract of employment, breaching the implied term of trust and confidence.

226. As the case law shows (e.g., *Western Excavating*), the question is whether the Respondent by these actions showed that it no longer intended to be bound by one or more of the essential terms of the contract – on the Claimant's case, the implied term of trust and confidence between the Respondent and the Claimant. As per the *Malik* case, the Claimant would need to show that the Respondent "*without reasonable and proper cause*", "[*conducted] itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*" – we find that it did not.

227. The Claimant agreed in oral evidence that the majority of her role was to deliver face-to-face training, and so neither Ms Laszkiewicz's email nor Mr Stevens' comments are out-of-kilter with that assessment. Mr Stevens' comments would have been difficult to make sensitively given the Claimant's impending surgery, but we consider it was legitimate for him to explore the Claimant's attitude to returning to work face-to-face in light of the removal of the Government guidance on shielding and the fact that the Claimant had been vaccinated for Covid-19. This is not to say that the Claimant was not reasonably anxious about returning to face-to-face work, but we find it was reasonable for Mr Stevens, as her line manager, to seek to discuss this with her. The Respondent had provisionally concluded that there was insufficient work for her to do remotely, and it was only by discussing that with her that it would be able to appreciate her response to that and her thoughts as to the scope of work that could be performed remotely. It was reasonable for it to do so, and to do so by reference to the pressures on the team as a whole so as to set out why redeployment was something it wanted the Claimant to begin to give active consideration to. Nor do we consider it unreasonable for the Respondent to instigate a formal absence review process following an absence of double the usual "trigger" period. That is not to say that

disciplinary sanction would have been a reasonable outcome to any such process – that is not something we have to consider as it never happened – but commencing the process was not an unreasonable thing for the Respondent to do.

228. We find that the cumulative effect of this conduct is very significantly short of amounting to a fundamental breach of contract, and does not, in fact, represent anything close to a basic breach of contract.

229. Although we do not need to consider this complaint further, we also find that the trigger point for the Claimant's resignation was not, as she has alleged, any requirement by the Respondent for the Claimant to attend a return to work/sickness absence meeting with Mr Stevens and Ms Stonebridge, but rather that the Claimant could not face engaging with the redeployment process that the Respondent had been building up to addressing with her. The Claimant's passion for her VR role was abundantly clear in the course of her evidence, and the Tribunal concludes that she was afraid that, whatever assurances were or would have been given to her about the temporary nature of such redeployment, she would not have been able to return to the role that she loved. She had, by this time, been contemplating bringing legal action against the Respondent, and she chose to instigate that rather than meaningfully engage with redeployment discussions.

230. The Claimant's complaint of constructive unfair dismissal consequently fails.

Direct disability discrimination

231. This complaint initially rested on the Claimant's allegations that:

    a) between April and August 2020 the Respondent failed to consult with her about the development of a band 7 VR role; and

    b) she was not encouraged to apply for the position, which was less favourable treatment than that received by Mr Stevens because of her disability.

232. Only the latter allegation was maintained (the former was withdrawn by the Claimant in her oral evidence), and the Tribunal has found that that allegation is not made out (see the Seventh Disputed Fact), and so this complaint fails.

233. Even if we are wrong and Mr Stevens was encouraged to apply for the role, we consider that that would have been because of Mr Stevens' enthusiasm to take up the post, which contrasted with the Claimant's own silence on the matter. The Claimant said herself that "*We were told we could apply and the job description would be available*". While she gave evidence to the effect that she did not feel supported to apply, she also said that she had "*a lot going on at that time. I needed to go away and think about it. I don't think I was ever clear one way or*

another at the time" – and this is perfectly understandable given all that was happening in her life at the time.

Discrimination arising from disability

234. The Claimant has alleged six instances of unfavourable treatment which she says is because of her sickness absence arising in consequence of her breast cancer:

a) That in September 2020, Mr Stevens stated to the Claimant that in not returning to provide face-to-face training she was not working to capacity, that he wished to remove her from his team and off his budget, and that her absence was causing stress on the team. The Respondent agrees that Mr Stevens expressed the need for the Claimant to return to face-to-face working once she had been vaccinated and once shielding had ended, but it denies that he said he wished to remove her from the VR team, off his budget, or that he said that her absence was causing stress on the team. We have considered this denied allegation under the label "Eighth Disputed Fact" above, and concluded that Mr Stevens discussed the need to ensure that the Claimant was sufficiently occupied for 30 hours per week, and that he would have mentioned redeployment as a possibility for some or all of that time, depending on the content of the awaited OH report. We do not consider that he would have been definitive (as he was clearly awaiting the OH report), and nor do we consider that Mr Stevens would have communicated it as something that he "wanted" to do;

