



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Miss D Parkinson**

**V**

**Department for  
Environment, Food and  
Rural Affairs**

**Heard at:** London Central

(Hybrid on 2 March 2023, thereafter via Cloud Video Platform)

**On:** 2, 3, 6, 7 and 8 March 2023

**Before:** Employment Judge Joffe  
Mr D Clay  
Ms R Rose

## **Representation**

**For the Claimant:** In person

**For the Respondent:** Mr Paulin, counsel

## **RESERVED JUDGMENT**

1. The claimant's claim of constructive unfair dismissal (Sections 94 and 98 Employment Rights Act 1996) is not upheld and is dismissed.
2. The claimant's claims of disability discrimination contrary to Section 15 of the Equality Act 2010 are not upheld and are dismissed.

3. The claimant's claim for notice pay is not upheld and is dismissed.

## REASONS

### Claims and issues

1. The parties had agreed a list of issues:

#### Unfair dismissal

1. Did the Respondent engage in the following course of conduct?
  - a. Bullying and harassment by the Claimant's line manager, Brigid Finlayson, as set out in her grievance dated 16 November 2020, namely by undermining and delaying work produced ahead of deadlines by the Claimant. In addition, the Claimant alleges that her line manager i) edited her probation review against her wishes and ii) accused her of not completing work over a series of telephone calls on 9 July 2020.
  - b. The Claimant's line manager's manager, Jane Barton, and Deputy Director, Nigel Gooding, failing to deal with the Claimant's informal complaints about her line manager's conduct before July 2020.
  - c. Senior management blocking or failing to authorise the Claimant's ongoing job applications for around eight posts to transfer out of the team.
  - d. Failing to follow its grievance and investigation procedure correctly by carrying out a flawed investigation and delays in the grievance process.
  - e. The Decision Maker refusing to uphold the Claimant's grievance.
  - f. The Appeal Manager refusing to uphold the Claimant's appeal.
2. If so, did the conduct either cumulatively or individually amount to a repudiatory breach of the implied term of mutual trust and confidence which entitled the Claimant to treat herself as discharged?
3. If cumulatively, what was the final straw that the Claimant contends entitled her to resign? The Claimant alleges that the Respondent's refusal to uphold her appeal against the grievance outcome was the 'last straw' that caused or triggered her resignation.
4. Did the Claimant resign in response to this alleged breach of the implied term of trust and confidence?
5. Did the Claimant act promptly in resigning in response to this alleged breach so that she could not be said to have waived her rights in relation to it?

6. Has the Claimant otherwise affirmed her contract since the act relied on?

7. If the Respondent is found to have constructively dismissed the Claimant, was the reason for this dismissal a potentially fair reason within the meaning of section 98(2) of the Employment Rights Act 1996?

Disability status (section 6 Equality Act 2010 (“EA”))

8. At the material time, did the Claimant have a physical or mental impairment that amounts to a disability as defined by the section 6 of the Equality Act? The Claimant alleges the relevant disability is anxiety and depression and the following sub-issues fall to be determined for establishing whether her anxiety and depression amounted to a disability:

- a. Did the Claimant’s anxiety and depression have a substantial adverse effect on the Claimant’s ability to carry out normal day-to-day activities?
- b. If not, would it have had such an effect were the Claimant not receiving medical treatment or other measures to treat her depression?
- c. Was the Claimant’s anxiety and depression long term? Namely, did it last for 12 months, or was it likely to last for more than 12 months? If not, was the impairment likely to recur?

9. When, if at all, did her impairment become a disability? The Claimant claims to have been disabled from November 2019.

10. Did the Respondent know the Claimant had this disability or reasonably ought it to have known of this disability? If so, when and by what means? The Claimant claims that the Respondent’s date of knowledge was July 2020 when she informed the Respondent by email that she was no longer able to function at work because of physical and mental health issues and enclosed a GP certificate signing her off work.

**The respondent conceded that the claimant was disabled at the material times.**

Discrimination arising from disability (section 15 EA)

11. Did the Respondent treat the Claimant unfavourably? The allegations of unfavourable treatment relied upon by the Claimant for this claim are:

- a. WhatsApp messages sent by Jane Barton in or around September 2020 asking her when she was expecting to return to work.
- b. Jane Barton announcing at a team meeting in or around summer 2020 that the Claimant was expected to return to work.

12. If so, did the Respondent treat the Claimant unfavourably in the manner alleged because of something arising in consequence of the Claimant’s disability? The ‘something arising’ relied on is the Claimant’s absence from work.

13. If so, was this a proportionate means of achieving a legitimate aim? The Respondent will say that the application of the Attendance Management Policy and the actions taken by Jane Barton were a proportionate means of achieving appropriate attendance management, which was a legitimate business aim.

#### Notice pay claim

14. Did the Respondent leave the Claimant with no choice but to resign without notice? The Claimant relies on the allegations at paragraph 1 to 4.

15. In so far as the allegations at paragraphs 1 to 4 are admitted or proven, would the Claimant have resigned without notice even if the Respondent had not engaged in this conduct?

16. If the Claimant would not have resigned but for the Respondent's alleged conduct, how much notice pay would have been payable to the Claimant if she had given notice in accordance with her contract?

#### Jurisdiction (time limits)

17. The claim form was presented on 23 December 2021. The ACAS early conciliation process ran from 19 October to 29 November 2021. Accordingly, and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 20 October 2020 is potentially out of time.

18. In respect of the claims for discrimination arising from a disability, the Tribunal will need to consider:

- a. Whether any of the matters occurring before 20 October 2020 form part of conduct extending over a period (within in the meaning of s.123(3)(a) EA) ending on or after 20 October 2020;
- b. If not, whether it would be just and equitable to extend time pursuant to s.123(1)(b) EA.

#### **Findings of fact**

#### The hearing

2. We had a bundle running to 1342 pages in both hard and electronic form. Each party provided us with a chronology and we also had a cast list from the respondent.

3. We had witness statements and heard live evidence from the claimant, and, for the respondent, Ms J Barton, previously the claimant's line manager, Ms A Ferguson, programme director for the respondent's offshore wind enabling actions programme, Ms R Muckle, programme manager for marine and fisheries, Ms G Collins, at the relevant time interim director for floods and water. We saw a document explaining that Ms B Finlayson was not giving evidence due to her personal situation.
4. The panel were expecting the hearing to be in person and the respondent attended the Tribunal on the first day. It appeared that the claimant had misunderstood and believed it would be a remote hearing. She was in Dorset and joined the hearing remotely. It appeared that neither party was keen to have an in person hearing and so we arranged for the rest of the hearing to be held by video. On the first day, after conducting housekeeping of the case in a hybrid manner, we spent the balance of the day reading. We agreed a timetable of the hearing with the parties and they were able to keep to that timetable, for which we were grateful.
5. We note that the claimant's witness statement was not always easy to understand. Although it was relatively lengthy, it did not include all of the basic evidence required in support of her claims and the tribunal panel had to ask her to provide further detail in some areas, such as what she said she had said to Ms Barton and Mr Gooding about her line manager in late 2019. A difficulty was that parts of the witness statement consisted of analysis of disclosed documents rather than the claimant's own evidence.
6. Similarly some of the claimant's questioning of the respondent's witnesses was somewhat gnostic. The Tribunal panel intervened at times to try to assist the claimant and the witnesses on occasions when the question was difficult to understand or there was no question. We could see that, as is the case for many if not all litigants in person, the claimant was stressed and sometimes did not take in the answer given by a witness. We should note however that she and everyone else taking part in the hearing behaved throughout with courtesy and consideration.

## **Parties**

7. We did not have any structure charts but our understanding was that Mr D Hill was director general for the Environment Rural and Marine directorate. Going down the chain, Mr N Hornby was a director, Marine and Fisheries, managed by Mr Hill, Mr N Gooding was a deputy director, EU Fisheries and Policy Negotiations. Under him was Ms Barton. She line managed Ms Finlayson who in turn line managed the claimant. The claimant was a senior policy adviser at grade 6 in the Negotiations Strategy Team for EU Exit Fisheries within the Marine and Fisheries directorate. This was our best understanding of the structure from the evidence with which we were provided.
8. We heard some evidence about how HR services were structured. General HR advice was given by HR business partners within DEFRA. For grievances

/ disputes it appeared that HR case workers from the Ministry of Justice might be involved.

9. From the claimant's CV, we could see that, prior to joining the respondent, she had a background in policy and research, including with respect to wildlife and international maritime matters. This was for various organisations including charities and corporations, The job with the respondent was the claimant's first civil service role.

