Case No: 2301382/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS:

Mr S Gooden
Ms Y Walsh

BETWEEN:

MRS D HAM

Claimant

AND

SURREY AND SUSSEX HEALTHCARE NHS TRUST

Respondent

ON: **26 June – 4 July 2017**

Appearances:

For the Claimant: Ms S Fraser-Butlin, Counsel
For the Respondent: Ms H Patterson, Counsel

RESERVED JUDGMENT

1. The constructive dismissal claim succeeds
2. The disability discrimination claim pursuant to section 15 Equality Act 2010 succeeds
3. The matter will be listed for remedy on a date to be advised.

REASONS

1. By a claim form presented on 22 July 2016, the Claimant complained of constructive unfair dismissal and disability discrimination pursuant to sections 15 of the Equality Act 2010 (EqA). A claim under section 20 EqA had been abandoned by the time the matter came before us. All claims were resisted by the Respondent though it conceded that the Claimant was disabled for the purposes of the EqA.

2. The Claimant gave evidence on her own behalf. We heard evidence from the Respondent through: Angela Stevenson, Chief Operating Officer; Paul Simpson, Chief Financial Officer; Sue Jenkins, Director of Strategy and Kaizen Promotion Office Lead; Janet Miller, Deputy Director of Workforce; and Jane Penny, Lead Cancer Nurse. The parties presented a joint bundle of documents and references in square brackets in the judgment are to pages within that bundle.

The Issues

3. The agreed legal and factual issues are set out at pages 59-61, as amended at the start of the hearing. These are dealt with more specifically in our findings and conclusions below.

The Law

Discrimination because of something arising in consequence of disability

4. Section 15 EqA provides that a person (A) discriminates against a disabled person (B) if –

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

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

Constructive Dismissal

5. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides that an employee shall be taken to be dismissed by his employer where the employee terminates the contract, with or without notice, in circumstances in which he is entitled to do so by reason of the employer's conduct.

6. The case; Western Excavating Limited v Sharp 1978 IRLR 27 provides that an employer is entitled to treat him or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach of the contract or which shows that the employer no longer intends to be bound by one or more of its essential terms. The breach or breaches must be the effective cause of a resignation and the employee must not affirm the contract.

7. The case: Malik v Bank of Credit and Commerce International SA 1997 IRLR 462 provides that the implied term of trust and confidence is breached where an employer, without reasonable or proper cause, conducts itself in a manner calculated or likely to

destroy or seriously damage the relationship of confidence and trust between employer and employee.

8. In London Borough of Waltham Forest v Omilaju [2005] ICR 481, the Court of Appeal stated that a final straw should be an act in a series whose cumulative effect amounts to a breach of trust and confidence and it must contribute to the breach. An entirely innocuous act on the part of an 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.

Submissions

9. We are grateful to both Counsel, who provided detailed written submissions which they spoke to briefly, along with a number of authorities. These have been read carefully and taken into account in our conclusions below:

Findings and Conclusions

10. The Claimant was employed by the Respondent from March 1998 to 30 March 2016 as a Clinical Nurse Specialist (CNS) Benign Breast Disease, in Cancer Services.

11. In November 2014, the Claimant was diagnosed with post traumatic stress disorder (PTSD) and secondary clinical depression, brought on by the death of her mother in December 2013. She relies on these conditions as her qualifying disability.

12. On 30 March 2016, the Claimant tendered her written resignation with immediate effect, claiming that she had been constructively dismissed. She relies on the following series of events which she contends cumulatively amount to a breach of the implied term of mutual trust and confidence:

Breach of medical confidentiality

13. On 9 January 2014, following the death of her mother, the Claimant was signed off work, initially for a period of 4 weeks, suffering from a bereavement reaction complicated by an anxiety/depression illness [223a]. She was later diagnosed with PTSD and remained absent from work, returning shortly before her eventual resignation.

14. On 18 February 2014, the Claimant was referred to Occupational Health (OH) by Jane Penny (JP) Lead Cancer Nurse. The referral form was signed by JP form and although the form contained a signature box for the employee to confirm receipt prior to its sending to OH, this was unsigned, presumably as it was thought unnecessary given that the form was emailed to the Claimant that day. The form states that the report will be sent to the manager making the request and HR Business Partner. [226]. Subsequent referrals followed this format until March 2016, when the form was amended, probably as a result of the Claimant's grievance, referred to below [494-496].

15. A number of medical reports were produced by OH over the period of the Claimant's absence which variously advised on her symptoms, prognosis, likelihood of return and adjustments.