b) That, on 16 October 2020, Mr Stevens informed the Claimant that there was a new way of working in that the Claimant's role would be primarily face-to-face and delivering a lot of physical training. The Respondent denies that this was a new way of working, and says that it represented in fact a return to the pre-pandemic way of working. We considered this as part of the Ninth Disputed Fact above, and agreed with the Respondent that it was not a new way of working, and consequently we find there was no failure to consult about a new way of working;

c) That, between November and December 2020 the Claimant was not invited to any of the planning meetings to deliver face-to-face training or asked to contribute. The Respondent denies this, and we refer to this as the Tenth Disputed Fact above, and conclude that the Claimant has failed to prove this allegation on the balance of probabilities;

d) That, in December 2020, the Respondent ignored the Claimant's request to participate in training and/or failed to carry out any risk assessments that might enable her to participate. Again, the Respondent disagrees that this occurred, and we refer to this as the Eleventh Disputed Fact above. We find that this allegation on the part of the Claimant fails;

e) That, on 11 February 2021, the Respondent declined the Claimant's request for a compassionate day to attend a hospital appointment and instead requested her to take a day's annual leave. The Respondent agrees that this occurred; and

f) That, on 9 March 2021, Mr Stevens told the Claimant that he wanted to redeploy her out of the team. We considered this as part of the Eighth Disputed Fact, as the Respondent denied this, and we found that while Mr Stevens raised the possibility of redeployment of the Claimant (depending on what an awaited OH report said), this was not expressed by him as him *wanting* to redeploy her out of the team.

235. In light of this, those of the Claimant's complaints that remain are:

a) that in September 2020 and/or 9 March 2021, Mr Stevens discussed the need to ensure that the Claimant was sufficiently occupied for 30 hours per week and mentioned redeployment as a possibility for some or all of that time, depending on the content of the awaited OH report; and

b) that on 11 February 2021 the Respondent declined the Claimant's request for a compassionate day to attend a hospital appointment and instead requested her to take a day's annual leave.

236. It then falls to us to consider whether these matters can properly be regarded as "*unfavourable treatment*", in the sense (as per paragraph 5.7 of the Code) or putting the Claimant at a disadvantage, where the threshold for detriment or disadvantage is "*relatively low*" (*Trustees of Swansea University Pension and Assurance Scheme*). We find that both of them are instances of unfavourable treatment.

237. The Claimant has said that her sickness absence is the "thing" that arises from her disability which she regards as the cause of the unfavourable treatment. The Respondent does not dispute that the Claimant's sickness absence arose in consequence of her disability, but only a few days of that sickness absence occurred at the time of the complaints the Claimant makes. If the first remaining allegation relates to September 2020, the Claimant had been shielding but had not had any sickness absence, and if it relates to 9 March 2021, she had only had four days' sickness absence. The second remaining allegation relates to a refusal to allow her compassionate leave on 11 February 2021, when the Claimant had not had any sickness absence. This complaint of discrimination arising from disability therefore fails.

238. In any event, the aim put forward by the Respondent as a legitimate one for its treatment of the Claimant is "*maintaining an effective and fully functioning workforce*", which the Tribunal considers legitimate. Should the unfavourable treatment of discussing the need to ensure that the Claimant was sufficiently occupied for 30 hours per week and mentioning redeployment as a possibility for some or all of that time, depending on the content of the awaited OH report have

been because of the Claimant' disability-related sickness absence (which we have found it was not), we would conclude that that treatment was a proportionate means of achieving that aim.

Failure to make reasonable adjustments

239. The Respondent agrees that it had a PCP that persons in the Claimant's role physically demonstrate VR interventions to delegates. The Claimant avers that this PCP put her at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was unable (because of her breast cancer) to carry out the physical elements of her role or attend the various work venues of the Respondent in person, and that the Respondent knew of this fact. The Tribunal agrees with the Claimant that, if the PCP was applied to the Claimant at the relevant times, it would have put the Claimant at that substantial disadvantage.

240. It is accepted by the Respondent that the Claimant was disabled, and that it knew of that fact, at all the times complained of.

241. However, the Respondent denies that it failed to make reasonable adjustments because it says that it disapplied the PCP (i.e., the requirement to physically demonstrate VR interventions) at the material times of March 2020 to February 2022. The Tribunal agrees with the Respondent.

