



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Ms S Sinclair**

**v**

**Plan International (UK)**

**Heard at:** London Central

**On:** 5 October 2022 – 13 October 2022

**Before:** EJ G Hodgson  
Ms Z Darmas  
Mr R Baber

**Representation**

**For the Claimant:** Ms T Jones, counsel

**For the Respondent:** Mr A Mathur, counsel

## JUDGMENT

**Claim 1 - 2201506/2021**

- 1. The claim of indirect discrimination fails and is dismissed.**
- 2. The claim of direct discrimination fails and is dismissed.**
- 3. The claim of harassment fails and is dismissed.**

**Claim 2 - 4111713/2021**

- 4. The claim of victimisation fails and is dismissed.**
- 5. The claimant was not constructively dismissed and the claim of unfair dismissal fails.**

## REASONS

### Introduction

- 1.1 On 31 March 2021, claimant commenced proceedings in the London Central employment tribunal under case number 2201506/2021 (claim one). On 14 October 2021, the claimant commenced proceedings in Scotland under claim number 4111713/2021 (claim two). Claim two was transferred to London and has been consolidated for hearing with claim one.
- 1.2 The claims contain allegations of indirect discrimination, direct disability discrimination, harassment related to disability, victimisation, and constructive dismissal.

### The Issues

- 2.1 The issues were agreed at the hearing. We have set out below the issues as sent to the parties on 7 October 2022. Minor amendments to correct typographical errors and inconsistencies have been made, but the substantive content has not been altered.

#### The issues agreed at the hearing

- 2.2 It was agreed that claim 1 has allegations of indirect discrimination, direct disability discrimination and harassment. Claim 2 has allegations of victimisation and constructive unfair dismissal. The alleged dismissal is not alleged to be any form of discrimination.

### Claim one

#### Disability

- 2.3 Did the claimant have a disability in that the claimant had a physical or mental impairment which has a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities?
- 2.4 The impairment is said to be depression. At the hearing the claimant abandoned any allegation that anxiety amounted to a disability. She does not allege that PTSD was a material disability at the relevant time. She alleges the discrimination has caused PTSD and that she has suffered personal injury.
- 2.5 The claimant's further and better particulars failed to set out adequately or at all the effect on day-to-day activity, and how it was varied from 2014 onwards. The claimant has filed an impact statement. It appears to be her case that in 2014 she had depression which severely affected her ability to concentrate, attend work, perform normal day-to-day activities including routine housework, dressing, and personal hygiene... It is the

claimant's case that [the symptoms] lasted at least a year and therefore sometime around 2015 she was disabled. It is the claimant's case she continues to suffer symptoms and is currently unable to work. However, she has had periods when she is able to work. Some time around 2018 to 2019, she significantly reduced reliance on antidepressants. It is claimant's case, therefore, that she was disabled from around 2015, when the symptoms had lasted for a year.

- 2.6 The tribunal was unable to adequately clarify the respondent's position on disability. The respondent does not dispute the fact of depression, or the date when it started, or the symptoms as alleged.
- 2.7 The respondent accepts the effect on day-to-day activities described in the claimant's impact statement as follows: difficulty taking care of herself (as regards personal hygiene and housework); difficulty taking part in social activities; persistent lack of motivation and enthusiasm; difficulty concentrating and decision-making; tendency to panic; and persistent fatigue.
- 2.8 The respondent alleged the impairment "became long term in around 23 November 2020, by virtue of it being likely at this point in time that the impairment would last for 12 months."<sup>1</sup>

Indirect discrimination - section 19 Equality Act 2010

- 2.9 Did the respondent apply to the claimant a provision, criterion or practice which he applied or would have applied equally to other persons not sharing the relevant protected characteristic?
- 2.10 The protected characteristics relied on is disability.
- 2.11 The provision, criterion or practice relied on is by the respondent requiring the claimant to maintain confidentiality about her grievance during the grievance investigation and the appeal process.
- 2.12 If so, did or would the provision criterion or practice put persons who share the same protected characteristic as the claimant at a particular disadvantage when compared with other persons?
- 2.13 The claimant puts the group disadvantage as follows:
- The group disadvantage is that employees with the Claimant's disability would be at a particular disadvantage when compared to other people, specifically, people who suffer with mental health problems, are more likely to need support from others during the grievance process.**
- 2.14 The claimant puts the alleged disadvantage she suffered as follows:

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<sup>1</sup> In submissions the respondent abandoned the contention that the impairment was not substantial since 2014.

The PCP relied upon put the Claimant at that disadvantage as she was told by HR that she was not allowed to talk to anyone about the process. It is the Claimant's case that the Respondent isolated the Claimant inside and outside of the organisation and this is a huge part of what led to her PTSD symptoms, feeling suicidal for the second time, and ultimately led to her GP increasing her antidepressants to the maximum dose allowed.

- 2.15 If so, can the respondent show it was a proportionate means of achieving a legitimate aim.

Direct discrimination - section 13 Equality Act 2010

- 2.16 Did the respondent treat the claimant less favourably than it treats or would treat others?
- 2.17 If so, was such treatment because of a protected characteristic?
- 2.18 The protected characteristics relied on is disability.
- 2.19 The claimant alleges both direct disability discrimination based on actual disability, and direct discrimination based on perceived disability. The claimant was ordered to identify the relevant abilities for each, for the purposes of considering the appropriate comparison pursuant to section 23.<sup>2</sup>
- 2.20 The allegations of detriment relied on are:
- 2.20.1 allegation one: on 30 September 2020 via email (page 214) and in early October 2020 in a team meeting Heather Smith referred to the Claimant as "a secondment". This was in front of the claimant's peers and team colleagues.
- 2.20.2 Allegation two: on 5 November 2020 when the claimant emailed Heather Smith for further clarification of an email sent in relation to the US election, Heather Smith replied "*there isn't anymore to understand in reference to this, it was as simple as what was put below*". The claimant relies on an email of 6 November at 15:39 page 242.
- 2.20.3 Allegation three: Heather Smith subjected the claimant to aggressive emails upon her return to work after sickness absence. The claimant relies on two emails: 8 December 20, 2015, 15:10 page 328 and 8 December 2020, 11:30 page 330.
- 2.20.4 Allegation four: Heather Smith sent invitations to meetings in her team<sup>3</sup> that had nothing to do with her. The claimant relied on one email: 1 February 2021 at 10:30 page 443.

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<sup>2</sup> The claimant failed to provide details of the abilities and breached the order of 5 October 2022.

<sup>3</sup> The claimant initially indicated there were five emails but this was clarified at the hearing.

- 2.20.5 Allegation five: on 28 September 2020 Heather Smith took a large project [the claimant fails to identify the project] from the claimant which she had been leading on and gave it to her colleague, Jess Nugent, who was not directly working on the project.
- 2.20.6 Allegation six: On 30 September 2020 via Teams Ms Heather Smith made it clear to the claimant in front of two of the claimant's colleagues that if she wanted to apply for any job relating to the funding she was welcome to do so in that new year. Further, Heather Smith shortly after the Teams meeting emailed the claimant copying in the same two colleagues pointing out the claimant had a report due and to let her know if she needed any help. The claimant relies on the email of 29 September 20, 2014: 14 page 205. The claimant states she felt that she has been fired after the Teams meeting, and the email left the claimant feeling humiliated as she did not need the help.
- 2.20.7 Allegation seven: on 14 October 2020 Heather Smith confirmed that Ms Lizzy Fauvel could set up a youth engagement hub. The claimant relies on email of 14 October 2020 at 11:11 at page 188, that being an evidence of a previous discussion between Ms Smith and Ms Fauvel. The claimant alleges she felt excluded from the piece of work and consider the action of Ms Smith to be undermining malicious and an abuse of power.

#### Harassment Section 26 Equality Act 2010

- 2.21 The claimant alleges that allegations one – seven are also, in the alternative, acts of harassment.