### Procedures

10. We saw a number of the respondent's procedures. The respondent's grievance procedure was called a 'dispute resolution' procedure and we saw a variety of the documents relating to this procedure which were extant at the material time. These documents were available on the respondent's intranet, which the claimant had access to throughout her period of sick leave.
11. The following parts of those documents were relevant to us and/or were drawn to our attention by the parties:

From the Dispute Resolution Policy and Procedure:

*15. Bullying, harassment and discrimination (BHD) complaints should always be treated seriously, but this does not necessarily mean going straight to the formal procedure, particularly when the employee themselves raises the issue informally and agrees that it may be possible to rectify the matter informally. Sometimes people are unaware that their behaviour is unwelcome or inappropriate and an informal discussion can lead to greater understanding, and an agreement that the behaviour will cease. It may be that the individual will choose to do this themselves, or they may need support from a manager or an employee representative.*

*16. Where it has not been possible to resolve the issue informally or a BHD complaint is submitted as a formal dispute, managers should undertake an assessment of the facts relating to the issue (speaking to both parties as necessary) before informing the employee of the proposed route to quickly and effectively resolve their issue.*

*17. There may also be cases where a manager identifies that an issue is serious enough to result in disciplinary action, and that it is more appropriate to consider under the department's disciplinary procedures from the outset. In these cases the manager should discuss the course of action with the employee raising the issue.*

*The employee will still be entitled to a written decision confirming the outcome of their complaint.*

*Breakdown in working relationships*

*18. Where the working relationship between two individuals has completely broken down, managers should carefully consider whether, from a welfare perspective, it would be beneficial for those concerned to be offered a move to another role or team. This is to avoid further escalation of the situation, and*

*to give managers the opportunity to investigate the issue and seek a resolution. Managers should be clear on the rationale for taking this action, and the situation should be handled sensitively to avoid apportioning 'blame'. Following a discussion with the employees concerned managers should identify an alternate role for one of those concerned. It should not be assumed that where the issue is between an employee and their line manager that the employee should be the one who is moved. Moves should never be used as a step to avoid fully investigating and resolving issues, or taking disciplinary action in cases of alleged misconduct.*

#### *Formal dispute resolution*

##### *Timing*

*22. Unless there are exceptional circumstances, it is expected that employees and managers will try to resolve issues informally in the first instance as this can be in everybody's best interest. If it hasn't been possible to resolve an issue through informal resolution, or if informal resolution is not appropriate (for example, due to the serious nature of the issue), the next step is to move to formal dispute resolution.*

*23. A dispute should be raised in writing without unreasonable delay, and employees should be encouraged to do this at the time the issue arises, so that action can be taken to quickly resolve it. This will ensure that the facts are fresh in everyone's minds. If the dispute is about an operational decision it will help ensure timely reconsideration where this is appropriate. Employees should use Example Letter 1 from the Dispute Resolution Example Letters supporting document or the Dispute Resolution notification form (GRD01).*

*24. In most cases it should be possible to raise a dispute within three months of the event or issue taking place, or within three months of the informal dispute resolution process concluding (including mediation).*

*25. In cases of sexual harassment or severe forms of bullying, harassment or discrimination employees may not feel able to come forward and report the issue until significantly after the event. This could be as a result of the power dynamic involved in raising complaints against a more senior colleague. It is important that the employee knows that managers will still consider these issues and deal with them appropriately. If an employee does not feel able to come forward at the time of or immediately following the event, they are strongly encouraged to still record a contemporaneous note to avoid anything being forgotten and in case it is needed later.*

...

##### *Employee action*

*27. A written formal dispute should:*

- Be clear about the grounds for the dispute.*
- Describe what has been done to informally resolve the issue, and if nothing has been done explain why.*
- Be factual and avoid using language that might be considered insulting or abusive.*

- *Explain what outcome is being sought.*

*28. Employees have a number of options available to them when considering how they submit their written dispute to their employer. In most cases, where the issue is around operational decisions or team working, this will be through their line manager. However, depending on the circumstances for example, where the dispute concerns their direct line manager, the employee should consider sending it to their line manager (Countersigning/Reviewing Manager) instead. There may also be circumstances when an employee will have clear reasons for submitting their dispute to another manager outside the line management chain, including cases where the line manager's action or behaviour has contributed to the complaint, or cases of ongoing bullying or sexual harassment within the line management chain. In these cases the manager receiving the dispute will work with, and be supported by HR, to agree who should be appointed as decision maker. The decision maker should then manage the case with the support of HR Casework.*

*29. It is important that employees are treated fairly throughout the dispute resolution process. If an employee believes that the decision maker or appeal manager cannot deal with the matter objectively and impartially, they should raise this with their line manager, HR Business Partner, or alternatively the individual with whom they originally raised their concern. Whilst every effort should be made to allay or address their concerns, this does not mean they can choose who deals with the matter.*

12. We also saw some pages from the respondent's intranet entitled 'Bullying, harassment, discrimination'. This document contained a number of suggested routes for an employee to raise concerns. These included the employee's line manager or line manager's line manager. An employee could talk to an HR case manager or ring the respondent's Early Resolution Helpline for advice on taking a more formal approach. There was a whistleblowing mailbox for which an email address was provided and a 'speakup mailbox'. The document said 'Both mailboxes are confidential and managed by a dedicated HR team.'
13. A section of these pages about the formal dispute resolution procedure explains that the employee must fill in a formal dispute resolution form. These pages linked to the dispute resolution procedure.
14. Also of some relevance to the issues we had to decide was the respondent's attendance management procedure. This emphasised that managers should 'stay connected' with employees as agreed throughout employees' sickness absence. We saw a document entitled 'Manager guidance: supporting employees through sick leave', which had what seemed to us to be sensible practical suggestions about how to keep in touch with employees during sickness absence. There is a section on planning for a return to work which suggests proactively discussing the situation from the start of the absence without pressuring the employee into returning before they are ready

## Chronology



15. On 21 February 2019, the claimant commenced employment with the respondent as a senior policy adviser in the negotiations strategy team, for the EU Exit Fisheries section of the Marine and Fisheries directorate, originally on a two year fixed term contract. This was a grade 6 role, also described as senior executive officer or SEO. Her line manager was Ms Finlayson, who had herself only recently started working for DEFRA.
16. In November 2019, the claimant said she raised complaints of bullying by Ms Finlayson to her deputy director, Mr Gooding, and senior line manager, Ms Barton.
17. The claimant had not set out in her witness statement what the bullying behaviours she complained of were and the Tribunal panel asked her to explain what the behaviours were. The claimant said that there was a 'lack of engagement' by Ms Finlayson, who spent more time with the other SEO she managed. She said that she was side-lined in her role and that she was unhappy about the way she was spoken to.
18. There was some more information on this issue in the transcripts of the dispute resolution appeal. The claimant said that there were personal comments and undermining behaviour and that Ms Finlayson had spoken over her in open meetings. Pressed by Ms Collins, the claimant described Ms Finlayson looking around at the claimant in the open plan office when the claimant was speaking to Mr Gooding and Ms Barton. She would seem put out, then act happy that the claimant was speaking to Mr Gooding and Ms Barton. She said that Ms Finlayson was anxious in the claimant's probation meetings and talked about her own performance and the lack of feedback she received. The main issue identified by the claimant was her concern that people would believe the claimant's work was delayed when she did not get feedback from Ms Finlayson quickly enough.
19. A difficulty which Ms Collins had and the Tribunal also had was that we were largely presented with characterisations of behaviour (eg undermining behaviour, bullying) without details of the behaviour itself.
20. There were concerns about the claimant's probation report which were difficult to fully understand. There was correspondence around 14 November 2019 between Ms Barton and Ms Finlayson; Ms Finlayson was indicating that the claimant wanted a hard copy of her probation report signed.
21. We saw the probation report itself; Ms Finlayson's feedback about the claimant was very positive.
22. The claimant complained that Ms Finlayson had edited the report to remove some things the claimant had said. We did not have a version of the probation report prior to editing and the claimant's statement did not explain what was edited. In evidence the claimant told us that some remarks she had made about Ms N Hill, another team member, delaying providing the claimant with work, were edited out.

23. The claimant also told the Tribunal that she had had nearly five hours of meetings with Ms Finlayson about her probation report, when the meetings should have taken only one hour.