16. This complaint arises out of an OH report produced by Dr Laurence Boakye on 2 June 2014. The report was addressed to JP and marked **Private & Confidential Addressee only**. It was cc'd to the Claimant as well as Juliette Stern, HR Business Manager. [236-237]

17. On 2 July 2014, the Claimant emailed JP complaining that Dr Boakye had copied his report to Juliette Stern without her permission and that this had caused her to feel upset and compromised. She went on to say that the RCN (Royal College of Nursing) had taken this up on her behalf. [240] JP did not respond to the complaint but told us that she had spoken to HR about the matter.

18. The Claimant subsequently raised this in her first grievance on 1 April 2015 and her complaint was partially upheld. The Respondent found that, whilst no express consent had been given for the disclosure, it was standard procedure to share OH reports with HR. The view taken by the Respondent was that explicit consent was unnecessary as HR Business Partners worked collaboratively, as required, in providing advice and in doing so, were bound by a duty of confidentiality. The Respondent relies on its sickness absence policy in support of this though they concede that its terms are not entirely clear on this issue. Dr Boakye had by this time left the Trust so there was no specific action that the Respondent could have taken against him at this stage, even if they had wanted to. However, recommendations were made in order to prevent the situation arising in the future. [385-386]. The Claimant felt that her complaint should have been fully upheld but that was rejected on appeal [461].

19. The Managing Sickness Absence Policy sets out the role of OH in providing a referring manager with a report on an employee's health and the impact on their capacity to work. Clause 3.17 of the Policy provides that prior written warning has to be given to the employee for information to be discussed with other named persons. It also provides that medical confidential information should not be disclosed without the employee's prior consent. [133,156].

20. Whilst we can understand why it would be necessary for HR to have OH information in order to carry out its advisory role in the context of managing sickness absence, the policy does not provide for this to be passed to HR as a matter of course and it is not sufficient in our view for the Respondent to rely simply on implied consent or normal practice when dealing with something as sensitive and personal as medical information. We find therefore that the Respondent's actions did amount to a breach of the Claimant's medical confidentiality.

Requirement to attend a formal sickness review

21. Under the Respondent's sickness absence policy, after a person has been absent for 4 weeks or more, a sickness review meeting should be arranged no later than the 5th week of absence. [114]. The 5th week of absence in the Claimant's case was 13 February 14, at which point, no sickness review meeting had been arranged.

22. On 3 April 14, JP wrote to the Claimant asking to meet up to see what support she could offer. She indicated that the meeting could be somewhere away from the office if the Claimant preferred. The Claimant was not well enough to meet at that time but said she would contact JP to arrange another time when she was feeling better. [232 & 233]

23. On 12 May 2014, JP emailed the Claimant renewing her invitation to meet up and again giving her the option to meet away from the workplace. [235]. The Claimant indicated that she was happy to meet up outside the hospital but did not give any indication as to when. [235]. The Claimant and JP eventually agreed to meet up on 1 July 2014 at a local pub in Reigate. However on the day, the Claimant emailed JP cancelling the appointment as she was not feeling up to meeting. [238a & 240]

24. On 18 August 2014, OH sent the Respondent a report stating that the Claimant would be fit to work with adjustments from September 2014 and set out suggestions for a phased return and limited duties. [243-244]

25. The Claimant wrote to JP saying that she intended to return to work on 15 September 2014. We did not see this letter but it is referred to in JP's reply of 28 August 2014, inviting the Claimant to a Formal Review meeting. The purpose of the meeting was to discuss OH's advice and the adjustments required on return to work. The letter was copied ito Capsticks HR Advisory Service [246-247]

26. There then followed an email exchange between the Claimant and JP about the proposed meeting. The Claimant queried the need to attend such a formal meeting and wanted to meet with JP on her own. She also expressed concern at the proposed attendance of a member of Capsticks HR Advisory Service. This was because she associated the name Capsticks with the Law Firm and considered their presence at the meeting akin to a disciplinary meeting and intimidatory. She was also concerned that Capsticks would be privy to her personal medical issues that would be discussed. The Claimant was shocked by the formality of the meeting.

27. Returning to the Absence policy, whereas under the short term and intermittent absence section there are gradations of meetings that become more serious as the absence progresses, the long-term absence section does not clearly distinguish between informal and formal meetings. We can therefore understand why the Claimant was expecting an informal return to work meeting as that had been her experience on a previous period of absence, albeit, that was probably dealt with under the short term absence provisions.

28. On 10 September 2014, the Claimant asked JP to send her details of any changes which might affect her role. [248-252B]. In response, JP advised the Claimant that she would update her on changes at work at their meeting. [252]. At the eventual meeting (which took place by teleconference) the changes discussed were general and not specific to the Claimant's role.