242. Had the Respondent issued the Claimant with an ultimatum of returning to face-to-face work involving physically demonstrating VR interventions, the Claimant's claim of a failure by the Respondent to make reasonable adjustments would need to be considered further, but in fact the Claimant worked from home without doing so at all material times alleged. The issue of whether the adjustments asserted by the Claimant to alleviate the disadvantage she would have faced had she been required to physically demonstrate VR interventions therefore does not arise, and this complaint fails.

Harassment related to disability

243. The Claimant says that the Respondent did or failed to do various things which amounted to harassment related to disability, namely:

    a) Allocated her a male line manager to her during her sickness absence and while she was awaiting surgery;

    b) Made comments, which the Claimant discovered when the Respondent responded to her subject access request, such as:

        (i) "*we need value for money from our band 6's*";

        (ii) "*when and if Niky returns to work there is no work for her*"; and

(iii) "*the majority of her role is face to face training which she cannot deliver*";

c) Ms Stonebridge placed two meetings a day in the Claimant's diary for a two-month period without prior discussion with her;

d) When the Claimant questioned Ms Stonebridge about those meetings, Ms Stonebridge said that it was "*part of the process*", and when the Claimant questioned her further about that response, she did not reply;

e) In March 2022, Ms Bishop of the Respondent's HR team responded to the Claimant's union representative saying that management disagreed with the Claimant's assertions that she had not been supported or well-managed; and

f) Failed to respond to the Claimant's question, raised in email to Shane Badmus on 19 April 2022, "*if the Trust is treating my email to Victoria as an extension of my existing grievances, why haven't you gathered information about the whole thing?*"

244. The Tribunal:

a) Considers that there was no "allocation" of a male line manager to the Claimant as alleged (see the Twelfth Disputed Fact above), and in fact the Respondent assigned Ms Stonebridge as a female "point of contact" for the Claimant the day after she requested one - so this allegation fails;

b) Notes that the allegations the Claimant makes under b) above as very similar to the First Disputed Fact. As set out in that section above, the Claimant has simply not adduced evidence that the first or third comment or observations were made. The second relates to an email from Ms Laszkiewicz which the Respondent agrees was sent in similar terms to those alleged by the Claimant;

c) Observes that the Respondent agrees that Ms Stonebridge scheduled these meetings;

d) Observes that the Respondent has not confirmed nor denied that Ms Stonebridge gave the explanation the Claimant avers, but this point was not put to Ms Stonebridge by Mr Johnston on the Claimant's behalf;

e) Agrees with the Claimant that the documentary evidence shows that Ms Bishop said this; and

f) Disagrees with the Claimant's assertion that the Respondent failed to respond to the Claimant's question – as described in the Thirteenth Disputed Fact above.

245. For those allegations which remain, the Respondent does not dispute that these were unwanted conduct, but the two questions remain as to whether the conduct

had the proscribed purpose or effect, and whether it relates to a relevant protected characteristic.

246. Taking each in turn:

a) Ms Laszkiewicz's email of 18 March 2021 included "*The fact is that when/if Nikki returns in April we have no work for her to do*".

i. This email was clearly not sent with the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. For one thing it was not sent to her, and it was sent in the context of trying to think about redeployment opportunities for her (it concluded with "*Please can you help us think about redeployment opportunities for Nikki*"), which the Tribunal judges to be very far from the proscribed purpose; and

ii. As for effect, it is clear that when the Claimant read this as part of her subject access request response, she was very upset by it. However, as the *Betsi Cadwaladr* and *Grant* cases make plain, upset is not sufficient – the language used in the statute denotes a high threshold of effect, using terms such as "*violating [the claimant]'s dignity*". Section 26(4) requires that when considering whether conduct had the required effect, the Tribunal is required to take account of the perception of the Claimant, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect. We consider that Ms Laszkiewicz was expressing plainly a point that the Claimant knew – this came across in her oral evidence (e.g., "*I was limited about what I could do*", and "*I was pushing – I was really pushing [for the continuation of the personal safety programme] – it was the only thing I felt I could try to do that was really beneficial to SABP*") and therefore, taking account of that circumstance and the situation of the Respondent's VR team when face-to-face training resumed post-Covid with the pressure to catch-up on the Covid-generated-backlog, it was not reasonable for Ms Laszkiewicz's email to have the proscribed effect;

b) Taking the meetings scheduled by Ms Stonebridge and Ms Stonebridge's alleged explanation for them together:

i. The Claimant did not explore Ms Stonebridge's purpose with her as part of Mr Johnston's cross-examination of her. Ms Stonebridge's written evidence in her witness statement was that the purpose of the meetings was "so that she felt supported and I was able to understand how she was getting on and whether we needed to make any adjustments to her phased return"; and