The complaints to managers

24. This was another area where the claimant's witness statement provided very sparse information and the Tribunal panel had to question the claimant about what it was she said to her managers about Ms Finlayson's treatment of her.
25. The claimant said she made a complaint to Mr Gooding, which he passed on to Ms Barton. She said that she had two meetings with each of Ms Barton and Mr Gooding. She did not say in her witness statement what was said at these meetings save that she said she reported ill treatment from Ms Finlayson to Ms Barton and Ms Barton said that Ms Finlayson was 'harmless and well meaning'. She did not say what she had said to Mr Gooding but reported that on the second occasion she spoke to him, she cried and he told her about how he was mercilessly bullied and often mocked in group settings whilst in one of his earliest roles with the civil service. In terms of the chronology of the complaints, we saw an email from Ms Barton in which she seemed to be arranging a discussion with the claimant on 15 November 2019.
26. In oral evidence, when questioned by the Tribunal, the claimant said that she told Mr Gooding in their first meeting that Ms Finlayson was hostile, undermining and belittling. She said she told him about the following: in team meetings they each had five minutes to give an update and Ms Finlayson would ask the other SEO who reported to her what he thought of what the claimant said but not the other way round and that the way Ms Finlayson would look at her was condescending, patronising and rude.
27. She said she went back to him two weeks later when the situation was getting worse and explained to Mr Gooding that because of Ms Finlayson's personality she could not see how mediation would work as she would become more hostile.
28. As to what she told Ms Barton, she said that Ms Barton told her that Mr Gooding had explained the difficulties she was having with Ms Finlayson. The claimant said she explained to Ms Barton that Ms Finlayson's bias against her was reflected in the rescheduling of meetings and that Ms Finlayson was acknowledging the work of the other SEO but not the claimant's work. In this second discussion, she said that because Ms Barton said that Ms Finlayson was harmless and well meaning, she felt that she had to make the concern be about the work and the lack of challenge in the work.
29. We note that we had in the bundle what appeared to be the claimant's contemporaneous notes about her concerns. These say:

*With Jane and Nigel;*

*Raised concerns over the probation report process.  
Noted that I would like to change line management.*

30. We did not hear from Mr Gooding, whom we understood had retired. Ms Barton's evidence was that Mr Gooding told her that the claimant was unhappy in her role. She emailed the claimant on 15 November 2019 to see if she was free for a call. She said that the claimant mentioned she was concerned there were delays in receiving feedback on her work and she was worried that this meant she would be perceived as not delivering. She was looking for more challenge in her role. She did not mention bullying or harassment.
31. Ms Barton said that she reassured the claimant that her work was not perceived as late and that she was seen as a fast and diligent team member. The way negotiations worked meant that they often had to react to new developments and be flexible about the work they were doing. She said that Ms Finlayson was new to her role and learning her job and that the claimant should not read anything negative into the time it took to get feedback. She did not recall saying that Ms Finlayson was harmless and well meaning.
32. Ms Barton was consistent in her oral evidence to the Tribunal and in evidence she gave to the dispute resolution investigation that the concerns the claimant raised were about her probation, the time it took to get feedback and lack of challenges in her role.
33. We accepted Ms Barton's evidence as to what the claimant had said to her and that the claimant had not said she was bullied or harassed by Ms Barton or described any behaviour which would have appeared to be bullying and harassment. In part this was because the claimant did not give a clear account to us of what she did say to Ms Barton or indeed a clear account of Ms Finlayson's behaviour. Such account as she did give had to be extracted by Tribunal questions. In any event, Ms Barton's account was closer to the claimant's own note of what she said and we found Ms Barton straight forward and consistent. In the notes of the appeal hearing, the claimant described herself as being 'diplomatic' and that may be why what she conveyed to Ms Barton did not suggest anything out of the ordinary about the behaviour of Ms Finlayson.
34. We did not have oral evidence from Mr Gooding but we did have the account he gave in his interview by Ms Ferguson for the purposes of the grievance, which is recorded in an email dated 5 February 2021. He said that he had had a brief conversation with the claimant in the corridor which indicated there was tension with her line manager and he passed the issue to Ms Barton to follow up on. They arranged for the claimant to have more 'stretch' in her role. He himself arranged for her to assist on the Animal Welfare virtual team network. This came to an end after about a month because of pressure in the team but also because the colleague whom the claimant was assisting found it difficult to work with the claimant. He was of the view that there was a difference in style between the claimant and Ms Finlayson. He had seen no indications himself of bullying behaviour from Ms Finlayson. After a conversation with the

claimant in early 2020, he had agreed there could be an exception for her in terms of a staff move.

35. The impression created by the email is that Mr Gooding did not perceive the claimant to have reported to him either bullying as explicitly so described by the claimant or behaviour he would characterise as bullying and he passed the issue on to Ms Barton to manage.
36. Although we did not have live evidence from Mr Gooding, given our findings as to what was said to Mrs Barton and given, in particular, the difficulties the Tribunal and others encountered with the claimant's style of communication, we were not persuaded on the balance of probabilities that the claimant had communicated to Mr Gooding that Ms Barton had bullied her, whether by expressly using language such as 'bullying' or 'harassment' or by describing specific behaviours by Ms Finlayson which would have appeared in that light to Mr Gooding. In particular we took into account the significant difficulties the Tribunal had in extracting clear particulars from the claimant, a difficulty which mirrored difficulties Ms Collins had in the appeal hearing.
37. We considered there was some further insight into the dynamics between the claimant and Ms Finlayson at this time in the notes of Ms Finlayson's investigation interview. She said:

'Danielle's communication style could be challenging at times. Jane, Nigel and I felt this was an area to work on, which I fed back to Danielle and about which she was aware. She had a tendency to delve into details in meetings without providing the context, creating some confusion and requiring me to step in, asking her to explain. Again, I fed this back to Danielle in order to allow her to be more effective in her verbal communication.'
38. It appeared to the Tribunal that those interventions in meetings were at least part of what the claimant objected to in Ms Finlayson's treatment. We were very careful to bear in mind that a Tribunal hearing is an unnatural setting and one which is likely to induce significant anxiety and affect a person's presentation. Nevertheless, it seemed to us to be fair to observe that the claimant's tendency to focus too quickly on details without having helped her listener to understand basic facts or the context of her remarks was also a striking feature of her witness statement, what we could see had happened in internal meetings and of her oral evidence. It seemed to us that at least part of the tension between the claimant and Ms Finlayson is likely to have arisen from Ms Finlayson's efforts to address this communication issue.
39. On 6 February 2020, the claimant sent an email to Ms Finlayson and Ms Barton asking whether she could apply for other roles as they arose as she was keen to draw on her experience of international engagement and maritime operations. Ms Barton replied that the claimant was free to apply for promotions or external competitions; EOIs (expressions of interest) on a level transfer would be discussed on a case by case basis 'depending on relative need and pressures at the time as well as development.' She said that she or

Ms Finlayson were happy to discuss any opportunities which the claimant was interested in.

40. The claimant subsequently raised the issue of the restriction on level transfers, which existed at that time due to the pressure of Brexit-related work, with Mr Gooding and he said he would make an exception for her.
41. On 19 February 2020, the claimant was made permanent; she sent an email to Mr Gooding and Ms Barton saying that she was really thrilled.
42. Ms Barton's evidence about this period was that she thought things had improved for the claimant although the claimant still wanted to move to a role which enabled her to use her previous experience of international engagement and maritime operations.
43. The claimant told the Tribunal that she applied for seven jobs at the respondent between early and mid 2020. There was no evidence in the bundle about most of these roles and the claimant had not provided a list as part of her written evidence.
44. The claimant said that she used Mr Gooding's email address as her line manager contact details in these applications. She believed from discussions with colleagues that the line manager named would authorise or block the application and that this was a feature of the respondent's processes.
45. The claimant was not interviewed for the posts she applied for; she did not receive communications about these posts. The online system through which she applied just indicated when applications had been unsuccessful.
46. We heard some evidence from witnesses of the respondent about how the recruitment system worked. It is fair to say all of the evidence was anecdotal. Ms Muckle told us there had historically been a system somewhat along the lines described by the claimant, which changed in 2015 or 2016. In that system the line manager had to provide a one page supporting statement for the candidate. The system now was that the line manager would just receive an email to say that the candidate had applied for a role. The manager would be expected to flag up a significant concern, such as where a candidate had applied for a role many levels above their existing role or had not completed their probation period, but otherwise would not be asked to comment on the candidate. Ms Collins's evidence was that managers were no longer generally expected to flag concerns at that stage as these now formed part of pre employment checks.
47. It seemed to us understandable that the claimant would have formed the impression that the line manager routinely played more of a role in internal applications if she spoke with colleagues who had applied under the older system.