#### Claim 2

##### Constructive dismissal

- 2.22 Did the respondent breach the claimant's contract of employment? The claimant alleges the respondent breached the term of mutual trust and confidence. In her "further and better particulars"<sup>4</sup> she identified the breach in the following terms

- 3. The Claimant claims constructive (unfair) dismissal. The behaviour which is said to constitute the breach is as follows:**
- a. Rachael Parker and Cheryl Richardson in the People and Culture department have directly and indirectly discriminated and harassed her in the workplace since June 2021.**
- b. On 22 June 2021, Rachael Parker during a meeting asked a series of questions which included whether the Claimant had heard from the Employment Tribunal service about the claim she had made for discrimination. Further she asked if the Claimant was ready to return to**

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<sup>4</sup> being the claimant's response of five October to the tribunal's order of five October for clarification the claims.

work and put pressure on the Claimant in attending Occupational Therapy. Rachael Parker told the Claimant that her absence was having an operational impact on the team due to the importance of her role.

c. On 24 June 2021, Rachael Parker contacted the Claimant to let her know she had been accidentally [overpaid] in June 2021. Between 24 June 2021 and 16 July 2021, when the Claimant handed in her resignation, she was subject to a tirade of harassment from Rachael Parker trying to recover the overpayment from her.

d. On 30 June 2021 Rachael Parker asked the Claimant for a meeting to discuss the overpayment.

e. On 2 July 2021 Rachael Parker told the Claimant that she felt it would be most helpful for her to simply transfer the overpayment back to them.

f. On 8 July 2021 Rachael Parker confirmed to the Claimant her holiday pay request for her July salary would not be appropriate as the overpayment had already been paid.

g. On 15 July 2021 Rachael Parker had a meeting with the Claimant's union representative but confirmed that she would not treat the holiday pay and overpayment as two separate issues. The Claimant identifies the last straw as being the outcome of this meeting where she felt that the Respondent was not willing to take on the advice of her union representative therefore, there was nothing else she could do about being treated. The constructive dismissal matters are pleaded.

- 2.23 The claimant relies on the last straw doctrine.
- 2.24 Did the claimant resign as a result of the alleged breach?
- 2.25 Did the claimant affirm the contract by reason of delay or otherwise?
- 2.26 Has the respondent established a reason for the dismissal?
- 2.27 Was the reason a potentially fair reason?
- 2.28 Has the respondent acted fairly in treating that reason as a sufficient reason to dismiss?
- 2.29 Matters relevant to remedy, including any Polkey deduction and contributory fault, will be considered at any remedy hearing.

#### Victimisation - section 27 Equality Act 2010

- 2.30 Did the respondent victimise the claimant by subjecting the claimant to a detriment?
- 2.31 If so, was such treatment because of a protected act? The claimant claims victimisation on the basis of the following protected acts:
  - 2.31.1 the first claim submitted on 31 March 2021 alleging harassment and discrimination; and
  - 2.31.2 the grievance to the respondent of 29 October 2020 against Heather Smith alleging discrimination.

- 2.32 The respondent accepts that they are both protected acts. It does not alleged bad faith, but makes no admission about the accuracy of any information or allegations contained in the protected acts.
- 2.33 The detriments relied on are:
- 2.33.1 Allegation eight: on 24 June 2021 (page 500) Rachael Parker contacted the claimant to let her know she had been accidentally overpaid. Rachael Parker insisted the claimant make a full repayment even though the claimant had expressed this would leave her with no money. The detriment to the claimant is she felt that Rachael Parker was dismissive of her feelings and she felt harassed to be pushed around.
- 2.33.2 Allegation nine: between 24 June 2021 and 16 July 2021 the claimant was subjected to a tirade of harassment from Rachael Parker in relation to paying back the overpayment. (The claimant relies on three emails at pages 252, 457, and 460). The alleged detriment to the claimant is the feeling of being harassed and that she had no support left within the organisation. She felt that her back was completely against a wall and there was no one left who she could trust.

### **Evidence**

- 3.1 The claimant gave evidence.
- 3.2 For the respondent we heard from Ms Heather Smith, Mr Alan McMahon, Ms Rachael Parker, Ms Sherryl Richardson, and Ms Rose Caldwell.
- 3.3 We received an agreed bundle of documents.
- 3.4 Both parties relied on written submissions.

### **Concessions/Applications**

- 4.1 The issues were not agreed before to the hearing. The respondent attempted to produce a list of issues; however, it could not be adopted, as significant aspects the claim remained unclear.
- 4.2 There were two claims. It was necessary to identify the claims contained in each. The difficulties were discussed at the hearing; the tribunal identified the matters that need to be addressed. To assist the parties, the tribunal produced a formal order which was sent to the parties during the morning of day one. The claimant was to comply by 16:00, 5 October 2022. The order asked for clarification of a number of matters which included the following: the indirect discrimination claim; the constructive

dismissal claim (including what was alleged to be the final straw); the allegations of victimisation, direct discrimination and harassment; the abilities of a hypothetical comparator for the purposes of the direct disability discrimination claim, and any direct discrimination claim based on perceived disability.

- 4.3 In addition, the order provided for clarification of the nature of the disability, and both parties were required to comply.
- 4.4 Miss Jones, on behalf the claimant, filed a response headed "claimant's further and better particulars" which provided some answers, but failed to deal with some aspects of the order, including the relevant abilities of the comparator.
- 4.5 Following further discussion, the tribunal confirmed that it would produce a draft list of issues, identifying the matters agreed. The parties were requested to consider the draft issues as soon as practicable, and bring to the tribunal's attention any errors, discrepancies, or disputes.
- 4.6 The issues, as set out above, were sent to the parties on the morning of 7 October 2022. Neither party indicated that the issues, as drafted by the tribunal, were in error.

### **The Facts**

- 5.1 The respondent is a global children's charity, which strives for a just world that advances children's rights and equality for girls. It focuses on girls and boys growing up in some of the world's poorest communities and seeks to ensure access to education, health care, clean water, and future opportunities.
- 5.2 The claimant's employment began on 2 August 2016 and ended on 16 July 2021, when she resigned without notice.
- 5.3 The claimant started work as a supporter relations coordinator. In October 2017, she changed roles to become a project information coordinator within the major partnerships unit (MPU) of the organisation. She managed a wide portfolio of programmes and produced resources for her MPU colleagues. The claimant states that she was well respected and that she loved working with a variety of people in the organisation. It appears she was happy in her work. She reports no difficulties.
- 5.4 In October 2019, the claimant agreed to a secondment into the girls' rights and youth team. As a social media coordinator for a programme known as "Girls Shout Out" (GSO). The claimant managed the day-to-day running of the project. It was a pilot innovation project funded by The Body Shop. The project was based on Instagram. Access to the online space was limited and monitored. It was designed to provide a safe online space for girls to discuss issues important to them. The aim of the project was to test the digital space to assess engagement and identify key



themes and trends affecting girls. The information could be fed into the wider work of the respondent. The claimant managed the day-to-day running of the project, which included adapting the model to suit the UK, tracking the budget, writing reports, creating and setting up safeguard protocols, delivering workshops, and managing the project's social channels.

- 5.5 The claimant reports having a "fantastic relationship" with her manager and other members of the team. She states it was "genuinely like a sisterhood." The claimant took on extra responsibility for the youth advisory panel in March 2020, when the lockdown commenced.
- 5.6 When she joined the respondent on 16 September 2020, Ms Heather Smith became the claimant's direct line manager. It is apparent that there were immediate difficulties in the working relationship. The claimant first met Ms Smith on 25 September 2020. It appears that Ms Smith did not view the meeting as an induction, but more of a get to know you meeting. The claimant saw this as Ms Smith changing the purpose of the meeting. She reacted negatively. In her statement the claimant says, "Since the moment we met, through her attitude, tone and actions, Heather Smith has made me feel as though I am useless, have no skills and nothing of value to offer her. From day one she made me feel like I wasn't part of a team that I had no worth as a member of staff and also as a human, in her eyes."
- 5.7 The claimant alleges that on 28 September 2020, in a Teams meeting, Ms Smith "took a large project from me, which I had been leading on, and gave it to a colleague who was not directly working on my project." There has been difficulty identifying what is said to be the project, and we will consider this further when considering the allegations of discrimination. We observe that the claimant's statement makes it clear that the project in question was that which was undertaken by Ms Jess Nugent. We have found that in no sense whatsoever was any project undertaken by Jess Nugent taken from the claimant; we will consider this further below.
- 5.8 It is clear that Ms Smith realised that there were difficulties in the working relationship. On 29 September 2020, Ms Smith sent an email to Ms K Morrison which stated, "I did talk her through a lot of what she is ask about below, so I think this is a bit of her testing me which is totally fine..."
- 5.9 We do not need to record the full detail of these exchanges. We note the email from Ms Smith Ms Rachel Parker of 30 September 2010. This states, "I had another conversation with Sherryl which was less positive than the previous." It states that the claimant "had challenged around a couple of areas of the decision-making for the project." It states, "So not wanting to leave things to linger I gave her a call to see what was going on and address her concerns." It then goes on to outline the main points raised by the claimant. Ms Smith gave reassurance that the claimant had not been "fired" on the Monday. The claimant complained about her role being broken up and elements given away. Ms Smith reported that she

gave assurance and explained the claimant would continue to deliver the programme, managing the platforms and reporting to The Body Shop until Christmas. At that time, her secondment would come to an end. It follows the claimant was raising a number of concerns. Some appear to concern the project, and how it would evolve, some appear to concern her position.