ii. As for effect, the meetings never in fact took place, as the Claimant never returned to work. Assuming that the Claimant is alleging that the

scheduling of the meetings had the proscribed effect, it is possible that in a scenario of an employee returning to work after a long period of sickness absence who is invited to twice-daily meetings of this kind, without an expectation of regular cancellation, could feel the effect of that as intimidating. However, in light of the text correspondence in the bundle between Ms Stonebridge and the Claimant, which was really friendly and warm (on both sides), we do not think that the Claimant here would reasonably have received those invitations as "*violating [her] dignity*", or "*creating an intimidating, hostile, degrading, humiliating or offensive environment for [her]*"; and

c) As for the complaint concerning an email sent by Ms Bishop of the Respondent's HR team to Mr Doran (the Claimant's trade union representative) that "management strongly disagree" the Claimant's assertion that she had not been supported or well-managed:

i. Ms Bishop's purpose was clearly to express and protect the Respondent's position. The Tribunal does not consider Ms Bishop's purpose to amount to the proscribed purpose; and

ii. Neither do we consider that the effect of Ms Bishop's email had the proscribed effect. The Claimant already knew that the Respondent's position was that it believed she had been well-supported and well-managed, as this message had been communicated by Mr Stevens and Ms Stonebridge repeatedly. Even if Ms Bishop's email had that effect, it was not reasonable for it to have done so in that context.

247. Consequently, the Claimant's complaint of harassment related to disability fails.

Victimisation

248. It is not disputed that the Claimant did a protected act when she raised a grievance on 25 May 2021, however the Respondent denies that it subjected her to any detriment because of it.

249. The Claimant avers that the Respondent did the following detrimental things:

a) Emailed the Claimant on 7 June 2021 in response to her grievance (an email from Ms Stonebridge) – the Respondent agrees that it did this but denies that this subjected her to any detriment;

b) Telephoned the Claimant when she was off sick to ask why she was not in a meeting with her (again, the Claimant says this was done by Ms Stonebridge) – the Respondent agrees that Ms Stonebridge did this, but denies that this subjected her to any detriment;

c) Upon learning that the meeting had been rescheduled, failed to apologise to the Claimant (again, the Claimant says this was done by Ms

Stonebridge) – the Respondent agrees that Ms Stonebridge did this, but denies that this subjected her to any detriment;

d) Requested that the Claimant attend a joint stage 2 sickness absence management meeting with Mr Stevens and Ms Stonebridge in circumstances where they were the subjects of the Claimant's grievance, when that grievance had not yet been heard and/or they did not have a full OH report – the Respondent agrees that this request was made, but denies that Ms Stonebridge was, at this stage, the subject of the Claimant's grievance;

e) Failed to conduct any stress risk assessment of the Claimant – the Respondent denies that there was any failure to do this; and

f) Fail to provide redress to the Claimant's concerns/grievance, or was dismissive of them/it – again, the Respondent denies that there was any failure to do this.

250. Allegations a) and f) are contradictory – the Respondent cannot both be found to have subjected the Claimant to a detriment for responding to her grievance and for being dismissive of it. In fact, the Tribunal finds (see the Fourteenth Disputed Fact) that the Respondent was not dismissive of the Claimant's grievance, but instead sought to progress it when the Claimant requested that it be "un-paused". By contrast, it was the Claimant who was the blocker to its conclusion.

251. As for b) and c), the meeting had been scheduled with the Claimant's agreement for a time when she was off sick, and had to be rearranged for other reasons. The Respondent did not subject the Claimant to a detriment by this means, or by failing to apologise for not realising that it had been rescheduled. These complaints fail.

252. Allegation d) does cite a detriment to which the Claimant was subjected, and so the next question is whether that detriment was "because" the Claimant had done a protected act (i.e., raising the grievance). We find that it wasn't – this was part of the Respondent's absence management procedure, and there is no evidence to support any contention that that procedure was otherwise routinely disregarded for other employees who had not raised a grievance. Moreover, the first part of the absence procedure had been instigated and followed prior to the Claimant raising her grievance.

253. Allegations e) and f) are not made out on the facts.

254. The Claimant's complaint of victimisation therefore also fails.

Time limits

255. Most of the Claimant's discrimination and victimisation complaints are significantly out of time, but we need not consider this further given that none of them succeed.

Conclusions

256. For all of the above reasons, each of the Claimant's complaints fails

Employment Judge Ramsden

Date 4 January 2024