29. On 16 September 2014, the Claimant gave some potential dates for the meeting and at the same time requested that it proceed without the presence of Capsticks HR. [252B].

30. On 17 September 2014, JP rang the Claimant. This conversation is not referred to in JP's statement but the Claimant says that JP insisted that the formal meeting with Capsticks HR was necessary before she returned to work and rejected the Claimant's suggestion that she (JP) conduct a separate meeting with HR afterwards.

31. On 18 September 2014, the Claimant was signed off again due to an exacerbation of her symptoms, which she put down to the Respondent's unsupportive approach in relation to the return to work meeting. [253]

32. The Claimant was referred again to OH and invited to attend a formal review meeting on 15 October 2014. As before, the meeting was to take place in the presence of an HR representative and, in a departure from the absence policy, the Claimant could be accompanied by a friend who was not a work colleague. At the end of the letter, the Claimant was asked to notify of any reasonable adjustments needed to enable her to attend and participate in the meeting. [255-256]

33. The Claimant was not well enough to attend the scheduled meeting and again complained about the formality of the proposed meeting and the intended presence of Capsticks. She told the Respondent that attending such a meeting would impact on her health and well-being and requested that it be conducted by way of telephone conference with just her and JP [258-260]. That request was initially refused by JP on the basis that OH had advised that it would be beneficial for the Claimant to attend a meeting. That is not an entirely accurate account of the OH advice given. JP had asked OH whether the Claimant would be fit enough to attend a face to face sickness absence review but without telling them of the Claimant's concerns. In those circumstances, the advice received - that there was no medical reason for her not to attend a meeting - was based on an incomplete picture. [262]

34. In November 2014, the Claimant referred herself to Dr Cantopher, a Consultant Psychiatrist, and he diagnosed her as suffering from Post Traumatic Stress Disorder (PTSD) and a degree of clinical depression. [273-274]. That information was fed back to JP by OH on 24 November 2014, at which point, they advised against a face to face meeting and suggested that questions be put to the Claimant in writing so that she could respond to them. On this occasion, OH for first time opined that the Claimant's condition was likely to be regarded as a disability under the EqA [275-276].

35. In light of the OH advice, JP agreed to a teleconference but with the Deputy Chief Nurse, Sally Britain and, Sarah Wood, internal HR representative also present for management [279]. The Claimant agreed to Sarah Wood being present provided matters related to her medical condition were not discussed. It is unclear whether she had any objections to Sally Britain's presence [291b].

36. In the meantime, on 15 January 2015, JP sent the Claimant some questions for her to think about in advance of the meeting and gave an indication of the topics for discussion.

37. In our view, given that the Claimant had been away from work for 7 months by August 2014 and it had not been possible to meet with her during that time to discuss her absence, it was not unreasonable for the Respondent to request a meeting before her return. Although the Claimant said that the invite letter made her feel as if she was being disciplined for her absence, her perception was not a reasonable one and may have been affected by her condition at the time. We have read the letter and there is nothing in its content that suggests anything disciplinary. The topics listed for discussion were appropriate and beneficial to the Claimant. The adjustments requested by the Claimant, although initially refused were eventually substantially agreed. However, the Claimant's complaint is that they were not agreed straight away. In our view, the Respondent's initial decision to apply its Absence policy was a reasonable starting point. After all, policies are there to be followed and they ensure consistency of approach. That said, employers should not rigidly follow procedures where some flexibility is appropriate, particular where adjustments are necessary for medical reasons. In this

case, once OH advised that adjustments be made to the meeting, they were. Whilst some criticism can be levied at the Respondent for not being as proactive as it could have in seeking OH advice, overall, we do not consider that its approach amounted to a fundamental or other breach of the Claimant's contract.

Issue 1.2.6 & 1.2.7 conduct of Teleconference/Respondent's failure to agree adjustments

38. The teleconference took place on 18 March 15' and did not go well on either side. The Claimant complains about the Respondent's conduct of the call and the effect it had on her. She was not specific about the conduct in question but said that she felt overwhelmed and distressed by the amount of information she was receiving. She said in cross examination that she had thought issues would be addressed slowly and sensitively, suggesting that they were not. Whilst we accept the Claimant's account of how she felt, we are not convinced that this is due to blameworthy conduct on the Respondent's part. The teleconference was taking place at the Claimant's request and was always going to be a poor substitute for a face to face meeting where an open dialogue could have been had and empathy more demonstratively expressed. Apart from the physical barriers presented by the phone, it made the conversation difficult and non verbal communication hard to read, increasing the scope for misunderstandings. So, for example, whereas the Claimant interpreted JP's approach as insensitive, JP viewed the Claimant as not being engaged and going through the motions in order to get through the meeting. We suspect that neither description is entirely accurate.