- 5.10 The GSO project, and its funding, were coming to an end. The claimant's secondment was coming to an end. No new project had been put in place. Ms Smith was starting the process of engaging an innovation agency; she hoped that that would lead to concrete proposals for a new project, and ultimately an application for funding. It was management of that new project which was handled by Ms Jess Nugent. Identification of, and development of, the new project was never part of the claimant's job. Whilst the claimant could have been considered to head a new project, she did not have the specific skills which Ms Smith understood Ms Nugent to have.
- 5.11 In her statement, the claimant describes the telephone call of 30 September 2020, as harassing, albeit it does not form part of her claim. Her statement says, "Heather Smith then proceeded to harass, interrogate, intimidate and gaslight me on the phone." It is apparent that the claimant had a strongly negative reaction. She describes the interaction, as "extremely dehumanising."
- 5.12 The relationship did not improve significantly or at all. We do not need to consider the detail of the claimants' allegations here. We have considered all the allegations and all the relevant documents. We will consider the specific allegations relied on in greater detail when we consider the allegations of detrimental treatment.
- 5.13 We have no doubt that the claimant viewed her interactions with Ms Smith negatively. In her statement she says, "Heather Smith carried out a smear campaign against me from late September 2020, until the end of the year, pushing the narrative that my issue was because my project was ending in December 2020, and telling multiple colleagues, international colleagues and directors that I was struggling with that because I [was] 'impacted directly.'"
- 5.14 On 23 October 2020, the claimant sought confirmation of how she could raise a formal grievance against Ms Smith. She filed a formal letter of grievance on 29 October 2020. She stated the grievance concerned "bullying and direct or indirect discrimination by Heather Smith and began on 28 September 2020, nine working days after she joined the organisation." It stated on 28 September that Ms Smith confirmed GSO would be closing in December and that the claimant would no longer be "leading on our review/innovation process." There were various other complaints, including being asked, on 30 September 2020, to produce a report on a current project. It is an extensive, involved, and multi layered grievance. Many of the allegations are generalised and refer to Ms Smith's attitude and her alleged gaslighting of the claimant. It asserts that

the claimant reached out to Ms Smith and acted in good faith. It records the claimant was off sick for a week "with severe wisdom tooth pain" and when she returned on 21 October, despite an apology from Ms Smith, which the claimant says she took in good faith, matters became worse.

- 5.15 There is no specific allegation about the conduct of the subsequent grievance investigation, investigation, grievance outcome, or the subsequent appeal. The claimant does raise an issue about the requirement to maintain confidentiality, and we will consider this further in our conclusions. We find the claimant's grievance was investigated. Both the grievance, and the subsequent appeal, were rejected. The reasons advanced are logical and rational, and we are satisfied that the respondent's managers approached the grievance conscientiously and came to conclusions open to them on the basis of the evidence obtained.
- 5.16 Sometime in early November 2020, the claimant commenced a period of absence related to her mental health. The claimant states she "attempted to return to work after almost 4 weeks off sick with [her] mental health." The claimant alleges that when she sought an update she was "barked at over email and put in [her] place." We consider the detail of this below. The claimant states "I was unable to complete my return to work and had to go straight to my GP and was signed off sick again as a result of her actions." She continues, "I did not feel safe to be at work even though I had felt better and wanted so much to be able to finish out the project for the girls involved."
- 5.17 By 8 December 2020, having taken into account holiday to be taken by the claimant, there would have been eight working days before her secondment finished. Ms Smith asked the claimant to focus on key tasks to be completed in that time. This led to further difficulties which we will consider in more detail below.
- 5.18 The claimant did not return to work before the end of her secondment and, effectively, Ms Smith's management of the claimant came to an end.
- 5.19 Later, Ms Smith included the claimant in an invitation to a meeting. We consider the full circumstances below.
- 5.20 In March 2021, the claimant entered into what she has described as protected conversations, which concerned her wish to leave the business. This evidence has not been objected to by the respondent. We do not need to consider it in detail. It is apparent that, by no later than March 2021, the claimant wished to leave.
- 5.21 On 31 March 2021, the claimant issued the first claim, which alleged direct discrimination, indirect discrimination, and harassment.
- 5.22 Sometime in January 2021, the claimant returned to her original position.
- 5.23 The claimant was absent part of February 2021. She had broken her arm.

- 5.24 From 9 March 2021, the claimant was absent from work. This became a period of long-term absence. During that time, the claimant exhausted her right to contractual sick pay, and she started to receive statutory sick pay only. To boost her salary, she requested to take payment for "holiday in lieu." The effect was that she nominally took periods of holiday and received pay.
- 5.25 On 9 June 2021, Ms Parker sent the claimant a letter explaining her entitlement to sick pay. The letter was detailed. It confirms the claimant had 60 days' occupational sick pay entitlement which was exceeded on 16 March 2021. However, as a matter of discretion, the respondent had continued to give the claimant full pay until April 2021. This was said to be to support the claimant and her well-being during a challenging period. It confirmed that from May 2021 she would receive statutory sick pay only (£96.35 per week), and her entitlement to statutory sick pay would continue until 16 August 2021. The claimant had asked to receive five days' holiday in May 2021, and this was agreed. The letter confirmed the claimant would receive holiday pay for two bank holidays and five days holiday from 4 to 10 May. The remaining fourteen days would be statutory sick pay only.
- 5.26 In addition, the claimant was benefiting from counselling paid for by the respondent. We understand this lasted for a period of three months.
- 5.27 The letter records the claimant had requested a delay in referring her to occupational health, Ms Parker stated the report would be helpful and would allow the respondent to gain a greater understanding of how best to support the claimant.
- 5.28 The claimant's normal salary was £2,582 per month, with a normal take-home pay of £1,905 per month.
- 5.29 On 7 June 2021, the claimant requested the respondent to "put through some more for this month." She asked for eight days. Ms Parker agreed to this.
- 5.30 The claimant met with Ms Parker again on 22 June 2021. At the meeting, they discussed the claimant's ongoing absence, her well-being, and when she may return to work. She expected to be signed off for a further period. The claimant continued to receive counselling. They discussed accessing counselling through the NHS, when the sessions funded by the respondent had finished. They discussed occupational health. During the meeting, they discussed the impact of the operational impact on the claimant's absence.
- 5.31 On 21 June 2021, the claimant received her June pay. She was overpaid. She received her full salary. The claimant has alleged before us that this overpayment was deliberate, and it was designed to put pressure on her. In support of that contention, the claimant alleges that she did not realise

she been overpaid and believes that the respondent knew that when it sought repayment it would cause her significant difficulty. There is no evidence in support of the claimant's assertion that the overpayment was deliberate. We accept there was an error. We reject the claimant's evidence that she failed to notice the overpayment. The letter of 9 June set out the position clearly. The claimant knew that her entitlement was to statutory sick pay. She requested eight days holiday which had been granted. She knew statutory sick pay was at the rate of £96.35 per week. The total of the statutory sick pay due and eight days' holiday could never have equated with a full month's salary. At best the claimant would have expected to receive around half pay. The claimant's assertion that she did not realise that she been overpaid is not credible and we reject her evidence on this point. We find that at all times, the claimant knew she had been overpaid and that she had no right to retain the full salary for June 2021.

- 5.32 We accept that the net overpayment was £861.51. This was close to half of the claimant's normal monthly salary.
- 5.33 On 24 June 2022, Ms Parker wrote to the claimant confirming she had been overpaid, and that details of the overpayment would be calculated and provided. She was informed that she would need to repay the overpaid wages.
- 5.34 The claimant failed to respond. Ms Parker sent a further email on 30 June 2020. She asked the claimant whether she had received the previous email. She asked the claimant to get in touch to discuss how the overpayment could be recovered. On 1 July 2021, the claimant replied saying "I'll be happy to discuss how Plan can recover the overpayment once I'm back at work on full salary again." She indicated she would not discuss the matter by phone. In no sense whatever did the claimant indicate that she had believed she had received the correct payment in June.
- 5.35 On 2 July 2021, Ms Parker sent a further email suggesting it may be easier to resolve the matter before the claimant returned to work. She confirmed the sum had only been paid on 21 June and suggested that the quickest and easiest way to resolve the matter would be for the claimant to return the overpayment.
- 5.36 On 6 July, the claimant sent a further email. She requested a further five days' holiday be processed in the July wage "to boost the pay for [her] a little." As for the overpayment, she confirmed that her response "still stands." She would not consider the matter until she returned to work.
- 5.37 On 8 July 2021, Ms Parker confirmed that the respondent would not make any deductions from pay to recover the overpayment. As for the further request she stated. "I note your request to receive payment for holiday... to boost your July payroll... we have already effectively boosted the pay that you would have received by over £800, it does not feel appropriate or necessary to make a further additional payment to you."