48. The claimant told the Tribunal in response to questions from the panel what jobs she applied for but we note that at no stage did she tell anyone internally what the roles were. To have investigated the claimant's concerns about her applications, Ms Collins would have needed to know the jobs and would then have needed the claimant's cooperation to make enquiries about specific roles due to data protection rules.
49. In May 2020, the claimant agreed her End of Year Review. The claimant suggested in evidence that references to bullying and harassment within the team were removed from the review but we were unable to understand what specifically the claimant said had been removed. It appeared that this might have been another reference to behaviour by Ms Hill. The narrative in the form agreed by the claimant included references to earlier difficulties the claimant had had with colleagues which had been overcome. The Review noted that the claimant felt very settled in team and 'thoroughly enjoys ways that we work together'.
50. On 9 July 2020, the claimant and Ms Finlayson had a series of long phone calls about a report they were working on. The claimant's account was that Ms Finlayson verbally abused her during a series of unnecessary phone calls and accused her of altering a report. In her investigation interview, Ms Finlayson was asked for her account. She said that there was a difficult phone call, which was stressful for both of them. They were under a lot of pressure to get a paper finished for the next round of negotiations. They were on the phone for some two hours looking at a document on SharePoint which was a mix of old and new papers. Ms Finlayson said that she was trying to understand what had happened; there might have been a misunderstanding by the claimant or a SharePoint issue. She was frustrated about the issue so may have raised her voice. She thought the claimant had understood that SharePoint was the source of her frustration. Ms Finlayson was in physical pain at the time and had been working several months without a break.
51. Ms Muckle's evidence was that Ms Finlayson speaks in a forceful voice and she could see how that could come across as angry. When questioned, she said that by 'forceful' she meant loud.
52. Clearly this was an unfortunate incident which should not have occurred and would have had a more significant impact on the claimant because of the views she already had about her relationship with Ms Finlayson.
53. On 13 July 2020 the claimant went on sick leave and sent an email raising concerns. She attached a GP certificate which indicated that she was suffering from anxiety and signed her off from 10 July to 7 September 2020.
54. She said in her email, amongst other things:

*Following four calls from my line manager on Thursday 9<sup>th</sup> July, this was a final straw in receiving feedback that has made me feel belittled, undervalued and the victim of verbal and psychological abuse... After consulting with other,*

*including my union and HR, I plan to make a formal complaint once I return from sick leave.*

*.. I'm sure any Employment Tribunal would decide that this would amount to constructive dismissal.*

55. She described the calls with Ms Finlayson as 'the final straw pushing me to the point of resigning'. There was a long attachment setting out what had occurred from the claimant's perspective in greater detail.
56. Also on 13 July 2020, Ms Barton wrote to say that she was sorry the claimant was not well; the claimant should take the time away from the office she needed. Ms Barton said that it would be helpful to have a chat to understand the claimant's concerns but there was no pressure to do this until the claimant felt better.
57. On 23 July 2020, Ms Barton wrote to the claimant:

*I just wanted to get in touch to check how you are doing. I hope you are managing to get some rest and starting to feel a little better. I'd be really grateful if you could send me a quick reply when you can just to let me know you are ok. Whilst you are signed off work, I will get in touch from time to time to check how you are doing but please do contact me whenever you'd like.*

*I don't know if you're aware of the Defra Employee Assistance Programme? It's completely confidential and I've heard it can be very helpful. All the details are available at <https://intranet.defra.gov.uk/hr/diversity-and-wellbeing/employee-assistance-programme/> and there's a free helpline number: 0800 111 6387.*

*I also wanted to let you know that I have noted the other issues which you raised in your email.*

*When the time is right for you, it would be great if we could organise a call to talk things through.*

*Please don't feel under any pressure, but Defra also has an early resolution helpline which provides advice and support on workplace issues. The number is 0300 303 3890 (Mon-Fri 8am-6pm).*

*In the meantime, please do take care of yourself.*

58. On 24 July 2020, the claimant wrote back to say that she was doing OK and would look into the respondent's early resolution line.

59. On 5 August 2020, the claimant wrote to Ms Barton:

*Hi Jane,*

*I just wanted to get in touch as I've spoken with my Doctor since my last note. I'm taking advice to be off work until the September period. I will be in touch then to follow up on the formal complaint.*

60. On 18 August 2020, Ms Barton wrote to the claimant:  
*I hope you are OK and beginning to feel a bit better.*  
...  
*I understand that you have been signed off work until 6 September and that, following the advice of your doctor, you will be remain off work until then. I am just beginning to think about how we facilitate your return to work after that point. It would be good if we could arrange a time for a chat early next week to consider what adjustments we might need to make to support you. Would this be ok and if so when would be convenient time to discuss?*  
  
*Best regards and please do let me know if there is anything you need.*
61. The claimant's email in reply, from a private email address, did not reach Ms Barton as it went to her junk email folder. Ms Barton was concerned and took some advice from HR and decided to contact the claimant by WhatsApp message.
62. On 1 September 2020, she wrote via WhatsApp saying she had tried to contact the claimant by email but not heard from her so hoped she did not mind her messaging. She said that it would be great if the claimant could let her know how she was doing and how she was feeling about returning to work next week. She wanted to make the process as smooth as possible and explore whether there were any adjustments they needed to make for the claimant. At this point Ms Barton was expecting the claimant to return to work when her GP certificate expired.
63. On 2 September 2020, Ms Barton sent the same message again. On 4 September 2020, Ms Barton wrote by WhatsApp and email saying that she was a bit worried as she had not heard from the claimant; she did not want to pester her but would appreciate if the claimant could let her know she was OK and her plans for the following week. If she did not hear, she said that she would try to follow up with the claimant's emergency contacts.
64. We note that, as the autumn wore on, Ms Barton attempted to arrange meetings with the claimant under the respondent's attendance management procedures. Those meetings would have included a discussion of reasonable adjustment and how to facilitate the claimant's return to work. The claimant declined to attend any such meeting and ultimately said she would not be in a position to return to work until her formal grievance had been considered and her health had improved.
65. On 27 October 2020, the claimant emailed Mr Hill about her complaint of bullying; she attached her 13 July 2020 email and said that she was advised by her mentor to copy him in to her complaints. She wanted to know if the matter had been responded to or referred elsewhere.



66. Mr Hill wrote to Ms Barton and Ms Newman asking about the situation and suggesting that Ms Barton pursue a discussion with the claimant.

67. On 28 October 2020, Ms Barton responded:

*Many thanks for your emails on this. The situation with Danielle is quite complex. She has raised some concerns about her line manager and indicated that she is intending to make a complaint but, as far as I am aware, she has not made a formal complaint and is currently off work on sick leave until December. As a first step, I have taken over as contact point with her until we are able to understand more about her complaint. I also have a caseworker supporting me on this – Lyndsey Green (copied in).*

*As well as my initial email (which you have below), I have sent a number of further emails offering to discuss when she feels ready and have also pointed her to the EAP and the early resolution helpline. She responded to my email about the early resolution helpline saying she would look into this. She also indicated that she would be in touch after the end of her sick leave to follow up her complaint (I've attached the relevant emails).*

*To date she has not taken up my offer to discuss the issue and we have been struggling to get her even to engage in the attendance management procedures as she has informed us that she has been advised not to engage with any work issues.*

*On HR advice, I asked for permission to refer her to occupational health but she has so far declined this. I attach the latest correspondence chain for your information. I have not heard back from her in relation to the meeting scheduled for Friday (although please note that I will need to rearrange this as unfortunately I will now be in Brussels negotiating on Friday).*

*In terms of a response and subject to any advice from Lyndsey, I think it would be helpful if you could encourage her to take up my offer of an informal discussion as a first step.*

68. On 10 November 2020, Ms Barton wrote to the claimant to say that she had followed the advice of HR to carry out an attendance review in the claimant's absence.

69. On 13 November 2020, the claimant wrote to Ms Barton. She said that she had spoken to the early resolution helpline. As her internal dispute had not been progressed, it should now be a formal grievance process. She did not wish to return to the team with Ms Finlayson. Ms Barton sought advice from Ms Green, the HR case manager, as to how to proceed.