39. On 30 March 2015, JP wrote to the Claimant with a summary of what had been discussed at the teleconference. It is clear from this document that the Respondent addressed all of the adjustments detailed in the most recent OH report of 2 March 2015. Where they could be accommodated, they were; and where it was not possible to do so, alternatives were proposed. The Claimant told us that the adjustments proposed by the Respondent were not the ones she needed – for example, one of the adjustments she wanted was to work from home, which the Respondent said was not feasible. In considering whether to make adjustments, the Respondent had to balance the needs of the Claimant against those of the Trust. This is addressed in the grievance appeal outcome letter of Paul Simpson, who we heard from, in which he explains why this adjustment, along with others requested by the Claimant, could not be made. [464-466]. We are satisfied that these represent genuine business reasons and there is no basis for us to interfere with them.

Issue 1.2.8 – Threat of dismissal

40. The Claimant complains that she was threatened with a final formal sickness review and dismissal on 30 March 2015. This is a reference to the letter above, which concludes by advising the Claimant that her role is at risk if there is no prospect of a return to work in the foreseeable future [305-308].

41. To set the context, the Claimant had been due to return to work on 23 March 2015. However, on 22 March, she emailed JP to say that she would be on sick leave until further notice as she was not confident that sufficient support mechanisms were yet in place. This was a reference to the adjustments that she required, which she felt were not adequately addressed at the teleconference. [304d]. By this stage, the Claimant had

been absent from work for a year and 4 months and an attempt by the Respondent to manage her return to work had failed. Against that background, we find that it was reasonable for the Respondent to turn its mind to how much longer it could hold the Claimant's position open and it was entirely proper that the Claimant be made aware of those considerations at the earliest opportunity so that she could put forward her own views on the matter. Although the Claimant said she found the statement threatening, we are satisfied that it was measured in tone and was in line with its long-term absence procedure.

1.2.9 – 1.2.13 Failure to address grievances 1-3 and the delay

42. On 1 April 2015 the Claimant submitted 2 grievances. The first grievance was about the breach of confidentiality by Dr Boakye, referred to above and separately, about the conduct of Bev Cornish, the OH Nurse Manager, who the Claimant alleged was abusive to her over the phone. The Claimant expressly stated that she did not wish to attend any grievance meetings in person. [311-314].

43. The second grievance made allegations of discrimination due to a failure by the Respondent to make reasonable adjustments and named a number of individuals who she considered responsible for this. The grievance was very detailed – it contained 68 separate bullet points – though much of it was background to the complaint. It ended with a number of outcomes being sought. [311-323]

44. On 13 April 2015, the Claimant lodged a third grievance. This seemed to be an extension of the second grievance as it was a further complaint about lack of reasonable adjustments, in relation to her planned return to work. [325-327]

45. On 14 April 2015, the Claimant wrote to the Respondent confirming that she was fit to return to work subject to agreement and implementation of adjustments outlined by OH. [332]. However, the Respondent decided that a return to work could not be agreed until the grievance investigation had concluded. The Claimant was therefore placed on special leave from 7 April 2015 [380].

46. On 21 April, the grievances were acknowledged by Fiona Allsop, (FA) Chief Nurse, who summarised her understanding of the complaints under 5 headings. The Claimant was advised that the grievances would be dealt with under stage one of the Respondent's grievance policy and would be completed within 4 weeks. [328-329].

47. On 30 April 2015, FA wrote to the Claimant informing her that due to work commitments she was unable to deal with the grievances and that they would instead be dealt with by Angela Stevenson, (AS) Deputy Chief Operating Officer. [337]

48. The grievances were investigated by Sally Dando (SD), Head of Therapies, and on 21 May 2015, she issued her report. This was provided to AS but not to the Claimant at this stage. [364-379] AS received this on Friday, 22 May 2015 but was on pre-planned leave from the following Monday, 25 May, and did not resume work until Monday, 1 June 2015. The Claimant was made aware of this at the time. [346].

49. AS provided her outcome to the grievance on 15 June 2015, 4 weeks later than advised. [385-387]. The outcome letter was in our view lacking in sufficient detail given that the Claimant was not provided with the report at the same time. AS did not address the complaint about Ms Cornish at all and her response to the very detailed allegations

relating to the management of her sickness absence and failure to make adjustments was dealt with in brief paragraphs without any information as to the basis for the decision. These deficiencies were addressed further in the process at appeal stage and the Claimant confirmed in cross examination that she was provided with a detailed response to her appeal.

50. The Claimant also complains about the length of time it took the Respondent to deal with the grievances, in particular, the appeal. The appeal was lodged on 2 July 2015 and acknowledged over a month later, on 7 August, by Yvonne Parker (YP), Director of Human Resources, who advised the Claimant that there would be a delay in convening an appeal panel during the summer holiday period, which we assume means the months of July and August. [391-396, 397].

51. The appeal was originally scheduled for 14 October 2015. We don't know exactly when the date was advised but it is referred to in a letter from Teresa Budrey (TB) the Claimant's RCN representative dated 10 September so it must have been on or before that date. In the letter, TB asks for a number of adjustments to be put in place for the hearing. These included a maximum hearing duration of 60 minutes, a clear agenda 7 days beforehand and a limit of 2 people on the Respondent's side. The latter was a departure from the grievance procedure which provides that the grievance appeal panel will comprise up to 3 and not less than two panel members and that there would be an HR Manager present taking the notes. [140]

52. On 14 September 2015, the Respondent received a letter from Dr Cantopher, the Claimant's Consultant Psychiatrist, suggesting that because of the Claimant's propensity for stress, the number of senior personnel attending the appeal should be minimised. [398]. There was then an exchange of correspondence about the adjustments. The Respondent initially insisted on referring the Claimant to OH so that they could seek advice on the adjustments requested by the Claimant. However, in the end, they agreed to the adjustments without a further referral but this was not until 2 November 2015, by which point the original date for the appeal had passed. [408-409]

53. The appeal hearing did not take place until 16 November 2015, 4½ months after the appeal was lodged. In line with the agreed adjustments, it was attended by 2 members of management, Paul Simpson, (PS) Chief Finance Officer, who was the chair, and an HR representative to take the notes. [435a-435g]. Although the grievance manager, AS, from stage 1 would normally have attended to present the management case, she did not do so on this occasion as the Claimant had specifically requested that she not attend.

54. The appeal outcome was not sent until 2 February 2016. [457-469] PS explains the delay in his outcome letter and expands on this at paragraphs 16-20 of his witness statement.

55. Whilst there were genuine reasons that account for part of the delay in dealing with the 3 grievances, they do not account for all of it. Given the timescales set out in the Grievance policy, the delay was unacceptably long and the Claimant was entitled to feel aggrieved by this. We do feel however that the grievance was responded to in full at the appeal stage.

1.2.14 – failure to agree adjustments requested by the Claimant

56. This complaint relates to adjustments that the Claimant wanted over and above those agreed by JP and overlaps with issue 1.2.7. Our findings are the same.

1.2.15 – Failure to address Grievance 4

57. In her letter to HR dated 10 September 2015, referred to above, TB, on behalf of the Claimant, raised a fourth grievance, this one about the delay in arranging her return to work and the length of time it was taking to schedule a grievance appeal hearing. [399-400]. Although the grievance was acknowledged, no hearing was arranged.

58. The Respondent accepts that it did not set up a separate grievance hearing for this complaint but contends that the concerns raised in the grievance were addressed by JM on 28 October 2015 at an informal meeting with the Claimant and TB and that they were also addressed by PS at the grievance appeal hearing, on 16 November 2015. However, on the 15 January 2016, TB wrote to Mark Preston (MP) Director of Organisational Development and People, seeking an update on grievance 4 [453]. The Respondent was therefore on notice that the Claimant did not consider the matter to have been resolved.

59. On 3 February 2016, MP replied that he had asked JM to write to her separately with the outcome of grievance 4 [470]. JM did not do so. She confirmed in evidence that MP had asked her what was happening with grievance 4 and she explained to him that those points had been dealt with. However, if that was her view, there was no reasonable explanation for her not responding in kind to the Claimant.

1.2.16 – failure to facilitate mediation

60. One of the things agreed following the grievance appeal was that the Claimant's line management would be moved away from JP and be temporarily transferred to Jamie Moore, Chief Divisional Nurse. Also, in order to repair the working relationship between the Claimant and JP, the Respondent intended to arrange a "clear the air" meeting between them. The Claimant complains that no such meeting took place but the Respondent contends that this was because the Claimant decided that it was not necessary. JM told us that a mediation meeting had been due to take place on 7 March 2016 but beforehand, she received a phone call from TB, who told her that, having now seen the investigation report, the Claimant appreciated that JP had been supporting her and there was therefore no need for a change of line manager nor for mediation. That evidence was not challenged and it appears to be supported, in part, by the Claimant's notes of a meeting on 14 March 2016 which record: "*No need for mediated meeting*". In light of JM's evidence, we find that this allegation is without merit.

1.2.17 - Change to return to work plan without consultation

61. Following the conclusion of the grievance process, it was agreed that the Claimant would resume work on Monday 14 March 2016. In preparation, JM wrote to the her on 4 March 2016 with a return to work plan purportedly taking into account the limitations identified in the OH report of 2 March 2015 [478-482]. The Claimant complains that the work plan included life support training to take place on her first day back on 17 March 2016, even though OH had recommended that she should not be required to provide

basic life support for the first 3 months of her return [290]. JM told us that this was because Jamie Moore was insistent that any nurse performing CPR needed to have the training and she relied on his clinical judgment. The problem with that was that the Claimant would not have been performing CPR in the first 3 months but it appears that was not conveyed to Jamie Moore either because JM was unaware of it or had forgotten about it. Either way, this breakdown of communication was unhelpful given the history of this case. In the event, line management of the Claimant remained with JP, who was content for the Claimant not to carry out the training straight away.

1.2.19 - Failure to consult on removal of counselling role

62. Although in the list of issues there is a complaint about the removal of the Claimant's counselling role as well as the lack of consultation about it, she said in evidence that although she was upset about the removal of this part of her role was not challenging the Respondent's right to make changes. Her complaint was about the lack of consultation.

63. By way of background, in October 2014, the Respondent issued a communication about a planned unveiling of a £1.5 million MacMillan Cancer Support Centre (the "Centre"). The idea for the centre came from JP and Deepa Doshi, former MacMillan Cancer Development Manager. They approached the Chief Executive of the Trust with the idea in early 2011 and in June 2013, funding for the project was approved. Among the facilities it would offer were counselling services. [254D]

64. As part of her role as Clinical Nurse Specialist, Benign Breast Disease, the Claimant provided therapeutic Counselling, predominantly to breast patients, but also to other patients with a cancer diagnosis. [198]. The Respondent had initially argued that counselling represented a small part (8%) of the Claimant's role. However, JP accepted in cross examination that it represented one third of her clinical facing role, which, in our view, is a far from small.

65. The services at the Centre were to be provided by volunteers. The Respondent started to recruit for volunteers around October/November 2015 and by 1 December 2015, they had 3 volunteer applicants, 2 of whom were interviewed on 10 December 2015 and the third applicant, on 20 January 2016. JP had been involved in some of the interviews and confirmed in evidence that by 10 December 2015, they knew they had 2 volunteers that were appointable.

66. The Claimant was the only employee within the Trust providing counselling services for cancer patients and had undertaken additional training to enhance her skills in this area. The intention of the Respondent was for the Centre to absorb this function and it was therefore inevitable, in our view, that there would be some impact on the Claimant's role. Presumably with the same thing in mind, on 11 December 2015, TB wrote to the JM asking her, amongst other things, what the implications of the Centre would be on the Claimant's role. [439-441]. On 18 January 15', having received no response, a chasing letter was sent. [455]

67. There was no direct response from JM to this enquiry but on 3 February 2016, MP replied, stating that he was unable to confirm, at that time, what implications the Centre would have on the Claimant's role and suggested that this would be covered in the arrangements for her return to work. [471]. We did not hear from MP so it is unclear whether his reply was informed by others or not. However, JM, who the original enquiry

was directed at, was copied in on the letter so was presumably comfortable with the response.

68. As already stated above, JM provided the Claimant with a return to work Job Plan on 4 March 2016 and this provided for the Claimant's counselling duties to be re-introduced 6 weeks after her return (i.e. 18.4.16). [481-482]. On 7 March 2016, in response to a request, JM sent the Claimant a copy of her job description. This was the job description which she had worked to prior to her absence. Significantly, it included under "Clinical Duties", the provision of therapeutic counselling. JM gave no indication in her correspondence that this was likely to change and it was therefore reasonable for the Claimant to assume that she would be returning to the same role, or at the very least, one that was substantially the same. [490]

69. On 14 March 2016, OH issued an updated report confirming the Claimant's fitness to return to work, initially on reduced days and hours. [499-500] JM met with the Claimant and her representative on the same day and confirmed that the return to work plan would be amended to incorporate OH's recommendations.

70. Accordingly, on 22 March 2016, JM wrote to the Clamant with an updated return to work plan. However, the amendments went beyond the OH recommendations. In this version, reference to the re-introduction of counselling services after week 6 had been removed. JM advised the Claimant that JP would update her on changes within the service on 23 March 2016 but gave no indication of what those changes were. JM had attempted to email the letter however, due to technological problems; the Claimant did not receive the amended plan before her meeting with JP. [505-507]

71. On 23 March 2016, the Claimant met with JP and it was during their discussion that JP told her that her therapeutic counselling role had been removed and taken over by the Centre. [511]. The Claimant told us that this was the last straw and on 30 March 2016, she tendered her resignation with immediate effect. [513]

72. JP told us that she first understood the implications of the Centre on the Claimant's role a few days before she was due to meet with her. That would have been around the 21 March 2016 and coincides with a conversation she had with JM. JP said that was on that occasion that she first saw the return to work plan prepared by JM and advised her that the Claimant would no longer by carrying out therapeutic counselling. JP said that it did not cross her mind to tell anybody before that point that the job had changed.

73. JP was the Claimant's line manager and knew that she was the only employee within the Trust carrying out counselling services for cancer patients. Also, as an integral part of the Centre project team, JP would have known that the plan was for the counselling function to be carried out exclusively by the Centre. She was therefore the one person in the Trust who should have known how the Claimant would be impacted by the opening of the Centre. JP confirmed in response to panel questions that a Business Plan was put together for the Trust Board and that there were meetings between the project team and the Board, though she did not attend these. JP also confirmed that she kept the cancer nursing team updated on the progress of the Centre at their team meetings, which were minuted. Whilst other team members received copies of the minutes, the Claimant did.

74. A project of this scale, conceived as far back as 2011, would have generated a certain amount of paperwork (manual or electronic) dealing with things such as: terms of reference; impact statements; staff projections; compliance documents and the like. Much to our surprise, no such documents were before us despite the Claimant's representatives apparently making repeated requests for disclosure. It is not credible for the Respondent to assert, as it did, that they did not have such paperwork. We know from the evidence that there was a Business Plan and this was not disclosed.

75. For the reasons above, JP's evidence on when she first became aware of the impact of the Centre on the Claimant's role was not, in our view, credible. It is more likely that, knowing that the Claimant would not have taken the news well, JP was reluctant to confront the issue and put it on the back burner for as long as she could.

76. It was submitted on behalf of the Respondent that the information had to be communicated to the Claimant at some point and she was going to be upset whenever she was told. That misses the point of the complaint. The Claimant would no doubt have been upset about the removal of the counselling, but it is the manner in which she was notified – once it was a fait accompli and without any prior warning or consultation – that she complains about.

77. It was further submitted that there was reasonable and proper cause not to warn the Claimant in advance of the changes as she had made clear that she did not want to be contacted or burdened with work-related issues while she was recovering. We consider that evidence disingenuous. It may well have been the case that the Claimant did not want to be troubled with general work matters while off sick, but she had made specific enquiries, through her representative, about the impact of the Centre on her job so clearly wanted to be informed about that. By the time that enquiry was made on 11 December 2015, the Respondent had 2 appointable volunteers. In our view, by this date, if not before, the Respondent would have had a pretty clear idea how the Centre would impact on the Claimant.

78. It was submitted for the Respondent that it would have been highly inappropriate to provide the Claimant with speculative information prior to her return, particularly if it could not provide details of the precise impact. Again, we disagree. It is quite normal for for employers to give advance warning of business decisions that potentially affect their employment. An obvious case in point is where employees are informed of the risk of redundancy.

79. It was suggested on behalf of the Respondent that because JP was not involved in line managing the Claimant between December 2015 and March 2016, she cannot be held responsible for any lack of consultation that occurred during that period. We disagree. JP was the one person (as we understand it) that knew about the impact of the Centre on the Claimant's role. It was therefore incumbent upon her to flag this up to HR and/or any interim management at the earliest opportunity.

80. Clause 5 of the Claimant's statement of main terms and conditions of employment provides: "*In order to respond to changes in the needs of the service, the Trust may seek to make a change to your location, duties, and responsibilities. Any such changes must be mutually agreed and will only be made after appropriate consultation with the Trade Unions and/or the individual employee….*" [189]. It is clear from this that the need

to consult was not just good practice, it was a contractual requirement. JP said that she was not explicitly aware of the term.

81. In our view, there was no reasonable or proper cause for the Respondent to act as it did. The Claimant describes her reaction to the Respondent's conduct at paragraph 117 of her witness statement. She refers to feeling deceived and deliberately misled into believing that she was returning to her original role and also feeling humiliated and traumatised on finding out that this was not the case. That reaction was entirely predictable given the background. The Claimant's representative had been asking repeatedly for an update and as late as 8 March 2016, counselling was included on the return to work plan.

82. We consider that the Respondent's actions in removing the Claimant's counselling duties without consultation, breached the implied term of trust and confidence and is sufficient, on its own, to amount to a fundamental breach of contract. Even if we are wrong about that, it qualifies as a last straw act and when added to the other failings we have identified (none of which on their own amount to serious breaches), we are satisfied that cumulatively, these amount to a fundamental breach of contract. We are satisfied that the Claimant resigned in response to the breach and did not delay. We find that the constructive dismissal complaint is made out.

83. Having found that there was a dismissal, we have then gone on to consider the reason for it. The Respondent relies on some other substantial reason of a type justifying dismissal. The reasons relied upon are set out at paragraphs 70-73 of the Respondent's written submissions. In essence, the Respondent contends that there was a genuine business reason for establishing the Centre; counselling only represented a small part of the Claimant's role; and the Respondent was not aware of its impact until March 2016. The last two points have already been rejected above. On the first point, we accept that there was a genuine business reason for establishing the Centre and it was no part of the Claimant's case that this should not have been done. These are therefore not substantial reasons justifying the dismissal. The Respondent has not demonstrated to our satisfaction that there was a potentially fair reason for dismissal and we therefore find that the Claimant's dismissal was unfair.

Section 15 EqA claim

84. The Respondent accepts, and we so find, that the Claimant's dismissal amounts to unfavourable treatment. We also find that the Claimant's absence was the effective reason or cause of the fundamental breach of her contract as it is clear to us that had she been at work, the Respondent would have engaged with her sooner on the changes. It is common ground that the Claimant's absence arose in consequence of her PTSD and depression, and therefore her disability. The first limb of section 15 EqA is therefore satisfied.

85. The Respondent relies on the following 4 legitimate aims:

    a. Managing the Claimant's sickness absence appropriately
    b. Managing the Claimant's grievance appropriately
    c. Ensuring the Claimant got a thorough response to her grievance
    d. Managing the Claimant back to work

86. We satisfied that they are all objectively capable of amounting to legitimate aims.

87. Turning to the issue of proportionality, we must ask ourselves whether the treatment of the Claimant was reasonably necessary to achieve the stated aims. Allonby v Accrington & Rossendale College and others [2001] EWCA 529. Put another way, could the aims reasonably have been achieved by a less discriminatory route and do they outweigh the discriminatory impact of the treatment/measures. That involves a balancing of the reasonable needs of the business against the effects of the Respondent's actions on the Claimant.

88. We remind ourselves that unlike unfair dismissal, the test is not "band of reasonable responses". Rather, we must reach our own view on whether the actions of the Respondent were an appropriate and necessary means of achieving the legitimate aims.

89. In dealing with this question, we have focused on the act that we have found to be a fundamental breach in its own right i.e. the failure to consult on the removal of the counselling duties.

90. We have asked ourselves whether it was reasonably necessary for the Respondent to delay notifying the Claimant of the removal of her counselling duties until March 2016 and for the reasons already stated above, we find that it was not. During cross examination, JP's stock response when asked to justify her actions was that she was taking advice from HR. JM says in her witness statement that part of her role was to support senior managers on complex HR issues but she told us that she only knew about the removal of the counselling duties a day or so before the Claimant. We heard no direct evidence from anyone with HR functions as to advice given in relation to this or the rationale for it.

91. Given the Claimant's propensity for stress and the difficulties she experienced previously with attending face to face meetings, which were well documented in the OH reports, the Respondent obviously needed to be mindful of not doing anything that might exacerbate her condition and extend her already lengthy absence. However, any concerns that the Respondent may have had about consulting with the Claimant on the changes while she was off sick could have been alleviated by them speaking informally to her RCN representative. From the correspondence we have seen, TB seemed to be doing a very professional job in representing the Claimant and she may well have been prepared to facilitate a discussion about the changes, had she been asked. Indeed the ideal opportunity to broach the subject with her arose following her letter of 11 December 2015. [439-441]. Further, or alternatively, the Respondent could have sought advice from OH on how to raise the matter in a way that was least detrimental to the Claimant's health and well-being. No reasonable explanation has been given as to why such steps were not taken.

92. Taking all of the above matters into account, we are not satisfied that the failure to consult was a proportionate means of achieving the Respondent's legitimate aims.

93. The section.15 complaint therefore succeeds.

Judgment

94. The unanimous judgment of the tribunal is that constructive dismissal and section 15 EqA claims succeed.

95. The matter will be listed for a remedy hearing on a date to be advised.

Employment Judge Balogun
Date: 13 September 2017