- 5.38 On 13 July 2021, the claimant alleged she had spoken to a union rep who had advised her that the overpayment and the processing of annual leave were "two completely separate issues." She requested that four days' holiday be included in the July payment.
- 5.39 On 14 July 2021, Ms Parker wrote to the claimant and stated she felt it was necessary to discuss the matter. She offered to meet with the claimant or her union representative.
- 5.40 By email of 14 July 2021, the claimant maintained her position. She stated there were two separate issues and went on to say, "I'll reiterate here that the Plan can have the overpayment back when I'm on full wages as it was your mistake."
- 5.41 On 15 July 2020, Ms Parker had a meeting with the claimant's union representative. She confirmed to the union representative that she would discuss the claimant's request with her line manager. Ms Parker discussed the matter with Miss Richardson. They concluded that to avoid further conflict with the claimant, they would make the payment of holiday as requested, without deduction. It was Ms Parker's last working day before the weekend; she did not immediately communicate the decision to the claimant.
- 5.42 Before the decision was communicated, the claimant resigned by letter of 16 July 2020. As the claimant had resigned immediately, the respondent then calculated the holiday pay due to the claimant as at the date of resignation. On 26 July 2021, Ms Richardson confirmed the claimant was entitled to 16 accrued days plus 5 taken over. She had taken 18.5 days leaving an outstanding band 2.5 days.
- 5.43 When the final salary was calculated, relevant adjustments were made. Sums due to the claimant were offset against the overpayment. The claimant was informed that the balance left owing was £569.12. The respondent requested the repayment of it. The claimant has not alleged unlawful deduction from wages, and we do not need to consider the detail of this further.
- 5.44 The claimant's resignation letter refers to three broad areas. First, it alleges fundamental breach of contract by reason of indirect discrimination during and after the grievance process in October 2022. It alleges continuing discrimination, harassment, and victimisation because of disability. No detail is given. Second, it alleges a breach of trust and confidence. It refers to breaches on multiple occasions. It states she has not affirmed contract or waived any breach. She refers to the appeal process not being upheld and alleges she would have resigned then had she not had PTSD. Third, she alleged a last straw incident. She alleges that Ms Parker subjected her to a tirade of harassment and pressurised her to attend occupational health. She alleges Ms Parker used the overpayment in the June salary to "withhold annual leave." She states

that the "manipulative, harassing and dehumanising behaviour has left me with no choice but to resign." She refers to being abused by Heather Smith. She refers to being gaslit during the grievance appeal process. Collectively, she refers to all these matters as unreasonable breaches of contract.

## The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

**(1) 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.**

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

**employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)**

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept the there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Harassment is defined in section 26 of the Equality Act 2010.

**(1) A person (A) harasses another (B) if—**

**(a) A engages in unwanted conduct related to a relevant protected characteristic, and**

**(b) the conduct has the purpose or effect of—**

**(i) violating B's dignity, or**

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

...

**(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--**

**(a) the perception of B;**

**(b) the other circumstances of the case;**

**(c) whether it is reasonable for the conduct to have that effect.**

**(5) The relevant protected characteristics are-**

**age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.**

- 6.5 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?
- 6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds.
- 6.7 In **Dhaliwal** the EAT noted harassment has its boundaries:
- We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.**
- 6.8 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
- 6.9 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.
- 6.10 Where the claimant relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.
- 6.11 Victimisation is defined in section 27 of the Equality Act 2010.



- (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.
  - (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
  - (4) This section applies only where the person subjected to a detriment is an individual.
- ...

6.12 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.13 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases are still relevant. It is not necessary to consider the second question, as posed in **Derbyshire** below, which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason for the treatment.<sup>5</sup>

6.14 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. As noted above there is no requirement now to specifically consider the treatment of others.

37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental... Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.

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<sup>5</sup> This point was affirmed by the EAT in *Woodhouse v West North West Homes Leeds Ltd* [2013] IRLR 733, EAT

40. The second question focuses upon how the employer treats other people...

41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan's* case [2001] IRLR 830, 833, paragraph 29, this

'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'

- 6.15 Detriment can take many forms. It could simply be general hostility. It may be dismissal or some other detriment. Omissions to act may constitute unfavourable treatment. It is, however, not enough for the employee to say he or she has suffered a disadvantage.
- 6.16 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law. In **Derbyshire**, Lord Neuberger confirmed the detriment should be viewed from the point of view of the alleged victim. Rather than considering the 'honest and reasonable test as suggested in *Khan*' the focus should be on what constitutes a detriment. It is arguable therefore that whether an action amounts to victimisation will depend at least partly on the perception of the employee provided that perception is reasonable. It is this reasonable perception that the employer must have regard to when taking action and when considering whether that action could be construed as victimisation. Detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. The detriment cannot be made out simply by an individual exhibiting mental distress, it would also have to be objectively reasonable in all the circumstances.

Reasons for unfavourable treatment.

- 6.17 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. The questions of reason and detriment are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.<sup>6</sup>
- 6.18 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail.

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<sup>6</sup> See, e.g., *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425

The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

- 6.19 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.
- 6.20 Lord Nicholls found in **Najarajan v London Regional Transport 1999 ICR 877**, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

#### Subconscious motivation

- 6.21 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influences the treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.

#### Comparators

- 6.22 Section 23 refers to comparators in the case of direct discrimination.
- (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
  - (2) The circumstances relating to a case include a person's abilities if—
    - (a) on a comparison for the purposes of section 13, the protected characteristic is disability;
- 6.23 Section 136 Equality Act 2010 concerns the reverse burden of proof.
- (1) This section applies to any proceedings relating to a contravention of this Act.
  - (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to--
  - (a) an employment tribunal;
  - (b) ...

6.24 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258**. We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246**. The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

6.25 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.

6.26 The leading authority is **Western Excavating ECC Ltd -v- Sharp [1978] ICR 221**. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

**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 then that terminates the contract by reason of the employer's conduct. He is constructively dismissed.**

6.27 In summary there must be established first that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract expressly as evidenced by delay.

6.28 In last straw dismissals individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the

least contribute, however slightly, to the breach of the implied term of trust and confidence.

- 6.29 A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.
- 6.30 Where there has been a course of conduct, the tribunal may need to consider whether the last straw incident is a sufficient trigger to revive the earlier ones. We may take account of the nature of the incident, the overall time spent, the length of time between the incidents and any factors that may have amounted to waiver of any earlier breaches. The nature of waiver is also relevant in the sense of was it a once and for all waiver or was it simply conditional upon the conduct not being repeated.
- 6.31 There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see **Omilaju v Waltham Forest London Borough Council** [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, i.e., from the perspective of a reasonable person in the claimant's position. (**Tullett Prebon PLC v BGC Brokers LP** [2011] IRLR 420, CA.)
- 6.32 The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (**Nottinghamshire County Council v Meikle** [2004] IRLR 703, CA; **Wright v North Ayrshire Council** UKEATS/0017/13)
- 6.33 **Omilaju v London Borough of Waltham Forrest 2005 ICR 481 CA** is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective.
- 6.34 We note that where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principle reason for the resignation, but it must be part of it and the breach must be accepted. The tribunal notes the case of **Logan – v Celyn House UKEAT/069/12** and in particular paragraphs 11 and 12.
- 6.35 We note **Bournemouth University v Buckland** 2010 IRLR 445 CA. The head note reads:

“(1) In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.

The following stages apply to the analysis of a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applied; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

It is nevertheless arguable that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement...”

- 6.36 In **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

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

- 6.37 We would note that it is generally accepted that it is not necessary that the employer's actions should be calculated *and* likely to destroy the relationship of confidence and trust, either requirement is sufficient.

## **Conclusions**

### **Disability**

- 7.1 The claimant relied only on depression as being an impairment causing disability. The respondent accepts that the claimant has had periods of depression which started in or around 2014. It accepts that in 2014 the claimant's day-to-day activity was severely affected, and this included her ability to concentrate, attend work, undertake normal housework, dress, and attend to personal hygiene. It is accepted that either because it lasted a year or would recur that she became disabled in 2014.
- 7.2 We accept the claimant was disabled in 2014. As she was disabled before she commenced employment with the respondent, we do not need to identify the exact date.
- 7.3 We do not accept the Heather Smith knew the claimant was disabled. Ms Smith was not told about the claimant's history of depression. When Ms

Smith commenced employment, the claimant was working full-time and was not exhibiting the serious effects on day-to-day activities described above. Ms Smith was told that the claimant could be sensitive. She was also told the claimant had had two weeks off during a the Covid lockdown. She understood this to be related to stress during that time.