70. On 16 November 2020, the claimant submitted the respondent's formal grievance / dispute resolution form, form GRD01.
71. The form said it should be sent to 'your line manager / appropriate manager considering your dispute'. We read that direction in the context of the section from the grievance policy documents we have set out earlier in these Reasons. The manager considering the dispute has a section to fill in and then is directed to send the form to the respondent's 'Shared Services', who will provide a case reference number. The claimant sent the form to the 'SSCL' or Shared Services email address and not to anyone in her line management chain.
72. In the form, the claimant wrote that her grievance was about her line manager's bullying and harassment. She did not describe what the bullying and harassment had consisted of. She said that she reported it to Mr Gooding and Ms Barton in November 2019 but was not taken seriously. She said, 'My main concern was that work I produced ahead of deadlines, for review by the G6, was being undermined by my line manager, for reasons still unknown and unaddressed. She also referred to job applications for around eight posts being blocked or not authorised and belittling phone calls and false accusations in July 2020.
73. On 20 November 2020, Ms Barton emailed the claimant:  
*Thank you for your email. I am glad to hear that you are feeling better and starting to think about a return to work.*  
*As regards your return to work, I note your view is that you do not wish to return to the team. Please could you confirm that you are expecting to return to work on Monday 30 November when the period covered by your sick certificate expires? It would be helpful to have a conversation on your wishes on how we can facilitate your return to work and on whether any reasonable adjustments will be required. I am currently in Brussels for negotiations returning tonight but if you could let me know when might be a good time, we can arrange to have a conversation for Monday. This will help to ensure we can make the necessary arrangements in time for your return. In line with the conclusions of the formal attendance meeting, we do need you to be engage more with steps on a return to work as you have been off work for some time now and it may not be sustainable much longer.*
- As regards your complaint, I would like to reassure you that we take all complaints seriously and now that you are feeling better and able to engage with work, it would also be good to have a discussion about the concerns that you have raised so that we can understand them better and consider what the next steps are. I am glad that you have been able to speak to the Early Resolution Helpline on this. Whilst it is correct that this is a separate process*

*from the attendance policy, we do need to understand more about the issues you raise which has not been possible whilst you have been off work.*

*Please could you let me know when you might be available on Monday so that we can arrange a time to speak about your return to work (apologies in advance that this may need to be a little fluid due to the ongoing negotiations).*

74. The claimant responded that she not looking to return to work until the formal grievance process had taken place and her health had improved.
75. There was some confusion on the respondent's side as neither Ms Barton nor the relevant HR advisers were aware that the claimant had made a formal complaint. On 1 December 2020, Mr Kirke from HR wrote to Mr Gooding, copying in Ms Barton to say that they had not located the claimant's formal complaint.
76. On 10 December 2020, Mr Kirke reported that the formal complaint had been found. It had been sent to SSCL, which was why it had not been found previously.
77. We saw internal correspondence which showed that individuals in HR were concerned to find someone independent to investigate the complaints but also someone who would have time to get started quickly, given that there had been a delay in locating the form and that the Christmas period was approaching.
78. On 15 December 2020, Mr Hornby (director Marine and Fisheries) sent an email to a number of staff asking for a Grade 6 member of staff to act as an investigator on a grievance; the claimant was not named. Ms Ferguson volunteered and was appointed as investigator for the grievance and Ms Muckle was appointed as the decision maker.
79. On 18 December 2020, Ms Ferguson emailed the claimant to introduce herself and say that she would be progressing the matter after her Christmas leave period.
80. Mr Hornby provided Ms Ferguson with the emails that the claimant had sent to Mr Hill, Ms Burton and Mr Gooding about her complaints. There was further correspondence which evidenced HR making arrangements for the grievance in late December 2020.
81. On 23 December 2020, Mr Hill updated the claimant as to the arrangements which had been made to investigate the claimant's grievance and explained that Ms Ferguson and Ms Muckle had been identified as independent / neutral managers outside the claimant's line management chain.

82. In terms of impartiality, Ms Muckle, as part of her role, met new joiners in the directorate. She had spoken with the claimant on occasion, Ms Barton was a peer at the same level as Ms Muckle, and Ms Muckle had chatted with Ms Finlayson about her children. She did not have a close professional or working relationship with any of the people involved in the grievance.
83. Ms Collins, who later heard the grievance appeal, did not know any of the protagonists.
84. On 7 January 2020, Ms Ferguson interviewed Mr Gooding. This was not done with a note taker and formal minutes as Mr Gooding was heavily involved in negotiations abroad and the interview had to be fitted around his other commitments.
85. On 15 January 2021, Ms Muckle emailed the claimant to set out the process which would be followed for the investigation and summarise what she understood to be the claimant's complaints.
86. In her response on 20 January 2020, the claimant said *inter alia*: 'thank you for your email and I appreciate that you have really taken the time to go through all the main points addressed in my initial request for a formal grievance.'
87. In planning her investigation, Ms Ferguson spoke with Ms Muckle and Mr Hornby to identify who should be interviewed as witnesses. She was hoping to discuss with the claimant what witnesses the claimant had to suggest.
88. On 22 January 2021, Ms Ferguson sent invitations to the witnesses she had thus far identified. The claimant declined the invitation to an investigation meeting with Ms Ferguson. The claimant wrote to Ms Ferguson to say that there had been a fourteen month delay in starting the internal investigation and she had now involved Acas and an employment lawyer. She suggested that Ms Ferguson wait to complete her investigation report until Acas provided her with evidence.
89. What is clear from this email is that the claimant had formed the view that a formal investigation should have started when she complained about Ms Finlayson's behaviour in July 2020. She was therefore not going to take part in the investigation being conducted by Ms Ferguson. The claimant also seemed to have an erroneous idea about the extent to which Acas would become involved in an internal grievance process.
90. The email led to some further correspondence between HR staff, Mr Hornby and Mr Hill in which Mr Hornby asked whether Ms Muckle and Ms Ferguson should be carrying on with the investigation. The claimant seemed to consider this correspondence showed that the respondent itself had doubts over the

appropriateness of Ms Muckle and Ms Ferguson. Our reading of the correspondence was that it simply showed Mr Hornby's uncertainty as to whether the matter should be taken over by HR given the claimant's references to Acas.

91. On 4 February 2021, Ms Barton was interviewed by Ms Ferguson and on 5 February 2021, Ms Ferguson emailed the notes of the interview to Ms Barton for her comments.
92. On 5 February 2021, Ms Ferguson wrote to the claimant asking her to meet with her. She said that she would investigate the delay the claimant complained about. She explained why it was important for her to meet with the claimant, otherwise she would only have the written material to work from.
93. Also on 5 February 2021, Mr Ferguson conducted an investigation interview with Ms Finlayson.
94. On 10 February 2021, the claimant wrote to Ms Ferguson to say that she had lost trust and confidence and 'do not wish to continue with a formal process that should've been initiated over a year ago.' Ms Ferguson then took advice from HR to the effect that she should not continue to press the claimant for a meeting given her ill health.
95. Terms of reference were drawn up by Ms Muckle after reviewing the claimant's emails of complaint and formal grievance form in early February 2021. These were:
  - Allegations of bullying by Ms Finlayson;
  - Ms Barton pressing for meetings during the claimant's sickness absence.Later the terms of reference were expanded to include consideration of how the claimant's grievance was dealt with.
96. On 12 February 2021, Ms Ferguson interviewed Ms Richardson, a member of the team who reported to the claimant and Ms N Hill and Ms H Hunter, staff outside of the team with whom the claimant had done some work.
97. Ms Blacker was the note taker for these interviews and she sent the notes to witnesses for their agreement, which in some cases led to the witnesses editing the notes. The claimant was critical of this process in front of the tribunal, but she did not take us to any material differences between the edited and unedited notes.
98. On 18 February 2021, Ms Ferguson finalised the Initial Investigation Report. She had not found evidence to support the complaints. She said inter alia:

*Danielle is viewed as a conscientious and diligent employee, who worked quickly and was keen to work independently. On the basis of my conversation with Brigid, Jane, Nigel, and Helen, and the evidence in her annual review, there is no evidence that Brigid took action which impacted negatively on Danielle's reputation with her senior managers. No-one in Danielle's line management chain held the view that Danielle's work had been delayed, and there was consensus that she liked to work very quickly. A common theme in a number of the interviews was that Danielle's communication style could sometimes be confusing, and that she would often go off "on a tangent" making it difficult to follow her point*

99. Ms Ferguson said that she could have asked more probing questions of witnesses had she had the opportunity to speak with the claimant to better understand the complaints. She would also have liked the claimant to have suggested some witnesses.
100. On 7 March 2021, Ms Muckle telephoned the claimant. Ms Muckle said that she was trying to encourage the claimant to take the opportunity to meet with the investigator. The claimant seems to have come away from the phone call with the impression that it was open to her still to present any further evidence she wished to Ms Muckle outside of the investigation process being carried out by Ms Ferguson. The claimant told us she did not engage earlier due to her loss of trust and confidence in senior management and what she saw as the lack of progress with her grievance from July 2020.
101. On 11 March 2021, the claimant was invited for a meeting with Ms Muckle and sent a copy of the investigation report.
102. On 17 March 2021, the claimant met with Ms Muckle. That morning she sent through a heavily annotated version of the investigation report with insertion of a large number of documents which she said were relevant. Ms Muckle considered that these materials should have been provided to the investigation and in any event she did not have time to read them before the grievance hearing.
103. The comments made by the claimant are extensive but written much in the style of the claimant's witness statement. They are difficult to follow and no concrete examples or a basic narrative of what the claimant was complaining about are provided. For example, she characterises treatment as eg 'toxic' but does not explain in simple terms what actually was occurring. One of few examples of behaviour she referred to was that Ms Finlayson would start discussions about her own struggles or issues which the claimant considered unprofessional.
104. In relation to the job blocking allegation, the claimant asked whether the relevant departments she applied to had been contacted about the roles, but

she had not indicated what roles she applied for, save that in this document she attached emails about one enquiry to an external department.