- 7.4 Ms Smith did not know or believe the claimant had an ongoing impairment caused by depression. She did not know or believe the impairment had a substantial adverse effects on the claimant's day-to-day activity. She did not know or believe that the effect was long-term.

Indirect discrimination

- 7.5 The provision criterion or practice is said to be by the respondent requiring the claimant to maintain confidentiality about her grievance during the grievance investigation and the appeal process.
- 7.6 Whilst there was a requirement for confidentiality, we do not accept the claimant's characterisation of the PCP is accurate. The grievance procedure itself does not set out the requirement for confidentiality. However, employers generally request those involved in grievance procedures to maintain confidentiality. There were several references to confidentiality. The claimant was never required to observe absolute confidentiality. She could speak freely with her union representative, family, and friends outside the organisation. She could speak to members of the HR team, the staff counsel, and the employee's assistance program. The respondent provided a free counselling for three months, and she could speak to her counsellor.
- 7.7 On 6 November 2020, Ms Richardson's email stated "it would also be important that you keep this matter confidential and do not discuss this with colleagues." It specifically said she could discuss the matter with her trade union representative. She could also contact Ms Parker. The claimant was encouraged to seek support.
- 7.8 On 26 January 2021, the claimant asked whether she could speak to Alex, who was on the staff counsel. Ms Richardson considered this and agreed. On 1 February 2021, the claimant confirmed that she proposed to confide in Alex. The claimant viewed this as friendly support that was valuable given the constraint in talking to other members of staff. Ms Parker's email of 21 February reiterated that the claimant should not feel isolated.
- 7.9 Ms Richardson arranged for the claimant to have private counselling via the employee's assistance programme. That counselling continued for three months.
- 7.10 We accept that there was a requirement for confidentiality, which applied to those who were involved in the grievance process. However, we do not accept that the requirement was absolute.

7.11 The group disadvantages put as follows:

**The group disadvantage is that employees with the Claimant's disability would be at a particular disadvantage when compared to other people, specifically, people who suffer with mental health problems, are more likely to need support from others during the grievance process.**

7.12 During her evidence, the claimant asserted that the group disadvantage was true. However, she produced no evidence.

7.13 It is apparent, when considering the claimant's emails, that she objected to not being able to speak to her friends who were also colleagues, but who were not part of the grievance process.

7.14 The alleged group disadvantage concerns the difficulty those with mental health problems may have during a grievance process, and the fact that they may need support. However, support was offered and there is no evidence to suggest that such support as was offered would be insufficient for those suffering from mental health difficulties.

7.15 The reality is that discussions with colleagues is likely to lead to a loss of confidentiality. That may lead to more widespread gossip, which could undermine the grievance process, and may itself be a source of stress. It follows that not having confidentiality carries a significant risk of undermining the grievance process and may both directly and indirectly cause stress.

7.16 It is possible that those with the claimant's disability may find a grievance procedure more stressful than those who do not have the disability. However, there is no evidence that maintaining limited confidentiality, in circumstances when there are clear safeguards in place, would cause any particular disadvantage to those with the same disability when compared to those without the disability. It is possible that not having a requirement for confidentiality may cause disadvantage to those who have the claimant's disability, as they may be less able to cope with the stress caused by any subsequent gossip. There is no proper evidence. The group disadvantage is not made out.

7.17 As to the individual disadvantage, the claimant says the following:

**The PCP relied upon put the Claimant at that disadvantage as she was told by HR that she was not allowed to talk to anyone about the process. It is the Claimant's case that the Respondent isolated the Claimant inside and outside of the organisation and this is a huge part of what led to her PTSD symptoms, feeling suicidal for the second time, and ultimately led to her GP increasing her antidepressants to the maximum dose allowed.**

7.18 It is clear that claimant overstates the position. It is not true that she was "not allowed to talk to anyone about the process."

7.19 We are not satisfied that requirement not to speak to friends who were also colleagues caused the claimant any particular disadvantage. The



claimant had people with whom she could discuss her grievance. We observe that allowing her to enter into discussions with colleagues may well have negatively escalated the situation and caused disadvantage.

- 7.20 If we were wrong, and that there is both group and individual disadvantage, we would need to consider the justification defence.
- 7.21 The respondent's aims can be identified broadly. First, the respondent wished to consider the grievance appropriately. Second, the claimant should be enabled to participate. Third, those involved, including the claimant and Ms Smith, should be treated with respect to enable their participation. Part of the means of achieving this is to require confidentiality. By having confidentiality, it was possible to investigate, obtain statements from all involved, and resolve the grievance in a way which would maximise the chance of preserving the working relationship. Without confidentiality that process would be seriously undermined. Without confidentiality, the claimant's grievance could not be heard fairly. It follows that confidentiality was an integral part of a fair and appropriate grievance procedure. Given it was necessary, we also find that it was proportionate means of achieving the legitimate aims.

#### Direct discrimination

- 7.22 The claimant was ordered to identify the relevant abilities of the comparator. She failed to engage with this. This was noted both during the hearing and in the list of issues we gave to the parties. The claimant was asked to address the matter in her submissions, and the matter was further discussed at the hearing.
- 7.23 Paragraph 11 of the claimant's submissions state
- The comparator relied on by the Claimant is Jane Coles, who was on a secondment within the Respondent's company. ... Miss Caldwell refers to Jane Coles as being the comparator and states "*Jane had come experience of the type of work carried out by Sherryl as she was involved in youth engagement work, similar to Sherryl*". Ms Smith confirmed in her evidence Miss Coles had been instructed to help with some of the Claimant's work whilst she was off sick. Miss Coles had the same abilities as the Claimant as she was trusted to carry out her work. The abilities required to carry out this piece of work would have been the same to that of the Claimant, or else she wouldn't have been able to carry out the role, which Ms Smith raises no concerns over her ability in her evidence.**
- 7.24 It is accepted by the respondent Ms Coles undertook some of the claimant's work during periods when the claimant was absent.
- 7.25 Section 23 Equality Act 2010 requires that, where there is a comparator, there should be no material difference between the circumstances relating to each case. When the protected characteristic is disability, the circumstances must include the person's abilities. In this case, the

claimant asserts that the relevant abilities are the ability to undertake the work.

- 7.26 We do not accept Ms Coles is a relevant comparator. The relevant circumstances, and therefore the relevant abilities, may need to be defined by reference to the specific allegations. Ms Coles was not in the same circumstances. When she undertook the claimant's work, the claimant was absent, Ms Coles was not. The claimant was unable to undertake her work by reason of the effects of the impairment, namely depression. The combined effects, including ability to concentrate, and ability to attend work, were the relevant abilities of the claimant at the material time she was absent from work. Ms Coles did not share those abilities, as she was able to attend work, work normally, and undertake normal work tasks.
- 7.27 We have not found it necessary to construct a hypothetical comparator for each of the allegations. It has been sufficient to focus on the respondent's reason for any treatment.
- 7.28 We should consider each of the allegations
- Allegation one - on 30 September 2020 via email (page 214) and in early October 2020 in a team meeting Heather Smith referred to the claimant as "a secondment". This was in front of the claimant's peers and team colleagues.*
- 7.29
- 7.30 The email of 30 September is headed "secondment conversation follow-up." In no sense whatsoever is this referring to the claimant as "a secondment." In the body of the email Ms Smith refers to the claimant's "secondment with UK programmes" finishing on 31 December.
- 7.31 We reject the claimant's evidence that she was referred to as "a secondment." The fact that she was on secondment and was therefore a seconded employee was referred to. As the claimant was never referred to as "a secondment" the allegation fails.
- 7.32 We observe that Ms Smith says she referred to the claimant's secondment, because she was on secondment, and that secondment was coming to an end. We accept that explanation. Ms Smith's reference to secondment was factual and innocuous. In no sense whatsoever was it detrimental. In no sense whatsoever was it because of the claimant's disability.
- 7.33 As we have noted, Ms Smith did not know the claimant was disabled. We should note that it may be possible to bring a claim based on perceived disability. At the start of the hearing, we were told that the claimant relied on perceived disability. The claimant fails to deal with perceived disability in her submissions; the nature of the allegation was not clarified during oral submissions.

7.34 We brought the party's attention to the case of **The Chief Constable of Norfolk v Coffey** EAT/0260/16. This case is authority for the proposition that if a person is perceived to be disabled, they may be treated less favourably because of the protected characteristic of disability.

7.35 At paragraph 51 HHJ Richardson confirmed that when considering whether discrimination may be on the grounds of disability:

**.... The answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law; in other words, it will not depend on A's knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation.**

7.36 It follows the person must perceive that there is an impairment and have in mind the relevant matters which demonstrate a substantial adverse effect on day-to-day activity, and some basis for establishing it is long-term. For the reasons already given, this cannot apply to Ms Smith. She did not perceive the impairment; she did not perceive the effect on day-to-day activity; she did not perceive that it was long-term.

*Allegation two - on 5 November 2020 when the claimant emailed Heather Smith for further clarification on an email sent in relation to the US election, Heather Smith replied "there isn't anymore to understand in reference to this, it was as simple as what was put below". The claimant relies on an email of six November at 15:39 page 242.*

7.37 We accept that Ms Smith replied using the words identified. The claimant was responsible for the relevant posts. Ms Smith was not responsible for the respondent's policy. On 4 November 2020, Ms Smith had been informed by Ms Amy Pearson that there was a policy not to comment on the US election. It was perceived as sensitive. Ms Smith was not involved in that decision. On 5 November 2020, Ms Smith confirmed that she been added to the email chain which contained a decision. She communicated the policy to the claimant. Ms Smith was not justifying the policy. She was passing on a message. The claimant's response was to ask for the email chain as, she thought it would help her understanding.

7.38 Ms Smith response was to the effect that there was no more to understand, but she did offer to seek further information if the claimant had questions.

7.39 There was no reason for Ms Smith to send the claimant the relevant chain of emails. Ms Smith had been copied in to inform her of the policy. Ms Smith informed the claimant of the policy. If the claimant had objected to the policy, she could have taken the matter further. We accept that Ms Smith considered the claimant's request to be unnecessary. Ms Smith's response had nothing to do with disability or perceived disability. As the respondent's explanation is established, we do not need to consider the matter further.

7.40 We have noted above that the claimant has failed to set out the abilities the relevant comparator. The claimant fails to set out what fact may indicate Ms Smith response was because of disability or perceived disability. However, as we accept the Ms Smith' explanation, we need consider this no further.

*Allegation three Heather Smith subjected the claimant to aggressive emails upon her return to work after sickness absence. The claimant relies on two emails: 8 December 20, 2015, 15:10 page 328 and 8 December 2020 11:30 page 330.*

7.41 During submissions, it was clarified that the claimant only relied on one email, being the email of 8 December 2020 sent at 15:10. In particular, in that email, she objected to the claimant capitalising, on three occasions, the word 'if.' It is necessary to set out some background.

7.42 Following a period of absence of approximately four weeks, the claimant returned to work on 8 December 2020. There was a meeting on 8 December 2022.

7.43 Ms Smith sent the claimant a welcome back email. The email sought to identify what work had been undertaken, it identified three key points which needed to be attended to in the final days of the claimant's secondment. She acknowledged that the claimant may be disappointed that some elements such as "the Zine" may be affected and the claimant may find that disappointing, but she asked the claimant to focus on the three priority matters identified.

7.44 The claimant had only eight working days left, and Ms Smith was concerned that the claimant should focus on what could realistically be achieved.

7.45 The claimant responded on 8 December at 14:24.

7.46 She stated she had a few queries which she put in blue. It does not appear we have seen the full email. However, the claimant's points were reproduced in Ms Smith's email of 8 December 2020 at 15: 10.

7.47 The claimant pushed back. We do not need to go into detail of the projects which she wished to advance. However, she asked Ms Smith to overturn her decision in particular relation to the Zine project.

7.48 As for the points raised by the claimant, Ms Smith did not reject the claimant's request out of hand. However, she did call for a detailed and clear plan as to how the work could be completed. Three of the points Ms Smith made are prefaced by the word "IF," which is capitalised. The first point is "IF you can provide a clear and detailed plan...;" the second point is "IF we agree this work is going ahead"; and the third point is "IF this is to be completed in the next eight days this will need to be a digital only publication." Again, we do not need to give further detail. The word 'if' was capitalised by way of emphasis. We have no doubt that it also reflected a

degree of frustration with the claimant, who instead of accepting a simple instruction, was pushing her own agenda as to what she believed should be prioritised. It is implicit that Ms Smith doubted the claimant would proceed with the matters which were Ms Smith's priority, but instead would prioritise those matters the claimant thought important.

- 7.49 This occurred in the context of the claimant persistently challenging Ms Smith. Capitalisation can be seen as shouting. We do not accept the claimant's categorisation that she was being barked at. In the context of this email, the capitalisation does not represent shouting. Had the capitalisation extended beyond the word 'if' we may have accepted that it was shouting rather than emphasising the conditional nature of any agreement. It does, however, communicate serious frustration. It is emphasising that any concession to the claimant's request is conditional. That frustration, and the need to be clear, explains why the word if was emphasised.
- 7.50 We have no doubt that the relationship between the claimant and Ms Smith had broken down. The claimant was hostile to Ms Smith. In that context, it was unwise for Ms Smith to capitalise whole words.
- 7.51 Did Ms Smith use the capitals because of the claimant's disability, or perceived disability? As noted, she did not perceive the claimant to have a disability. We find Ms Smith's used the capitals as emphasis because she was frustrated with the claimant's resistance to her instructions.
- 7.52 It is possible that the claimant's behaviour was in consequence of a disability. However, that is not her case before us. It may be that she did not have the ability to perceive the way in which she was behaving or have the ability to moderate her responses or to accept legitimate instruction. However, if the claimant's behaviour, including any inability to moderate her behaviour, was caused by the disability, the appropriate comparator would also be a person who similarly failed to recognise her own conduct. Ms Smith would have responded in exactly the same way. It follows that the direct discrimination claim cannot succeed.
- 7.53 We accept that Ms Smith behaved the way she did because she reacted to the negative way the claimant behaved towards her. She did not do so because of the claimant's disability.

*Allegation four - Heather Smith sent invitations to meetings in her team that had nothing to do with her. The claimant relied on one email: 1 February 2021 at 10:30 page 443.*

- 7.54 We can deal this briefly. We accept that the distribution list was not generated centrally. Ms Smith generated a Teams meeting link. She sent an invitation to her team. When sending that, she used an old email and she copied over the distribution list. That distribution list contained the claimant. Ms Smith failed to recognise the claimant was on it and the email with the Teams meeting link was sent to the claimant by mistake.

The claimant seeks to persuade us that this was some form of deliberate action by Ms Smith which was designed to upset or intimidate the claimant. We reject that contention. There is no credible evidence in support of it. Ms Smith made a mistake. It was not because of the claimant's disability; it had nothing to do with the claimant's disability.

*Allegation five - On 28 September 2020 Heather Smith took a large project [the claimant fails to identify the project] from the claimant which she had been leading on and gave it to her colleague, Jess Nugent, who was not directly working on the project.*

7.55 It is the claimant's case that a large project was taken from her. We have considered the evidence above. The claimant's witness statement makes it clear that the project she had in mind was that which was given to Ms Jess Nugent. This claim must fail because the allegation is the project was taken from the claimant. That is not true. Ms Smith wished to develop a new project. An innovation agency was to be employed. It would make recommendations and potentially contribute to designing a new project. No doubt the claimant wished to be involved. No doubt she believed the project was in a similar territory to that in which he been involved in. However, her project was ending. Her secondment was ending. This was a new project. Ms Nugent had greater experience in the field. Ms Smith was entitled to nominate Ms Nugent. It follows that nothing was taken from the claimant. This allegation is driven by an unreasonable belief that the claimant should have been given responsibility for a new project.

7.56 The other way it is been put, if only tentatively, is that elements of the GSO project were taken from her. We reject that allegation. It is true that Ms Coles undertook some work. Ms Coles undertook the work because it needed to be done and the claimant was absent through ill health. However, when she returned to work on 8 December, it was envisaged that the claimant would continue with all of her role. However, she returned for one day and then was absent again.

7.57 It follows that the allegation fails because nothing was taken from the claimant. Further, to the extent there was a new project, there are clear and rational reasons why Ms Nugent was preferred, those reasons had nothing to do the claimant's disability.