105. The document was in Word format so Ms Muckle could open the email attachments.
106. At the meeting, the claimant wanted to reopen the investigation and said her complaints had not been investigated in enough detail. Ms Muckle said to the claimant that she had not taken opportunities to meet with the investigator and the investigation would not be reopened.
107. Ms Muckle did review the amended investigation report and attachments sent by the claimant. She told the Tribunal that had there been significant new evidence, she would have asked Ms Ferguson to investigate further, but she did not consider there was any such evidence.
108. On 23 March 2021, the claimant was sent the outcome of her grievance by Ms Muckle. The complaints were not upheld:
  - There was no evidence of bullying and harassment by Ms Finlayson;
  - There was no evidence that Ms Barton had behaved inappropriately / not in compliance with the absence management policy;
  - There was no evidence that line management had not complied with policy in handling the claimant's complaints;
  - There was evidence that Ms Finlayson's behaviour on 9 July 2020 when she spoke in a raised tone was unacceptable. At the time she had been in acute pain and dealing with frustrating SharePoint problems
109. On 24 March 2021, Ms Collins was appointed as appeal manager. The claimant submitted a grievance appeal form on 26 March 2021. She ticked the boxes on the form for: 'new evidence', 'unfair process not applied correctly' and 'unreasonable decision'. She attached at Annex A what she described as new evidence. This was the annotated report and attachments previously sent on 17 March 2021.
110. The appeal hearing took place on 26 April 2021. Ms Collins told the Tribunal that her role was to review the original decision and decide if the new evidence would have made a difference to the outcome. The claimant covertly recorded the hearing and we were provided with a transcript. The respondent made notes which were not verbatim. We were not taken to any material differences between the two sets of notes.
111. On 29 April 2021, Ms Collins sent the claimant notes which were taken by the respondent of the appeal hearing for her to check for accuracy. She said that the actions she had taken away to do were:
  - a. To follow up the claimant's concerns about the roles she had applied for. She said that the claimant had agreed to send information on the eight jobs she had applied for through Civil Service Jobs.

- b. To review the new evidence provided about the claimant's line manager. She said that the claimant was going to forward to her the attachments to her annotations of the grievance investigation report as Ms Collins had that report in a pdf version and could not open the attachments.
  - c. To look at the format and procedure for the investigation of the claimant's grievance.
112. The claimant's response to Ms Collins that day was to ask if previous recipients could open the email attachments to the report. She did not provide the attachments nor did she provide information on the eight jobs she said that she had applied for. Ms Collins responded, still on 29 April 2021, explaining why she could not access the attachments.
113. On 11 May 2021, Mr Gooding emailed the claimant to offer to attempt to facilitate a managed move to a different role for the claimant outside of the dispute resolution process. The claimant did not respond to that offer.
114. 13 May 2021, Ms Collins forwarded her previous email to the claimant but did not receive a response. Ms Collins said that at that stage she attempted to contact Mr Jones, the claimant's mentor who had attended the appeal hearing with her.
115. There was then a delay until 6 July 2021, when Ms Collins again emailed the claimant, asking for information to conclude appeal. She asked her to provide the information by 16 July, otherwise she might have to make a decision based on the information which she had available. We were not given any explanation of the delay during this period but were conscious that Ms Collins had a very busy day job to carry out.
116. On 16 July 2021, the claimant emailed saying that she was not aware that Ms Collins was waiting for information. She said that: 'I believed it should be possible for everything I sent previously to be accessed, otherwise that would mean it had not been read or considered as part of the original grievance.' She expressed concern about the delay but she did not provide the missing information or documents.
117. Ms Collins was then on leave for over a fortnight. On 9 August 2021, Ms Gallichan, HR Business partner, was able to access a version of the annotated investigation report in which the attachments could be opened and she sent this to Ms Collins.
118. Ms Collins then reviewed all of the materials she had. She concluded that the emails attached looked like ordinary work exchanges; nothing stood out to her as unusual.
119. On 31 August 2021, Ms Collins sent the claimant the appeal outcome. She did not uphold the appeal. She did not consider that the evidence provided by the claimant undermined the findings of the original grievance. She considered that the original investigation had been carried out correctly and



that the conclusions reached were reasonable. The claimant had not provided her with the information she needed to investigate the complaint about the jobs the claimant had applied for.

120. That same day the claimant sent her resignation email. She said in the email that she had drafted the email the previous week: ‘...I hadn’t got around to sending it because I found the process of drafting it upsetting. I can see now that I was correct in my assumptions that my concerns weren’t, and still aren’t being taken seriously. So I am sending my resignation below.’ She went on to complain about the delay in dealing with her complaints and said that she could not see any hope of her concerns being addressed.

## Law

### Constructive dismissal

121. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct”.
122. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) must be an effective cause of the employee’s resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.
123. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal. In United First Partners Research v Carreras 2008 EWCA Civ 1493 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.
124. In this case the claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important. Conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause.
125. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer’s conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it: Woods v Car Services (Peterborough) Limited [1981] ICR 666. It is the impact of the employer’s behaviour (assessed objectively) on the employee that is significant - not the intention of the employer (Malik v BCCI [1997] IRLR 462). It is not however enough to show that the employer has behaved unreasonably

although “reasonableness is one of the tools in the employment tribunal’s factual analysis kit for deciding whether there has been a fundamental breach”: Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445.

126. In Tullett Prebon v BGC Brokers LP and others 2011 IRLR 420, the Court of Appeal explained the legal test by reference to the recent case of Eminence Property Development Ltd v Heaney 2010 43 EG. 99: “The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon or altogether refuse to perform the contract...” “All the circumstances must be taken into account in so far as they bear on an objective assessment of the intention of the contract breaker. That means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person.”
127. The breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In Omilaju v Waltham Forest LBC [2005] ICR the Court of Appeal said that the final straw may be relatively insignificant but must not be utterly trivial: “The test of whether the employee's trust and confidence has been undermined is objective.”
- “...what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? ...The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term... Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence ...
- If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. ...
- Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective.”
128. A breach of the implied term of trust and confidence is necessarily a repudiatory breach of contract: Ahmed v Amnesty International [2009] ICR 1450.

129. In Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978 the Court of Appeal listed five questions that it should be sufficient ask in order to determine whether an employee has been constructively dismissed;
- a. What was the most recent act (or omission) on the part of the employer which the employee says cause, or triggered, his or her resignation?
  - b. Has he or she affirmed the contract since that act?
  - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
  - d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed together amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of the previous possible affirmation).
  - e. Did the employee resign in response (or partly in response) to that breach?
130. As to affirmation the EAT gave an overview of the general principles in WE Cox Toner (International) Ltd v Crook [1981] ICR 823:  
*Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: Allen v. Robles [1969] 1 W.L.R. 1193 . Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. \*829 However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation: Farnworth Finance Facilities Ltd. v. Attryde [1970] 1 W.L.R. 1053 .*
131. It is of course somewhat artificial to require an employer who denies having dismissed an employee to show a reason for the dismissal. The Court of Appeal addressed this problem in Berriman v Delabole Slate Limited [1985] ICR 546 where the Court said that, in the case of a constructive dismissal, the reason for the dismissal is the reason for the employer's breach of contract that caused the employee to resign. This is determined by analysis of the employer's reasons for so acting, not the employee's perception (Wyeth v Salisbury NHS Foundation Trust UK EAT/061/15).

Discrimination arising from disability

132. In a claim under Section 15, a tribunal must consider:
- Whether the claimant has been treated unfavourably;
  - Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
  - Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.
133. There are two aspects to causation:
- Considering what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator;
  - Determining whether that reason was something arising in consequence of the claimant's disability. That is an objective question and does not involve consideration of the mental processes of the alleged discriminator: Pnaiser v NHS England and anor 2016 IRLR 170, EAT.
134. An employer has a defence to a claim under Section 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.
135. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment and the reasonable needs of the party responsible for the treatment: Hampson v Department of Education and Science [1989] ICR 179, CA.