*Allegation six - On 30 September 2020 via Teams Ms Heather Smith made it clear to the claimant in front of two of the claimant's colleagues that if she wanted to apply for any job relating to the funding, she was welcome to do so in that new year. Further, Heather Smith shortly after the Teams meeting emailed the claimant copying in the same two colleagues pointing out the claimant had a report due and to let her know if she needed any help. The claimant relies on the email of 29 September 20, 2014: 14 page 205. The claimant states she felt that she has been fired after the Teams meeting, and the email left the claimant feeling humiliated as she did not need the help.*

- 7.58 This breaks down into two broad allegations. The first is that during a Teams meeting it was made clear that the claimant was welcome to apply for a new position. That did happen. There was no actual position at the time that could be applied for. This occurred in the context of a potential new project. The project was in its early stages. When the project had been identified, and funding obtained, there could be positions. The claimant was told that she could apply for those positions. It is unclear why the claimant objects to this. This was simply a statement of fact, and a reassurance that the claimant may seek further roles. In no sense whatsoever was it because of the claimant's disability. It was a simple confirmation that she may apply for new future roles.
- 7.59 Second, we accept that Heather Smith sent an email to the claimant which referred to there being a report due. The claimant relies on the email of 29 September 2020 at 12:14. There had been a first email at 12:11. Ms Smith sent the first email to the claimant and Ms Nugent. It confirmed what each would be doing. Ms Smith said she wished to "stay quite close to this project." The email at 12:14 really only concerned the claimant, albeit, as it was in a chain, it appears it was also sent to Ms Nugent. It addresses the claimant and refers to there being "reporting due." It says, "shout if you have any problems with that and if you could send me through what goes to them it would be really great for me to see." This is innocuous. It is a legitimate managerial request. We are satisfied that there was no intention to undermine the claimant by copying in Ms Nugent. Ms Smith made the request because she wanted to stay close to the project and she wanted to be aware of what was being reported. That is a legitimate part of a managerial function and entirely understandable. That explains the reason for the request. It was not because of the disability; it had nothing to do with the claimant's disability. This claim fails.

*Allegation seven - on 14 October 2020 Heather Smith confirmed that Ms Lizzy Fauvel could set up a Youth Engagement Hub. The claimant relies on email of 14 October 2020 at 11:11 at page 188, that being evidence of a previous discussion between Ms Smith and Ms Fauvel. The claimant alleges she felt excluded from the piece of work and consider the action of Ms Smith to be undermining malicious and an abuse of power.*

- 7.60 Part of the claimant's case is that the original idea was hers. We do not need to resolve that. It matters not who had the original idea. If it was the claimant's idea, it was in the context of her employment, and therefore, not her property. We have no doubt that ideas for projects develop and different individuals may make contributions. A youth engagement hub was a developing idea.
- 7.61 On 14 October 2021, Ms Fuavel sent an email to Ms Smith and others which referred to a "brilliant meeting this morning about how we can better work with young people." It goes on to say it is just a quick email to check everyone is happy to move forward. It refers to drafting new processes, guidelines, and definitions of youth work and youth engagement. The idea

was at an early stage. The details needed to be worked out, reduced to writing, and proposals made. It was likely a working group would be set up. There would be reviews. The relevant processes would be. None of that was going to happen in a matter of days. It was a project which was going to take weeks to start and probably months to complete.

- 7.62 We have no doubt that the claimant believes that she could have contributed, given her knowledge of GSO. However, this was not a GSO project. The claimant was on secondment. GSO was coming to an end. There was no specific reason to include her. She had no reasonable expectation that she should be included. The claimant's desire to be part of the process does not create an obligation on the respondent to include her. It may have been that the claimant would have been included at some stage, but that is speculative. There was no reason to include the claimant at the time. The fact that she was not included has nothing to do with her disability. Ms Smith did not believe the claimant would be in the team long term and saw no reason to include her in this new project. The reason was not because of disability. The explanation had nothing to do with disability.

### Harassment

- 7.63 The claimant's submissions do not develop, in any meaningful way, why the alleged detriments are also put as allegations of harassment. The submissions put it as follows

**If the Direct Discrimination claim fails then the Claimant relies on harassment in the alternative. The Claimant has made many reference to how the behaviour had made her feel humiliated and demeaned.**

- 7.64 We should consider each of the allegations as allegations of harassment, in the alternative.
- 7.65 It is unclear whether the claimant suggests that each of the allegations had the purpose of harassing her. When considering purpose, it may be possible for the burden to shift, in the same way as it may for direct discrimination.
- 7.66 There is no fact identified in relation to any of the allegations from which we could conclude that the purpose was to harass, with the possible exception of allegation three, which we will consider in detail below. For all the other allegations, the burden does not shift. In any event, for each the explanation advanced by the respondent is an answer to any suggestion the purpose was harassment, that includes allegation three.



- 7.67 It would appear that the case is advanced on the basis that the respondent engaged in unwanted conduct which had the effect of harassing<sup>7</sup> her.
- 7.68 When considering whether the behaviour should be found to have the effect of harassing the claimant, we must bear in mind claimant's perception, all the circumstances of the case, and whether it is reasonable for the conduct to have had the effect. With these matters in mind, we will consider briefly each of the allegations. Thereafter, if we find for the claimant on all those points, it is still necessary to ask whether the conduct related to disability.
- 7.69 Allegation one - this fails because the behaviour did not occur the claimant was not referred to as a secondment. In general, referring to the claimant as being seconded or on secondment or on a secondment is as an accurate description and is in no sense whatsoever pejorative. It is possible the claimant perceived it to be harassment. As the reference is essentially innocuous, it is not reasonable for the conduct to have had the effect of harassing.
- 7.70 Allegation two - as noted, Ms Smith did use the words alleged.
- 7.71 We have no doubt the claimant found the words unwelcome. She found much of Ms Smith's behaviour unwanted. We doubt that she viewed the behaviour as harassing in itself. The claimant had formed a negative view of Ms Smith. The claimant's request was a challenge to Ms Smith and the organisation in general. Underlying the request is a discontent with the decision and a wish to challenge it. That discontent was only partly directed at Ms Smith. The claimant's general discontent does not in itself indicate she believed she was harassed.
- 7.72 Ms Smith was reasonable in saying there was nothing further to be understood. She was reasonable in offering to deal with any questions the claimant raised. Her response was appropriate and one which was designed to limit conflict. It was not reasonable for the conduct of had the effect of harassment.
- 7.73 In any event, in no sense whatsoever was it related to disability. The claimant has not sought to argue that her own request was caused by, or arose in consequence of, her own disability. We find that the claimant objected to the policy. It was the objection which drove the claimant's behaviour, and which was dealt with by Ms Smith.
- 7.74 Allegation three - as noted above, the claimant objected to Ms Smith capitalising the word 'if.' We have no doubt that this was unwanted conduct. We have reviewed Ms Smith's explanation when considering this

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<sup>7</sup> When we refer to harassment or harassing we have regard to 26(1)(b) Equality Act 2010. It must be behaviour which violates the claimant's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for her.

as an allegation of direct discrimination. Ms Smith exhibited a degree of frustration. However, her purpose in stressing the word 'if' was to set out her expectations clearly, and in particular the limitations which would be placed on the claimant, should it be decided that she could pursue the Zine project. The purpose was clear. The purpose was not to harass.

- 7.75 When considering harassment, it is important not to view relatively trivial behaviour as sufficient to satisfy concepts such as violation, intimidation, hostility and intimidation.
- 7.76 It is at least arguable that the claimant perceived the use of capitalisation as harassment. By this time, the relationship had broken down, and the claimant saw much of Ms Smith's behaviour as harassing. We do not accept it was reasonable for the conduct to have that effect. It is necessary to bear in mind all the circumstances. There was limited time left in the project. Ms Smith was entitled to identify priorities. She did so reasonably. She was entitled to give direction. She did so in a reasonable and professional email. The claimant made it clear that she was hostile to Ms Smith's position and advance those matters which she believes she wished to work on. We have no doubt that Ms Smith believed the claimant would concentrate on the matters which are of concern to her, and not on the matters which are of concern to Ms Smith. Despite the challenging position adopted by the claimant, the vast majority of Ms Smith's response was reasonable. What she said was reasonable. Using the word 'if' was reasonable. The only criticism is the capitalisation. Ms Smith should have realised that could be seen as shouting. It is unfortunate that she allowed her frustration to be illustrated by the emphasis given to the word 'if.'
- 7.77 It is not all negative behaviour which will be seen as harassment. It has to be sufficient, in context, for it to violate dignity or create the relevant hostile environment. In our view, this capitalisation falls short; it was not harassing.
- 7.78 In any event, we do not accept that it related to the claimant's disability. It is no part of the claimant's case that the advancement of her own agenda, or the way she sought to advance that agenda, related to her disability. In the circumstances, there is no link to disability. The behaviour did not relate to disability.
- 7.79 Allegation four - sending the email was a mistake. The claimant objected, because the claimant objected to receiving anything from Ms Smith. She became sensitised both to Ms Smith's name and to Ms Smith's picture accompanying the email. Given it was a mistake, we cannot find it would be reasonable for the conduct to have the effect of harassment. Further, as it was a mistake, it did not relate to disability. We reject any suggestion that it was intentional; as it was not intentional, harassment was not the purpose.

- 7.80 Allegation six confirming to the claimant that she may apply for a job in the future, when such a job did not at the time exist, is simply a statement of fact. In no sense whatsoever could it be conduct amounting to harassment. It would not be reasonable for to have that effect. It did not relate to disability.
- 7.81 Requesting the claimant provides a copy of a report to Ms Smith is a legitimate managerial request. The fact it was copied to a colleague is innocuous and explained by the email train. It is not reasonable to find the conduct had the effect of harassment. In any event, no sense whatsoever does it relate to disability.
- 7.82 Allegation seven - as noted above, the claimant had an unreasonable expectation of being included. The claimant was not included because there was no need to do so, and because she would not be involved in the project going forward. However much the claimant objected, it is not reasonable to find the conduct had the effect of harassing. In any event, it had nothing to do with the claimant's disability. It occurred because it was not the claimant's project, and the claimant was not going to be involved in the new project.
- 7.83 It follows all allegations of harassment fail.

Constructive unfair dismissal

- 7.84 It is necessary to consider whether the respondent was in breach of contract. The claimant relies on a course of conduct, which is said to amount to a breach of the term of mutual trust and confidence, and she relies on a final straw.
- 7.85 We consider each of the elements relied on.
- 7.86 The respondent did not directly or indirectly discriminate against the claimant.
- 7.87 We accept that on 22 January 2021, Ms Parker enquired whether the claimant had heard from the employment tribunal about her claim. This was not a conversation about the detail. It was simply a question as to whether she had received a response. In the circumstances, considering the history of conflict between the parties, it was probably unwise to ask the question. It probably would have been better to remain silent and allow enquiries to be made through the legal channels. We accept that the parties must cooperate in litigation. However, the fact of litigation should be separated from general work. However, the question was a request for minimal information. It was not an attempt to discuss the case. Whilst we can understand the claimant may have experienced some annoyance, in context, the reference to her claim was not significant. It certainly did not show an intention not to be bound by her contract. It was

not a breach of contract. We note this is not advanced as an allegation of harassment and so we do not need to consider it in that context.

- 7.88 Telling the claimant that her absence had an operational impact is simply communicating a fact. The claimant should have appreciated the difficulties her absence caused. It appears she suggests that she should have been insulated from this knowledge because of her disability. We do not accept that. In the context of providing cover, it may be necessary to explain to an absent employee that steps must be taken because there is an operational impact. If the communication were confrontational or offensive, it could be harassment. This communication was reasonable and appropriate.
- 7.89 We have considered the entirety of the correspondence relating to the claimant being overpaid. We do not accept the claimant's assertion that she did not realise she had been overpaid. We find she knew she had been overpaid, as she did not expect to receive a full month's salary. It is difficult to see what else the respondent could have done other than contact her. The respondent did so promptly and in language which was measured and appropriate. It is apparent the claimant resisted all requests for repayment. Instead, she insisted that she would not discuss the matter, or contemplate repayment, until she returned to work.
- 7.90 Given the previous negotiations between the parties, we have some doubt that the claimant genuinely believed she would ever return to work, but we do not need to consider this further. In any event, the respondent did accept in principle that she would not be required to repay the money until she returned to work.
- 7.91 Following further correspondence, the claimant then decided she wished to receive holiday pay for July. We should note that the claimant was not asking for holiday. She was seeking what she thought of as a payment in lieu. Granting that was not a contractual right, and all viewed it as a discretion. It has not been argued that she had a right to take holiday, or that any delay was a breach.
- 7.92 It is not surprising that the respondent questioned the request. It would have been the respondent's right to grant the request and use the money to repay, in a part, the overpaid wages. In asking the respondent to refrain from its right, the claimant was asking the respondent to exercise its discretion and was not asserting any contractual or statutory right.<sup>8</sup>
- 7.93 The respondent did not propose that she should be paid holiday but that it should be used to repay the overpaid wages. The dialogue remained open. The respondent was considering the request. Ultimately the respondent decided to accede to the claimant's request and make further payment for holiday whilst not using that sum to recover in part overpaid wages. This was a reasonable position for the respondent to adopt.

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<sup>8</sup> See section 14 Employment Rights Act 1996.

- 7.94 It would be wrong to say the payment for holiday and recovery of overpayment are separate issues. The claimant's employment did not come to an end. Payment of holiday pay would be payment of holiday deemed taken during the period of ill health. That is wages. The respondent could have used it to deduct against the overpayment pursuant to section 14 Employment Rights Act 1996. The fact that the respondent chose to refrain from doing so illustrates the reasonableness of the approach of the respondent.
- 7.95 The claimant says the last straw was the outcome of the meeting on 15 July between Ms Parker and the claimant's union rep. The claimant says she "felt" that the respondent was not willing to take on the advice of a union representative. The union representative had been told that the respondent would consider it. We must focus on the action of the respondent. It may be that the union representative failed to communicate the position accurately. At the time the claimant resigned, the respondent was considering its position. It was reasonable for it to do so. It would have been open to the respondent to grant the claimant's request for holiday, and to use that money to offset against the sums owed to the respondent. In no sense whatsoever could the respondent's behaviour be seen as blameworthy.
- 7.96 Rather than wait for a formal response, the claimant resigned, assuming her request would be denied. However, her resignation was not in response to any refusal by the respondent. It was in response to her feeling. The action of the respondent in taking time to consider her request was reasonable and in no sense whatsoever was it blameworthy.
- 7.97 There is nothing in the respondent's approach to the overpayments which can constitute a breach of contract, whether by way of breach of mutual trust and confidence or otherwise. The reality is that the respondent had taken active steps to support the claimant. It provided counselling. It had extended time for payment of sick pay. It had acceded to the claimant's request to have holiday pay. The claimant was obliged to repay the money, the claimant was obliged to repay the money. The respondent was indulgent in agreeing that it would not recover the money until she returned to work full-time. The respondent was ultimately indulgent in refraining from recovering the money from holiday pay.
- 7.98 The claimant alleges that the overpayments was a deliberate act designed to put pressure on her. There is no foundation for that assertion, and we reject the argument.
- 7.99 It follows that of the matters relied on by the claimant, the only possible criticism of the respondent revolves around the question on 22 June. However, there was a minor point and not capable of being a breach. None of the other matters relied on amounted to any form of breach at all. There was no final straw. It follows that at the point when the claimant

resigned, there was no breach of contract capable of being accepted. It follows that she was not constructively dismissed.

- 7.100 In the circumstances we do not need to go on consider, further, the claimant's reason for resignation. We note that it is arguable that the claimant had already made up her mind to resign. It appears that she was seeking to leave in March, but the negotiations were unsuccessful. However, we do not need to finally resolve this point as the claim of constructive unfair dismissal fails for the reasons already given.

### Victimisation

*Allegation eight- Allegation eight: on 24 June 2021 (Page 500) Rachael Parker contacted the claimant to let her know she had been accidentally overpaid. Rachael Parker insisted the claimant make a full repayment even though the claimant had expressed this would leave her with no money. The detriment to the claimant is she felt that Racheal Parker was dismissive of her feelings and she felt harassed to be pushed around.*

- 7.101 We have considered the circumstances surrounding Ms Parker contacting the claimant. The claimant alleges that the overpayment was not accidental, but deliberate. For the reasons we have already given, we reject that assertion. We accept the respondent's explanation. The claimant was contacted with a view to her repaying overpaid wages because the wages were overpaid and the respondent wished to recover the sum. In no sense whatsoever was any contact made because a protected act. In no sense whatsoever was the overpayment because of a protected act. This allegation fails.

*Allegation nine - between 24 June 2021 and 16 July 2021 the claimant was subjected to a tirade of harassment from Rachael Parker in relation to paying back the overpayment. (The claimant relies on three emails at pages 252, 457, and 460). The alleged detriment to the claimant is the feeling of being harassed and that she had no support left within the organisation. She felt that her back was completely against a wall and there was no one left who she could trust.*

- 7.102 We have considered the relevant circumstances above. We cannot accept the claimant's categorisation of the emails concerning the overpayment as being a tirade of harassment. The respondent made a reasonable request for return of the overpayment. There followed a conversation. At one point the claimant ignored the emails, and this led to a reminder, which was reasonably phrased.
- 7.103 Ultimately, the respondent indicated it would not recover the money until the claimant returned to work. For the reasons already given, it was reasonable and appropriate for the respondent to consider whether further holiday pay should have been given in July. We accept the respondent's explanation.

7.104 Contact was made because the respondent wished to exercise its legitimate right to discuss how the money should be repaid. This overpayment arose out of a mistake. The claimant was resistant to repayment, even though she knew at all times the money had been overpaid. None of this was because of any protected act. The allegation of victimisation fails.

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Employment Judge Hodgson

Dated: 8 November 2022

Sent to the parties on:

08/11/2022

For the Tribunal Office