## Submissions

136. We heard helpful submissions from both parties and took these into account in our deliberations. We refer to them below only insofar as is necessary to explain our conclusions.

## Conclusions

*Issue 1. Did the Respondent engage in the following course of conduct?*

*a. Bullying and harassment by the Claimant's line manager, Brigid Finlayson, as set out in her grievance dated 16 November 2020, namely by undermining and delaying work produced ahead of deadlines by the Claimant. In addition, the Claimant alleges that her line manager i) edited her probation review against her wishes and ii) accused her of not completing work over a series of telephone calls on 9 July 2020.*

137. Although we tried hard to extract from the claimant an account of what in general she had found bullying about Ms Finlayson's behaviour, we were left ultimately with little by way of tangible examples.

138. So far as the specific allegation of delaying work was concerned, we had no actual examples provided and the reports on the claimant we saw were flattering about the claimant's speed and efficiency. We accepted evidence from Ms Barton that this was a busy and difficult time with changing priorities. We could see no real evidence that Ms Finlayson had deliberately delayed the claimant's work or done anything to undermine her work. The claimant's perception that other people would think that the claimant was not doing her work timeously was the opposite of the truth. Her probation report was glowing and her position was made permanent.
139. The only example of 'undermining' we could see was the claimant's assertion that Ms Finlayson had on occasion talked over her in meetings. However, it seemed likely to us that what the claimant was referring to here were the occasions which Ms Finlayson described in her investigation interview when she intervened to provide context to the claimant's remarks.
140. As to the claimant's allegation that Ms Finlayson had edited her probation report against her wishes, we had an evidential difficulty in that we were not provided with the unedited version. In the absence of that document or a good description of it, we could not form a view as to whether the references the claimant had made to Ms Hill had been appropriately edited out or not. It may well be the case that criticisms of another colleague do not properly form part of an appraisal. We were not in a position to form a view.
141. The phone calls on 9 July 2020 occurred, and Ms Finlayson did raise her voice inappropriately and did cause the claimant to believe she was being blamed for the problems with the report. That was clearly something which should not have occurred. We asked ourselves whether on its own, this incident was a breach of the implied term of trust and confidence.
142. We concluded it was not. People do behave badly at work at times especially when under stress. Not every such occasion is a breach of the implied term of trust and confidence in the contract of the employee on the receiving end of the treatment and one has to look at the severity and context of the incident. This was a one off incident, it was not sustained or extreme; there was, for example no insulting of the claimant or swearing.
143. We could find no surrounding facts which would put a complexion on this incident which would make it, on its own, a breach of the implied term. We go on below to consider whether, taken together with other matters, this incident was part of a breach of the implied term of trust and confidence.

*Issue: b. The Claimant's line manager's manager, Jane Barton, and Deputy Director, Nigel Gooding, failing to deal with the Claimant's informal complaints about her line manager's conduct before July 2020.*

144. We concluded that the claimant had not said anything to the managers which would have led them to believe that she was complaining of bullying and

harassment by Ms Finlayson. They (correctly based on what the claimant told them) perceived that her main concerns were about the role and they took appropriate action to look for work which would stretch her and to facilitate a move if she wished to have one. Although it was recognised that there was some tension in the relationship between the claimant and Ms Finlayson, this was perceived to be caused by a difference in work style between the two. The claimant did not revert to Mr Gooding or Ms Barton in a manner which would have alerted them to ongoing problems with Ms Finlayson.

145. We did not conclude that this was a breach of the implied term of trust and confidence.

*Issue: c. Senior management blocking or failing to authorise the Claimant's ongoing job applications for around eight posts to transfer out of the team.*

146. The only evidence we have on this issue was the claimant's evidence that she was not interviewed for any of the roles she applied for. We had some anecdotal evidence as to how internal applications to jobs posted on the Civil Service Jobs website were processed. We concluded that at the relevant time, managers would only be involved in 'blocking' a candidate in the sense that they could raise an issue of significance if there were such an issue, such as the fact that the employee in question had not passed probation.
147. Because the claimant had not provided details of the jobs she had applied for, either internally to the grievance investigation or at any stage prior to being asked by the Tribunal in her oral evidence, the respondent had not been able to investigate why the claimant was rejected for the roles. Any deficiency in the evidence we had must be laid at the claimant's door.
148. As to transfers at the same grade level, an exception was made for the claimant at a time when there was otherwise an embargo in such moves.
149. We could not conclude that senior management had blocked or failed to authorise any of the claimant's job applications.

*Issue: d. Failing to follow its grievance and investigation procedure correctly by carrying out a flawed investigation and delays in the grievance process.*

150. Looking at the issue of delays, we deal first with what we concluded was a misunderstanding on the claimant's part. She appears to have believed that it was part of the role of management to pursue a grievance on her behalf, either after her raising concerns with Mr Gooding and Ms Barton in November 2019 or in July 2020 when she complained about Ms Finlayson's behaviour. The respondent's procedures, like every grievance procedure the Tribunal panel are aware of, requires an employee to make a decision

whether she wishes to make formal grievance and to articulate that grievance herself.

151. There was no delay in November 2019 because there was no formal grievance at that point and there was no delay in July 2020 for the same reason. At that point the claimant was saying in terms in any event that she was going to pursue a grievance herself in the future. She was, if anything, discouraging the respondent from undertaking an independent investigation of her complaints in her written communications and by declining to have a discussion with Ms Barton.
152. Once the claimant had submitted the form to commence a formal grievance, there was a period of delay which at least in part is the claimants' responsibility. She did not submit the form to someone in the line management chain or another appropriate manager as the guidance required. Some responsibility appears also to attach to the respondent in that the email inbox the claimant sent her form to does not appear to have been thoroughly monitored. This was not a substantial delay.
153. We concluded that once the form had been found, the respondent sought to pursue the investigation with an appropriate degree of urgency. We considered that Ms Ferguson acted with reasonable expedition in arranging and completing interviews with witnesses and that the report was prepared within a reasonable timescale. She made appropriate efforts to involve the claimant in the investigation. Ms Muckle also carried out her part of the process within a reasonable timeframe. We could see that there were factors which slowed the process down, including the extension of the terms of reference. We did not consider that there was any culpable delay during this period or that the impression objectively created was anything other than that the respondent was taking the matter seriously and seeking to address it efficiently.
154. So far as the appeal was concerned, there were more significant delays. However, much of that delay was created by the claimant's own failure, for whatever reason, to cooperate with the process and provide the further information she had been asked for. Whether or not there was fault in the respondent's own systems in not being able to access a Word version of the claimant's documents with accessible attachments at an earlier date, the claimant was made aware of the problem and asked to assist so that Ms Collins could progress the appeal. The claimant did not assist. Nor did she provide the information requested by Ms Collins about the jobs she had applied for through Civil Service Jobs.
155. There were longer delays than there should have been in the appeal process. We were conscious that Ms Collins had a busy day job to do and had asked the claimant on a number of times to help her with accessing information. The claimant's responses were not helpful. Whilst it may be that Ms Collins could have done more than she did to chase information and update the claimant over the period, we could not conclude that her relatively minor derelictions could of themselves amount to a breach of the implied

term of trust and confidence, particularly in circumstances where it was within the claimant's own power to get the process back on track and she took no action.

156. The claimant's other complaints about the process seemed to us to have no merit.
157. She suggested that the managers involved in her grievance were not impartial as they came from the same directorate and must have been friends with Mr Gooding. We found no evidence of the latter. It seemed to us that in a sizeable directorate of over 300 staff, it was reasonable to consider that managers outside the line management chain would be sufficiently impartial albeit they might know the subjects of the grievance in passing, by name and/or by sight.
158. The claimant asked a number of questions of witnesses about the roles played by various HR staff but we could see nothing suspicious about the role played by HR.
159. The selection of witnesses made by Ms Ferguson was a reasonable selection given the information she had about the claimant's complaints. It would not have been sensible or proportionate to simply interview everyone in the claimant's team. The claimant had but did not avail herself of the opportunity to suggest witnesses. In terms of the questions Ms Ferguson was able to ask, she was hampered by the claimant's refusal to meet with her to provide further detail about her complaints.
160. We found nothing irregular in witnesses being given the opportunity to make adjustments to the notes of their interviews.
161. There were limitations to the investigation carried out by Ms Ferguson caused by the claimant's refusal to be interviewed and suggest witnesses. The claimant's behaviour in this respect was difficult to understand. We did not conclude that the investigation was inadequate in those circumstances. Ms Muckle tried to give the claimant a further opportunity to be involved in the investigation. The claimant's response of producing a long and difficult to understand document with numerous attachments on the day of the grievance meeting was not reasonable in the circumstances and it was proportionate for Ms Muckle to later review that document but not to reopen the investigation. The claimant was significantly in breach of her own duty to cooperate at this point.
162. In any event the document was fully considered by Ms Collins at the appeal stage.
163. It was suggested by the claimant that some kind of review of Mr Gooding's emails should have taken place to investigate the claimant's allegation of job blocking. This seemed to the Tribunal a wholly inappropriate and disproportionate step in circumstances where the claimant declined even to



identify the jobs she had applied for. The claimant generally suggested that more documents should have been obtained and considered but it was difficult to see how Ms Muckle could have undertaken any kind of proportionate search for documents without the claimant's input, which was not forthcoming.

164. We could see nothing about the grievance process which amounted to a breach of the implied term of trust and confidence.

*Issues: e. The Decision Maker refusing to uphold the Claimant's grievance.  
f. The Appeal Manager refusing to uphold the Claimant's appeal.*

165. The grievance was not upheld and nor was the grievance appeal.
166. Bearing in mind the claimant's failure to cooperate fully with either investigation, we could not find that the conclusions reached were anything other than conclusions which were reasonably open to Ms Muckle and Ms Collins respectively and which did not themselves breach the implied term of trust and confidence.

*Issue 2. If so, did the conduct either cumulatively or individually amount to a repudiatory breach of the implied term of mutual trust and confidence which entitled the Claimant to treat herself as discharged?*

167. We have already considered above whether the individual matters complained of constituted such a breach. We went on to look at the matters where there was some fault on the part of the respondent – such as Ms Finlayson's conduct in July 2020 and the delays in the grievance appeal, and considered whether taken together these amounted to a breach of the implied term of trust and confidence. We concluded they did not. The context of these failings was one where the respondent was assuring the claimant that it was seeking to investigate her grievance and provide her with such support as she needed. For whatever reason, whether due to suspicion of the respondent caused by or in conjunction with poor mental health, the claimant did not cooperate.

*Issue: 3. If cumulatively, what was the final straw that the Claimant contends entitled her to resign? The Claimant alleges that the Respondent's refusal to uphold her appeal against the grievance outcome was the 'last straw' that caused or triggered her resignation.*

168. We did not have to look separately at this issue, given our findings above.

*Issue: 4. Did the Claimant resign in response to this alleged breach of the implied term of trust and confidence?*

169. We did not find that there was such a breach but we accepted that the claimant resigned due to a perception that the matters she had complained

about to the Tribunal had constituted a breach of the implied term of trust and confidence.

*Issue: 5. Did the Claimant act promptly in resigning in response to this alleged breach so that she could not be said to have waived her rights in relation to it?*

170. We did not have to consider this issue, given our findings above.

*Issue 6. Has the Claimant otherwise affirmed her contract since the act relied on?*

171. We did not have to consider this issue, given our findings above.

*Issue 7. If the Respondent is found to have constructively dismissed the Claimant, was the reason for this dismissal a potentially fair reason within the meaning of section 98(2) of the Employment Rights Act 1996?*

172. We did not have to consider this issue, given our findings above.

173. We did not uphold the claimant's unfair dismissal claim.

#### Disability status (section 6 Equality Act 2010 ("EA"))

*Issue 8. At the material time, did the Claimant have a physical or mental impairment that amounts to a disability as defined by the section 6 of the Equality Act? The Claimant alleges the relevant disability is anxiety and depression and the following sub-issues fall to be determined for establishing whether her anxiety and depression amounted to a disability:*

*a. Did the Claimant's anxiety and depression have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?*

*b. If not, would it have had such an effect were the Claimant not receiving medical treatment or other measures to treat her depression?*

*c. Was the Claimant's anxiety and depression long term? Namely, did it last for 12 months, or was it likely to last for more than 12 months? If not, was the impairment likely to recur?*

*9. When, if at all, did her impairment become a disability? The Claimant claims to have been disabled from November 2019.*

174. The claimant's disability was conceded by the respondent.

*Issue: 10. Did the Respondent know the Claimant had this disability or reasonably ought it to have known of this disability? If so, when and by what means? The Claimant claims that the Respondent's date of knowledge was July 2020 when she informed the Respondent by email that she was no longer able to function at work because of physical and mental health issues and enclosed a GP certificate signing her off work.*

175. We had no evidence that the respondent had any information about the claimant's disability at the relevant time apart from the email and sick certificate in July 2020. The sick certificate referred to anxiety and signed the claimant off for two months. At that point and through the relevant period in September 2020, there was no reason why the respondent would or should have understood that the claimant's condition was likely to continue for twelve months. The claimant did not assist Ms Barton to obtain further information which might have revealed that her condition was long term when she declined occupational health referrals.
176. The claimant suggested that the respondent would or should have been aware of her mental health condition prior to that date but she did not give evidence of anything which would have reasonably put Ms Barton or anyone else in her line management chain on enquiry. She said that she was sitting away from her team, which should have alerted management, but Ms Barton said that in the crowded environment they were in, this was unremarkable. By March 2020, of course, everyone would have been working remotely and the opportunities to observe the claimant would have been limited. She appeared to be content at the time of her interim report in May 2020. Although the claimant may have confided in her mentor and other colleagues, there is no evidence that anything she said to these individuals was passed on to the claimant's line management chain and there is no basis on which to impute their knowledge to the respondent.
177. We did not find that the respondent had actual or imputed knowledge of the claimant's disability at the relevant time.

Discrimination arising from disability (section 15 EA)

*Issue 11. Did the Respondent treat the Claimant unfavourably? The allegations of unfavourable treatment relied upon by the Claimant for this claim are:*

*a. WhatsApp messages sent by Jane Barton in or around September 2020 asking her when she was expecting to return to work.*

178. We concluded that Ms Barton's efforts to keep in touch with the claimant and enquire about her return to work were both in accordance with the respondent's policy and also sensible and reasonable. Her tone was empathetic and appropriate. There was no unfavourable treatment.

*Issue: b. Jane Barton announcing at a team meeting in or around summer 2020 that the Claimant was expected to return to work.*

179. Ms Barton denied that she had made such an announcement and the claimant had no evidence that she had made such an announcement. It appeared from the claimant's questions to Ms Barton in cross examination that the claimant had drawn an inference that there had been such an announcement from the notes of Ms Barton's investigation where Ms Barton

referred to the fact that 'we' were expecting the claimant back in the office after her initial sickness certificate was due to expire. It was clear that this was a generic managerial 'we' rather a than reference to the entire team having an expectation caused by Ms Barton making an announcement.

180. This did not happen so there was no unfavourable treatment.

*Issue: 12. If so, did the Respondent treat the Claimant unfavourably in the manner alleged because of something arising in consequence of the Claimant's disability? The 'something arising' relied on is the Claimant's absence from work.*

181. In relation to the communications from Ms Barton, they clearly did arise from the claimant's absence from work, which in turn was caused by her disability. However, there was nothing unfavourable about the treatment.

182. The announcement at work simply did not happen.

*Issue: 13. If so, was this a proportionate means of achieving a legitimate aim? The Respondent will say that the application of the Attendance Management Policy and the actions taken by Jane Barton were a proportionate means of achieving appropriate attendance management, which was a legitimate business aim.*

183. We did not have to go on to consider this issue.

184. We did not uphold the claimant's claims of disability discrimination.

Notice pay claim

*Issue 14. Did the Respondent leave the Claimant with no choice but to resign without notice? The Claimant relies on the allegations at paragraph 1 to 4.*

185. There was no constructive dismissal on our findings above. We did not uphold this claim.

*15. In so far as the allegations at paragraphs 1 to 4 are admitted or proven, would the Claimant have resigned without notice even if the Respondent had not engaged in this conduct?*

*16. If the Claimant would not have resigned but for the Respondent's alleged conduct, how much notice pay would have been payable to the Claimant if she had given notice in accordance with her contract?*

186. These issues did not fall to be considered given our findings.

Jurisdiction (time limits)

*17. The claim form was presented on 23 December 2021. The ACAS early conciliation process ran from 19 October to 29 November 2021. Accordingly, and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 20 October 2020 is potentially out of time.*

*Issue 18. In respect of the claims for discrimination arising from a disability, the Tribunal will need to consider:*

- a. Whether any of the matters occurring before 20 October 2020 form part of conduct extending over a period (within in the meaning of s.123(3)(a) EA) ending on or after 20 October 2020;*
- b. If not, whether it would be just and equitable to extend time pursuant to s.123(1)(b) EA.*

187. These issues did not fall for consideration given our findings.

Employment Judge Joffe  
London Central Region  
28/03/2023

Sent to the parties on:

28/03/2023

For the Tribunal Office: