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EMPLOYMENT TRIBUNALS

Claimant: **Miss T James**

Respondent: **London Borough of Redbridge**

Heard at: **London Central Hearing Centre**

On: **21 - 24 February 2017 (and in Chambers)**

Before: **Employment Judge Ferris**

Members: **Mr D J Adsett**
Mr J Quinlan

Representation

Claimant: **In Person (assisted by her sister-in-law, Ms James)**

Respondent: **Ms Murphy (Counsel)**

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that all the Claimant's complaints are dismissed. The claim is dismissed

REASONS

1. The Claimant, who was born on 26 February 1963, joined the Respondent on 4 May 2004 and resigned her employment with effect from 25 February 2016. The Claimant was employed as an administration assistant working a 36 hour week for a salary of £1,796 before tax and deductions. The claim presented by the Claimant to the Tribunal on 8 July 2016 followed first contact with ACAS under the early conciliation scheme on 18 May 2016 and the certificate was issued by ACAS on 10 June 2016. The claim presented on 8 July 2016 was for disability discrimination. The text of her claim appeared to identify direct discrimination and a failure to make reasonable adjustments.

2. At a Preliminary Hearing conducted by Employment Judge Brown on 12 October 2016 the Claimant was given permission to amend her claim to include the labels indirect disability discrimination and constructive unfair dismissal to her claim already pleaded. In addition the Claimant was permitted to amend her reasonable adjustments

complaint. The issues as determined by Employment Judge Brown were set out in her summary of the Preliminary Hearing conducted on 12 October 2016, sent to the parties in October.

3. The Tribunal is not going to set out that list here but will identify and follow that list of issues in the course of its judgment. The Tribunal reminds itself of the law. Disability is a protected characteristic and is defined by Section 6 of the Equality Act 2010 ("the Act"):

> *"(1) A person (P) has a disability if—*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
> *…*
>
> *(6) Schedule 1 (disability: supplementary provision) has effect."*

4. We have taken account of the provisions of Schedule 1 in reaching our conclusions on the issue of disability in this case. We have also considered and taken into account the statutory guidance.

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

5. Sections 20 and 21 of the Act provide a statutory duty to make adjustments for a disabled person and provide for a remedy in the event of failure to comply with the duty A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. For the purposes of that provision, a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

> *"(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

6. Section 136 of the Act provides that, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred, but that does not apply if A shows that A did not contravene the provision.

7. The Tribunal heard evidence from the Claimant and from the three witnesses called by the Respondent. Mr Vincent McHale was the Claimant's line manager at the Woodbine Club, a part of social services provided by the Respondent at which people with learning disabilities had access to a day centre. Mr McHale became the Claimant's line manager in May 2015 although he had been managing at the Woodbine Club for a longer period of time. Alison McCabe was Mr McHale's line manager. She is now a service manager but before that she was employed as a project manager working in adult services. The third witness called on behalf of the Respondent was Mary Byrne, who has been employed by the Respondent as a principal officer, adult social services, for about 23 years. Ms Byrne met with the Claimant to discuss the appropriate action following the outcome of her grievance on 13 May 2015 (instead of Alison McCabe, the service manager who was absent at the time).

8. During the trial the Respondent made the decision not to call John Loxley, an employment relations advisor, for whom a witness statement had been served. The Tribunal has taken no account of that witness statement. In addition to the oral evidence heard over two very full days the Tribunal had a trial bundle which with the additions provided by the Claimant during the trial was over 1000 pages. The Tribunal has not read this trial bundle like a book but has carefully considered those documents to which it was taken during the course of the trial by one or other or both of the parties.

9. The Tribunal makes the following findings of fact.

Direct disability discrimination

10. The Claimant contends that she is, and was, disabled by reason of her conditions of narcolepsy, cataplexy and keratoconus. At the outset of the trial it was conceded on behalf of the Respondent that the Claimant is, and was, disabled at the material times by reason of the conditions of narcolepsy and cataplexy. It was not accepted by the Respondent that the Claimant was disabled by keratoconus.

11. Thus, the first issue that the Tribunal has to consider is whether the Claimant was a disabled person at all relevant times because of keratoconus (as well as the other two conditions). The relevant period of time is agreed to have been from 24 March 2015 to 25 February 2016.

12. In 2009 and 2010 the Claimant had a corneal transplant on each eye respectively. Following that corneal transplant, the evidence laid before the Tribunal demonstrated on a balance of probabilities that the Claimant was not disabled by reason of keratoconus. The Claimant produced no clinical evidence that following the corneal transplants she still suffered (in the sense that it impacted on her daily life) from that condition. In particular she has not produced any report from her consultant ophthalmic surgeon. In short, she appears to have had a past disability in this regard but not at the relevant time. On this issue we agreed with the detailed submission made by the Respondent:

> *"5. The rule about ignoring medical treatment to assess disability under s.6, only applies to 'measures that are being taken' (Sch 1, para 2, EqA) and not to concluded treatment [– see also Abadeh v*

British Telecommunications plc [2001] IRLR 23 EAT at para 80]. It follows that the Tribunal has to take into account result of passed treatment (here surgery) and [the Claimant's] evidence that following the surgery she was no longer partially sighted and could wear glasses (Code, para 17 which confirms that 'the effect while the person is wearing spectacles or contact lenses should be considered'). In other words, the impairment caused by [keratoconus] (or other) ceased to have a substantial adverse effect prior to the relevant period and there was no clinical evidence that it is likely to recur.

6. *Alternatively, even if the [Respondent] is wrong, and it is assume for present purposes that there was sufficient evidence to support a sensory impairment affecting her sight (whether or not [keratoconus]), in terms of analysing the effect of the impairment (the importance of which is stressed in the Code…, Appendix 1) there was no evidence that [the Claimant] was receiving any or any significant medical or other treatment during the relevant time which should be ignored under the Act (Sch 1, para.5 (Effects of treatment) and Code (App 1, Meaning of Disability, 'What about treatment' para.16).*

7. *In terms of the evidence that regular breaks away from screen time would assist the Claimant, this falls under B7 of the Guidance… as a coping or avoidance strategy to prevent or reduce the effects of an impairment on normal day-to-day activities therefore the effects of which can be taken into account in deciding whether an adverse effect is substantial. … Regarding the use of 'zoomtext' program, the [Claimant's] evidence was at best equivocal on this. She used it prior to the operation and apparently afterwards. [The Respondent] submits that there was insufficient evidence of a substantial adverse effect on normal day to day activities."*

13. As to this last point, the Claimant asserted that she had needed a text-enlarging program to make use of her computer screen on the occasions when that was necessary (although she was not screen bound all day by any means, her main duty being that of a receptionist to welcome people and deal with people at the Woodbine Club and to deal with telephone enquiries and calls). The ZoomText program had been used by the Claimant for some years before she had her corneal transplants. It was clear from the evidence that we heard that the Claimant was capable of using the computer for periods of time of up to an hour at least without making use of the ZoomText program. There was some evidence that the ZoomText program did not engage very successfully with a later version of software employed by the Respondent during 2015 and as the Tribunal will explain in due course there was a partly successful attempt by the Respondent to upgrade the Claimant's computer by adding memory to it so that the ZoomText add-on program could continue to be made use of.

14. The short point here is that there was a Windows program which could be made use of to enlarge text although it was, according to the Claimant, *"glaring"* and her eyes became tired from it after an hour. On the evidence the Tribunal heard, the Claimant's

need to use the computer for more than an hour at a time was exceedingly rare and her line manager, Mr McHale, was especially sympathetic to the difficulties which she faced in making use of her computer. That was because first of all everyone in the Woodbine Club premises had difficulties with the server which was a long way away and very slow. Also, all members of staff there had difficulties with IT generally because of changes in the system and deficiencies in the old system and teething problems with the new system. These were general problems shared by everyone.

15. More particularly, Mr McHale himself was disabled by dyslexia and relied heavily on a Dragon program in order to be able to dictate letters and other documents. In the same way that the Claimant's add-on ZoomText program crashed the system that she was operating when she made use of that program, so did Mr McHale's Dragon program and thus both he and the Claimant were in the same boat so to speak. Thus, the Claimant was not put upon by her line manager in respect of the difficulties that she faced in making use of the computer although of course it continued to be irritating. The Tribunal finds that the Claimant was not disabled by reason of keratoconus.

Direct disability discrimination

16. The burden of proof is on the Claimant to establish a prima facie case of less favourable treatment in the following alleged ways.

Updated job description ("JD") / list of duties.

17. The Claimant told the Tribunal that she was not provided with an up to date job description or list of duties after 6 May 2015 at about the time when a fellow administrative officer (Paula Medland, with whom the Claimant did not enjoy the best of relations) reduced her working days prior to resignation and early retirement. The Claimant also alleged that she was not given any relevant training after 6 May 2015. Mr McHale's evidence confirmed that the Claimant was provided with an up to date job description by the Respondent's human resources on 24 March 2015. That job description identified the job title, administrative support officer, but the Claimant sought to make something of the difference between an administrative support officer and an administrator or administrative assistant. In the Tribunal's judgment that was a distinction without a difference.

18. The purpose of the Claimant's role had been to provide administrative support to the local base and specifically to be the first point of contact for services' users at the Woodbine Club: that would involve giving information and reassurance to service users. The job which had been done by the Claimant for many years may be summarised as follows:

> *"1) To maintain a courteous, helpful and polite response to members of the public at all times and to ensure that individual needs are recognised and supported.*
>
> *2) To support people using the service to provide a reception service.*
>
> *3) To record staff and service user attendance.*
>
> *4) To be the first point of contact for service users, careers and*

colleagues making enquiries about services at the locality bases.

5) *To ensure that enquiries, requests for assistance, and other messages are recorded and passed to the appropriate professional colleague for action or information.*

6) *To deal with payments from petty cash including training payments to service users and to prepare documentation for banking."*

This is a quote from the "updated" JD given to the Claimant in March 2015

19. Those were all main tasks which the Claimant had been engaged to do as an administrative support officer/administrative assistant during her years working in the Woodbine Club and there was no change following the reissue of the job description to her in March 2015 and no change thereafter. Shortly after that job description was reissued to the Claimant, the Claimant met with Mary Byrne on 13 May 2015 where they also discussed her job description. Mr McHale was present at that meeting. He confirmed (supporting the evidence given by Mary Byrne and the email sent by her after the meeting to the Claimant on 14 May) that the Claimant was told that she could submit a list of additional responsibilities for Mr McHale to consider and he could then have relied on those to submit a revised job description to Human Resources to have her role evaluated. However, as Mr McHale explained the Claimant never submitted any proposed changes to her job description.

20. The Claimant was reminded of this opportunity (or entitlement) at a meeting on 3 December 2015 but she still did not submit anything to the Respondent. Her right to suggest such amendments and her failure to date to make any amendments or provide a list of additional responsibilities was referred to in a letter to the Claimant sent on 6 January 2016 which the Claimant received.

21. The Tribunal rejects the Claimant's case to say that she was not given an updated description or list of duties on 24 March 2015 following her grievance outcome. There was no such failure as is clear from the findings of fact above following the meeting on 13 May 2015.

22. The Claimant contended that she was not given any relevant training first after 24 March 2015, then after 6 May 2015, then after a meeting on 15 July 2015. The Claimant contended that that training would have been relevant to the *"amended tasks"* that the Claimant had been allocated including *"Aggresso"* training on purchase orders, invoices, facilities booking and petty cash. Mr McHale gave evidence about this to the Tribunal. He confirmed, and he was supported in this by Alison McCabe, that Abacus and Care First training was arranged for the Claimant on 26 August 2015. The petty cash system had been in use from as long before as June 2014 and had not apparently presented major difficulties. The Claimant raised concerns about the new petty cash system as she felt it was not how she wanted it to be. However, the Claimant did not raise any personal performance gaps she may have had as a result of the change. The Tribunal observes that the Claimant had been, prior to joining the Respondent, an accountant by training and by practice.

23. The Claimant was requested to undertake Abacus training which was part of the Care First service user database. The council's system support officer, Ms Nettleship,

tried to arrange one to one training with the Claimant who failed to agree a date. The Claimant had originally undergone Care First training in 2011 but was hostile to using the system. During the training the Claimant went through a list of service users with the Care First officer and the officer showed the Claimant how to put them onto the Abacus register. All new service users thereafter would be added onto Abacus in the same way that the Claimant was trained to do with the existing list of service users.

24. For reasons which were never clear to the Respondent nor to the Tribunal, the Claimant was asked to carry out these tasks but did not do them and in the end Mr McHale picked up the slack. Mr McHale told us that because the Claimant had been employed at Woodbine for many years and during those years had often covered parts of her co-administrative support officer's role (Paula Medland) when Ms Medland was on leave or absent, the Claimant had a number of years' experience and had therefore acquired the skills and knowledge to be able to provide that cover.

25. The Claimant was also providing another team (Elderberries from June 2014) with her advice and knowledge on the Respondent's financial processes. The Claimant had in fact worked at Elderberries on a two day a week basis for about a month in order to implement their petty cash system. Alison McCable told the Tribunal that when Mr McHale was on holiday during the summer of 2015 she became aware that the Claimant had not been trained on a particular part of the Aggresso system which covered the raising of purchase orders and Ms McCabe requested that the Claimant was trained on that in the future. That training was offered while Ms Medland was still employed and because it was not urgent it got lost or overlooked in the autumn of 2015 when other problems in the management of the Claimant (in particular punctuality and sickness absence) assumed priority.

26. The Claimant alleges that the Respondent did not support her in the further following ways:

From 31 July 2015 withdrawing a 15 minute window for the Claimant's arrival in the morning.

27. Having heard the evidence of Mr McHale and read the contemporary correspondence, it is clear that the 15 minutes of leeway that the Claimant enjoyed throughout 2015 was never withdrawn contrary to the Claimant's case. The Claimant was contracted to start work at 8.45am and, with 45 minutes for lunch, to work until 4.30pm. Following advice from occupational health fully informed about the Claimant's health conditions it was agreed that the Claimant would have 15 minutes leeway in respect of her arrival in the morning. The Claimant was a receptionist. In order to cover that period it was necessary either for the caretaker to work late or for another member of staff to attend early and to cover. After 9am it was very difficult at the resource-starved Woodbine Club for anyone else to cover for the Claimant following her supposed 9am delayed arrival. Details of her arrival times during 2015 demonstrate that she was seriously unpunctual. The Claimant was regularly 60 minutes late and often did not arrive until 10am. That imposed an insufferable burden on her colleagues at work as well as diminishing the effective service provided by the Woodbine Club to vulnerable members of the community.

From 6 May 2015 not allocating a nap room for the Claimant's nap and not allocating cover for her to take a nap during her lunchtime.

28. There was some support for the Claimant needing a middle of the day short nap in order to cope with her disabilities. It had been recommended by occupational health and immediately adopted by the Respondent. There were rooms available in the Woodbine Club for the Claimant to make use of during her short nap. The Claimant explained that she did not need to lie down but she did need to rest her head in her hands or to sit down and to take this essential break for about 15 minutes at about 12pm every day. Although it was beyond the Respondent's resources in that building to provide a room exclusively for the Claimant to have her nap, it was the evidence heard by the Tribunal that generally there was a room available at the right time for the Claimant to make use of exclusively during her short nap. It is therefore wrong to say that the Respondent did not allocate a nap room. As to providing cover to enable the Claimant to take her nap during her lunchtime, the evidence heard from all three witnesses for the Respondent confirmed that such cover was available.

From 6 May 2015 not providing cover for the Claimant, for example to take toilet breaks.

29. This was not put to the Respondent's witnesses and there was no evidence for it.

On 15 October 2015 following the Claimant taking leave for a hospital appointment at short notice the Claimant's manager, Mr McHale, saying to the Claimant that the Claimant had a negative impact on the service was disrespectful and undermined protocols and wrongly accusing the Claimant of not contacting him about the leave

30. The Claimant had a short morning hospital appointment on 15 October 2015. In the usual way the NHS provided considerable advanced notice to the Claimant of that appointment. The Claimant had filed the NHS appointment letter and forgotten to ask the Respondent for permission for that leave so that appropriate arrangements could be made to cover her absence in the provision of a front line service in this resource starved front-facing service provided by the Respondent.

31. In the event the Claimant did not realise her error until after hours on 14 October 2015 when she sent a text to Mr McHale's working phone which he did not immediately pick up, unsurprisingly. By the time Mr McHale was informed by the Claimant on the morning of 15 October it was too late for him to make proper provision to cover her absence. The Claimant then compounded her error by failing to attend work that afternoon after the conclusion of her short appointment.

32. It was the Claimant's fault for forgetting that she had a hospital appointment on 15 October and failing to observe an entirely reasonable protocol which expected members of staff where possible to give as much notice as possible so that cover could be arranged in respect of their absence. In the circumstances and having heard the evidence of Mr McHale, nothing inappropriate was said by Mr McHale in response to the Claimant's failure to observe the protocol. He was not disrespectful and he correctly told the Claimant that she had failed to contact him appropriately and in accordance with the protocol about her hospital appointment and as a result there had been inconvenience again for the Claimant's colleagues and for vulnerable service users.

Instructing an occupational health advisor to put unreasonable and intrusive questions

to the Claimant at an occupational health meeting on 16 February 2016.

33. The Tribunal will return to this briefly when considering constructive dismissal. The questions which were put to occupational health by Mr McHale were questions which needed to be answered so that the Claimant could be properly supported in any return to work and so that if appropriate, the issue of redeployment could be addressed.

Giving information and letters to the Claimant which were misleading and which implied that the Claimant was not doing her job properly: for example statements made in a return to work form on 28 April 2015; statements made in a meeting on 27 May 2015; statements in a referral to occupational health dated 26 March 2015 for an appointment on 28 April 2015; statements in a letter dated 15 September 2015; a letter of 15 October 2015 and a letter dated 22 December 2015.

34. There never was a capability or disciplinary procedure in respect of the Claimant's performance engaged against her save to say that there were issues about her unpunctuality and also about her sickness absence. The content of these letters seen by the Tribunal is not shown to be critical or unjustified. In the circumstances of the Claimant's poor punctuality and extensive sickness absence it was appropriate for these matters to be addressed in correspondence at the low and relatively informal level that they were dealt with there.

Exaggerating the negative effect on the Claimant's disability in order to make the Claimant look incompetent.

35. There was no evidence that this was a strategy or tactic of the Respondent. The Respondent took the Claimant's health seriously because it knew about her disabilities. There were regular referrals to occupational health and the advice of occupational health was followed. The Tribunal has already commented on the sympathetic attitude displayed by Mr McHale who was himself disabled by reason of dyslexia and faced some of the practical difficulties (using the computer) that faced the Claimant.

Not giving the Claimant an individual performance plan despite this having been agreed: either or after a meeting on 13 May 2015 or a meeting on 22 December 2015.

36. It is correct that the Claimant was not given an individual performance plan notwithstanding that this had been agreed. Mr McHale explained that since May 2015 he had been conducting regular supervision with the Claimant. The Tribunal was shown the notes of some of the supervision meetings. Mr McHale himself undertook performance management training on 3 June 2015 and was due to undertake the development of a performance plan as part of the Council's performance management process. Following his training it was his plan to meet with the Claimant to go through her performance management, unfortunately that did not happen for a number of reasons as Mr McHale explained. From taking over operational management of the service in May 2015 Mr McHale noted that all staff had outstanding performance management requirements. He was trying to implement systems to prioritise and implement performance reviews. The Claimant was not the only person to be affected by that. There were in total in June 2015 15 members (out of 18 or 19) of staff with outstanding plans. On top of that Mr McHale had updated the Claimant's risk assessment following some research into the conditions from which she suffered

unfortunately the Claimant was in disagreement with Mr McHale on the content of that risk assessment and had refused to sign it. Mr McHale had asked the Claimant to go through his risk assessment with him and to provide any amendments but she had refused to follow the process or indeed to suggest any other.

37. In addition the Claimant was in receipt of regular supervision by Mr McHale which was part of the performance management process even though no formal plan had been agreed. It meant that the Claimant was not without a forum to raise issues, discuss work tasks and indeed to discuss her performance.

38. To compound the difficulties identified in paragraph 36 above which were still outstanding when Mr McHale returned from a three week vacation at the end of the summer of 2015, on 21 October 2015 the Claimant went off sick and never returned to work. It should also be mentioned that in that period after Mr McHale came back from holiday at the end of the summer 2015 and up until 21 October 2015 Mr McHale was struggling to cope with the Claimant's very poor punctuality. In that process the Claimant had refused to condescend to explain to Mr McHale why it was that she was late. The Claimant chose to retain a complete confidentiality about the reason why she was unpunctual throughout that period of time. That is so far as Mr McHale was concerned at the time.

Continually failing to fix the Claimant's computer when it malfunctioned, such malfunctioning happening two to three time a week from 6 May 2015.

39. In his notes of the Stage 1 absent manager procedure meeting with the Claimant on 6 May 2015 (which followed on an occasion on 24 March when the Claimant had become seriously unwell and was then away for 24 days) Mr McHale recorded:

> *"I'm also aware of the ongoing IT technical issues that are causing stresses with the programs that you are using. This will be forwarded to the management of the IT service desk – for the purpose [of these] notes I have been [trying] to support [you on] this in the past."*

40. The health issue that affected the Claimant's vision and use of her IT equipment had been mitigated by software on the Claimant's computer and Mr McHale was also aware that the Claimant had undergone successful corneal transplants. There were a number of IT issues noted by Mr McHale that were not related to her condition. The computers often froze or crashed as the Tribunal has already noted. Mr McHale explained that the Claimant was not the only person affected by that: it affected most staff because of the server problems. He had tried to resolve the issue of the computers freezing by pestering the IT department.

41. He had understood from an email to Mary Byrne on 26 May 2015 that the Claimant had confirmed that the IT issues had been resolved, certainly in that email the Claimant confirmed:

> *"The long term problem with regard to my restricted use of the computers, especially Outlook has now been resolved."*

42. Something similar was confirmed to Alison McCabe on 3 December 2015 in her letter to the Claimant sent on 30 December confirming the outcome of the discussions

with the Claimant on 3 December. Ms McCabe wrote,

> *"**5. IT issues to be resolved***
>
> *I understand that the previous IT issues have been resolved; however consideration will be given to whether further improvements can be made to IT hardware."*

43. In other words there had been some resolution of past issues, but, not so unusually in a modern office, IT issues continued to be a pain and a problem. What is noteworthy about this is that it demonstrates an active concern by the Claimant's managers about the ongoing IT problems that were shared extensively by other users as well although the Claimant had some special concerns. What it does not support is the Claimant's contention that she was the only person with problems and that her problems were ignored by the Respondent.

44. It would have been easy for the Claimant on a regular basis to have pointed out particular difficulties that she was singled out to suffer so to speak and to do so by email either to Mr McHale or to Ms McCabe, two managers with whom she was in regular communication. It is significant that there are no such emails.

45. In all these complaints except one the Tribunal has found that there was no less favourable treatment. As to the issue about the individual performance plan it cannot be said that the Claimant was treated less favourably compared with her hypothetical non-disabled comparator. The Respondent has shown that disability played no part of the reason for not providing the Claimant with her performance plan and as the Tribunal has already noted in another context, her line manager's sympathy for the Claimant and her struggles with IT in particular was something which he shared with her (because of the Dragon program and his dyslexia) and a special reason for his sympathetic approach. The Claimant has not shown facts from which the Tribunal could conclude that there was less favourable treatment because of the Claimant's disability. The claim for direct discrimination is dismissed.

Discrimination arising from disability

Did the Respondent treat the Claimant in the following ways?

The ways set out under direct disability discrimination.

46. These allegations have been dismissed under direct discrimination and are now dismissed in relation to the claim for discrimination arising from disability.

Requiring the Claimant to speak directly to her manager if she was coming in late when other people were not so required.

47. That was not put to Mr McHale. However it was a sensible obligation because he was the line manager and in respect at least of those people who were his direct reports he needed to know as quickly as possible so that appropriate cover could be arranged.

On 3 December 2015 the Respondent's senior manager accused the Claimant of

having an impact on the service because of her lateness even though the Claimant was not due to be in work until 8.45am each day.

48. This allegation makes no sense because it purports to refer to a period before her contractual start time. The Claimant was contracted to arrive at 8.45am. There was no sense that the Claimant was at risk because she did not arrive before 8.45am. It has been established to the Tribunal's satisfaction that the Claimant was allowed 15 minutes' leeway up to 9am every day, an allowance which the Claimant took advantage of as is demonstrated by the statistics about her unpunctuality.

The Claimant being required to account for all her working time by filling in a task flow sheet from 15 July 2015 when others were not.

49. Paula Medland was also required to undertake this process. On 15 July an administrative meeting was held which Mr McHale attended. Both the admin workers, the Claimant and Ms Medland, were asked to undertake a daily task flow sheet. As was explained to them at the time, that was because both admin workers claimed to be undertaking the same tasks and in order for management to be able to understand the complexities of their respective roles and the time it took to undertake each administrative task. The other admin assistant/support officer, Paula Medland, submitted the daily task flow sheets without complaint. The Claimant started to send the sheets to Mr McHale but then stopped. When Mr McHale asked for them the Claimant told him that she was *"storing them on the admin drive"*. When Mr McHale looked at the drive the work flow task sheets had not been completed on a daily basis although there were some stored on that drive. The Claimant's explanation to the Tribunal which was that that this was a computer difficulty was unpersuasive.

50. Mr McHale worked in an office next door to the Claimant and as he explained and the Claimant conceded, if there had been a computer problem she could have filled in these sheets very quickly by hand and passed them over to him as was done by Ms Medland. The fact that the Claimant had not fully completed those task sheets which she chose to enter on the computer demonstrated to the Tribunal that she was not committed to this process. The Claimant gave no satisfactory explanation for her lack of commitment. This was not an obligation imposed on the Claimant arising from disability.

Telling the Claimant that a policy would be applied to her if she continued to be late but never saying what that policy was which was worrying for the Claimant.

51. Mr McHale explained to the Tribunal that he was managing the Claimant's sickness absence as well as her unpunctuality. We accept his evidence that he never told the Claimant that *"a policy would be applied to her if she continued to be late"*. We accept Mr McHale's evidence that he tried to address the Claimant's lateness as part of the Claimant's sickness absence process because he recognised that, at least on the Claimant's terms, there was a connection between that lateness and her sickness absence. Indeed Mr McHale's attempts to unravel this connection so as to support the Claimant effectively can be seen in the process of referrals to occupational health which led to the last occupational health report produced in February 2016.

If so, did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disabilities?

52. The Tribunal's primary decision is that the Claimant has failed to establish the alleged treatment so it need go no further. If the Tribunal has misunderstood the evidence and the Claimant has established that there was relevant treatment which was unfavourable, for example the failure to give a performance plan, Mr McHale's evidence is that this was *"because of something"* not arising from disability but because of the pressure of his workload, and therefore it did not arise *"as a consequence of disability"*.

53. As to the alleged failure to fix the malfunctioning computer: Mr McHale's evidence was that there were problems with a server which affected everyone *("because of something"*); that was clearly not *"as a consequence"* of disability.

54. It could also be said in respect of the performance plan that the establishment of systems to prioritise and implement performance reviews was a proportionate means of achieving a legitimate aim. In respect of the computer problems the Respondent is a public body and managing its resources appropriately, including those available to it in respect of IT and that is a relevant consideration in support of the conclusion that what was done though it may not have achieved a perfect system was nevertheless done as a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

But for the provision of ZoomText, a computer program as an auxiliary aid, would the Claimant have been put at a substantial disadvantage in comparison to non-disabled people, in that she was unable to look at a computer screen for long periods of time without developing headaches?

55. The judgement of the Tribunal is that this was not established because it was not shown by the Claimant that there was a prima facie case to say that but for ZoomText the Claimant would have been at a substantial disadvantage. The Tribunal reaches that conclusion because ZoomText had been made use of by the Claimant prior to the corneal transplants but after the transplants there was less of a problem and the Claimant was no longer disabled in that respect. Moreover there was a Windows facility which enabled her to make use of the computer for up to an hour and the Claimant also had coping strategies which the Tribunal finds may be taken into account in relation to her use of the computer. She was not a devoted screen user. Her primary duties were away from the computer. There were regular interruptions of any use that she might be making of the computer which would enable her to rest her eyes and accordingly this failure is not identified.

When the ZoomText program was added to the Claimant's computer, did it not function so that the Claimant was unable to do her job at all and was subject to unfair criticism?

56. This has not been established. There were some delays but other users had crashing and server problems with the computer and Mr McHale in particular not only had those general and ongoing difficulties with the changing IT system but had a very similar problem in adapting his Dragon program to fit in with the new IT system.

Did the Respondent take reasonable steps to provide the Claimant with ZoomText and did it take reasonable steps to provide her with a functioning computer on which the

ZoomText program could run?

57. Yes, clearly the Respondent had facilitated the use of ZoomText by the Claimant from a date many years before the events relevant to this hearing and the Respondent had been assisting the Claimant in facilitating the engagement of ZoomText with the new IT system during the course of the second half of 2015. In particular the Respondent had provided considerable extra memory for the Claimant's personal computer or desktop computer and that had reduced the difficulty of operating ZoomText on her computer. These were reasonable steps.

Did the Respondent apply the following provision, criterion or practice ("PCP") requiring employees who worked as administrative assistants to attend work at 8.45am in the morning?

58. No, the Respondent allowed 15 minutes leeway, so there was no duty here.

If so, did that PCP put the Claimant at a substantial disadvantage because by reason of her narcolepsy the Claimant had difficulty in getting up in the morning and was not able to attend work regularly at 8.45am so that the Claimant was told that if her lateness continued a policy would be applied which the Claimant feared would lead to the termination of her employment?

59. The latest and most relevant evidence about narcolepsy was contained in a letter dated 26 October 2016 procured by the Claimant from Guy's and St Thomas' NHS Foundation Trust. In that letter Mr Adrian Williams FRCP, Professor of Sleep Medicine and Consultant Physician, confirmed that the Claimant was a patient of his Sleep Disorders Centre with narcolepsy and cataplexy –

> *"…a recognised sleep disorder with symptoms of excessive sleepiness and with episodes of collapse.*
>
> *The condition may affect mobility because of potential for cataplexy (that is collapsing) with physical coordination, coherent speech, and perception of the risk of danger being affected.*
>
> *It appears from out notes that the condition started around the age of 21 and is ongoing. There is not likely to be intrinsic improvement in the condition although it is usually and in this case satisfactorily managed with medication.*
>
> *There is an effect on activities of daily living because of excessive sleepiness albeit treated, and potential for collapsing in circumstances of emotional stimulation.*
>
> ***The effects on the working environment maybe the need to take scheduled naps and potential for reduced concentration <u>but it does not inhibit use of computers and does not effect time keeping</u>."***

60. It is clear from that report that the Claimant was being treated with *"conventional medications (Modafinil and Venlafaxine). Without these her symptoms would return, specifically daytime sleepiness and collapsing"*. That was the only relevant medical

evidence that the Tribunal had about the Claimant's disability and time keeping.

61. The Claimant sought to explain to the Tribunal that her unpunctuality was attributable entirely to the impact of these *"conventional medications"* which she took on a routine basis for many years. That does not explain why in the words of Mr McHale there was a delinquent deterioration of her unpunctuality during the latter part of 2015. The Claimant said at the time that she was suffering from IBS although subsequently that was discounted by her physicians.

62. The Tribunal notes that on 23 April 2015 immediately prior to the events that the Tribunal is most concerned with, Dr Patrick Murphy at the Guy's and St Thomas' NHS Foundation Trust advised:

> *"We also suggested using 200mg modafinil at 9am and 200mg at 11.00am to see if this improves her overall sleepiness. She continues to use a daytime nap with good effect…"*

63. In the absence of more general expert advice it is clear to the Tribunal that the Claimant's disabilities were well regulated by these conventional medications. The evidence above shows that she was recommended to take one dose at 9am, which would have been after she arrived at work and a second dose a couple of hours later in order to counteract sleepiness at work.

64. It was part of the Claimant's case that her sleepiness was so uncontrolled that she would regularly fall asleep on the bus, go past her destination for work and therefore arrive late at work. There does not seem to be much sympathy for that account from the clinicians treating and advising the Claimant. In addition the Claimant claimed that the conventional medications had caused terrible bowel symptoms which led to her delayed arrival at work. There is no evidence that the Claimant sought advice from her GP to deal with these bowel problems and IBS as we have already recorded was later found not to be a condition from which she suffered.

65. In short, the Claimant has not demonstrated to the Tribunal a connection between her narcolepsy and her inability to attend work regularly and timeously. When one adds in the fifteen minutes' leeway it is not possible to see any connection between the Claimant's disabilities and her corrosive unpunctuality.

66. Just as the Tribunal has struggled to see a connection between the Claimant's disability and her unpunctuality so did her line manager. Thus in late October 2015 (and after the Claimant went sick for the last time) Mr McHale made a detailed referral to occupational health in which he identified as a primary reason for the referral *"Lateness possibly due to narcolepsy and/or cataplexy"* and in which he sought occupational health's practical advice.

If so, did the Respondent fail to take reasonable steps to avoid the disadvantage by – failing to allow the Claimant 15 – 30 minutes leeway for her arrival?

67. The Tribunal has already found that the Claimant was allowed 15 minutes leeway. The Claimant never asked for 30 minutes leeway. There is no clinical evidence that connects her poor time keeping with narcolepsy and cataplexy. The evidence of the Claimant's unpunctuality demonstrates that even if the Claimant had

been given 30 minutes leeway she would regularly have arrived after the revised deadline.

Failing to redeploy the Claimant.

68. The issue of redeployment is important here and also in respect of the constructive dismissal claim. In short, the Claimant resigned before the Respondent had a full opportunity to consider the last occupational health report which was relevant in this context. The Claimant was on notice of that report. In that occupational health report dated 16 February 2016 the report opened with the words:

> *"I would consider her narcolepsy/ cataplexy conditions to be stable on treatment. She can still feel tired and sometimes drowsy first thing in the morning, until 09.15-09.30 hours."*

69. The Tribunal notes that this drowsiness was dependent on when the Claimant woke up. If the Claimant had gone to bed earlier and woken up earlier the timing of the 9.15 – 9.30am *"still feel tired"* would have been earlier and she would have been punctual.

70. The report dealt with redeployment in the following terms: first the question,

> *"OH identified redeployment to another role if lateness at work and/or…performance is unacceptable to management. A flexible approach to working times is not a reasonable adjustment within this particular role and cannot be supported by management. Can you advise on whether medical redeployment should be considered as a way forward as no other option appears to be available at this time."*

71. The occupational health advisor said:

> *"My last report indicated redeployment as an option. It is not a medical/occupational health requirement in the sense that it would be impossible for Ms James to return to her current role for medical reasons. However, there is a significant risk that if her confidence in her current work arrangements cannot be restored and she feels unduly pressured due to work-related factors, her symptoms will relapse. As such, I would support consideration of redeployment, should a suitable post exist."*

72. The occupational health report of 16 February was sent to the Claimant who gave consent for it to be released immediately to the Respondent. The earlier occupational health report which had been sent to the Respondent on 18 January 2016 triggered a new sickness absence meeting which was addressed in a letter to the Claimant dated 18 February 2016. The purpose of the meeting was to:

> *"1. Review your sickness absence record and the impact that your absence is having on the service.*
>
> *2. Review occupational health information that is available.*
>
> *3. Consider any other action that will assist you in returning to work."*

73. It was clear to the Claimant and her union rep, as the Claimant explained, that redeployment was a route out of the difficulties facing the parties and her union representative (who had been acting to advise her since the end of November 2015) was engaged in investigating the possibility of a non-medical redeployment. That was still outstanding when the Claimant sent in her letter of resignation on 23 February 2016. Accordingly there was no *"failure to redeploy"*, it was something which was under consideration and might have been dealt with favourably for the Claimant if she had been a little more patient.

Did the Respondent apply the following PCP's: not designating a nap area and not providing cover for lunchtimes when administrative assistants were on their lunch break?

74. No, it did not: there was a choice of rooms for a nap; there was no failure to designate an area.

Did those PCP's put the Claimant at a substantial disadvantage in that she needed a nap during her lunch hour to prevent her falling asleep at work after lunch so that if she did not have a nap she was not able to carry out her duties properly?

75. The Claimant did take naps and was therefore not put at a substantial disadvantage. That was facilitated by the Respondent.

Did the Respondent fail to take such steps as it was reasonable to avoid that disadvantage in that: it failed to provide a designated area for a nap; and it did not authorise cover for the Claimant's lunchtime so that she could have a nap?

76. This has not been indicated by the Claimant and the Respondent has shown to the Tribunal's satisfaction that it did provide convenient areas for a nap and that cover was available to a reasonable level.

Did the Respondent apply the following PCP: maintaining a standard job description of duties for administrative assistants?

77. There was an opportunity to revise the job description but it was never taken up.

Did that put the Claimant at the following disadvantage: managers and employees expected the Claimant to do all the things in the standard administrative assistant job descriptions when she could not do those things so that the Claimant was brought into conflict with other staff when she did not carry out those duties?

78. There was no evidence brought forward by the Claimant in support of this assertion. The Claimant had identified concerns regarding her job description in her grievance appeal (Stage 2) initiated on 7 March 2015. In the outcome letter authored by Paramjit Binning, an employment relations manager with the Respondent, sent to the Claimant on 24 March 2015, a number of issues were resolved and in relation to the job description the Claimant was advised:

> *"Whilst you raised the issue of your job description in the background to your grievance this was not included in the list of issues raised in your*

original grievance. …

However, as you identified this as an expected outcome I will ensure that you receive a copy of your job description."

79. The Tribunal has already commented on the renewed job description which accompanied that letter in March 2015 and the Tribunal has identified that in main respects the job described and its major duties and responsibilities in that job description was indeed the Claimant's actual job with its major duties and responsibilities.

80. On 13 May 2015 the Claimant met Mary Byrne to discuss action following the outcome of her grievance. The Claimant was met by Ms Byrne because Alison McCabe, the service manager, was absent at the time. Ms Byrne told the Tribunal, and we accept, that during the meeting she informed the Claimant that there were no plans to re-evaluate her role as part of the council's transformation process. At that time the council was remodelling the health and adult social care service and a formal review and restructure was in hand. This formal review and restructure of service related to health staff, social workers, occupational therapists but it did not include a restructure of day opportunity staff other than a change in line management with the service moving as was, to be managed by NELFT under a section 75 partnership agreement.

81. The Claimant was told by Ms Byrne that in line with the council's job evaluation policy she could note additional responsibilities to reflect her role and discuss that with her line manager, Mr McHale. He would then be able to submit a revised job description for evaluation for her individual role. Those agreed outcomes following the grievance were set out in a document which was signed by the Claimant and dated 13 May 2015 and Ms Byrne sent that document to the Claimant on 14 May 2015 and in the email again confirmed that it was to record the agreed actions and that the Claimant should review her job description and discuss it with her manager. That document was returned to the Claimant with her signature on 26 May 2015.

82. Accordingly, the Claimant was given an opportunity to amend her duties on her job description in discussion with her manager and to get it re-evaluated but the Claimant did not take up that offer.

Did the Respondent fail to take such steps as it was reasonable to avoid that disadvantage by failing to publicly clarify the Claimant's duties and responsibilities when those differ from the standard administrative assistant's job description?

83. The Tribunal has found that there was no such failure.

Indirect discrimination

In respect of each of the above PCP's in the reasonable adjustment complaint:

Did the Respondent apply, or would it apply those PCP's to people that did not have disability?

Did those PCP's put or would they put disabled people at the particular or

substantial disadvantages specified in the reasonable adjustment complaint when compared with non-disabled people?

Did they put the Claimant at those disadvantages?

Can the Respondent show the application of the PCP to be a proportionate means of achieving a legitimate aim?

84. The complaint of indirect discrimination is misconceived because these PCP's were not applied to the Claimant. The Tribunal notes that in respect of the third PCP (the naps) that clearly would not be of general application so could not form the basis for a complaint under that head.

85. The Claimant has not established a case where the Respondent is required to prove a proportionate means of achieving a legitimate aim and the claim for indirect discrimination is also dismissed.

Time limits

Has the Claimant brought her disability discrimination complaints in time? Were the acts of discrimination continuing acts, the last of which was in time? If part, or all, of the claim is out of time, is it just and equitable to grant an extension of time for its presentation?

86. On the calculations presented by the Respondent, the last in time date for a relevant act was 8 February 2016 (presentation 8 July 2016 less four months plus 24 days). That would, if relevant and if found by the Tribunal, include the last discrimination allegation of a failure to redeploy which was recommended for consideration by 16 February 2016 occupational health report. However, the Tribunal has dismissed that complaint. As to the earlier complaints (all of which have been dismissed on the merits) even if the next earlier in time complaint (which is the intrusive and unreasonable questions in the occupational health referral made at the end of 2015) was in time and part of a continuing series of events those complaints would still be out of time; in short all those discrimination complaints would be out of time.

87. It therefore falls to be considered whether it is just and equitable to extend time. The Claimant said nothing to persuade the Tribunal that it would be just and equitable to extend time even though this was identified clearly as an issue to be resolved at the Final Hearing. The Tribunal notes that the Claimant had union representation from a date towards the end of 2015 and was also represented by a solicitor and in those circumstances, in the absence of material laid before the Tribunal by the Claimant, the Tribunal must reach the conclusion that the Claimant has not persuaded the Tribunal that it would be just and equitable to extend time and if it had been necessary the Tribunal would have dismissed the discrimination claims on the basis that they were out of time and the Tribunal did not have jurisdiction to hear those claims.

Constructive dismissal

If the Respondent acted in any of the ways alleged in the Claimant's disability discrimination complaints above, in doing so, did it act in such a way as was calculated or likely to destroy or seriously damage the relationship of trust and confidence

between employer and employee?

If so, did the Claimant resign in response to that breach of the implied term of trust and confidence? The Claimant contends that she resigned in response to a last straw which was the unreasonable and intrusive questions the Respondent required the occupational health practitioner to ask the Claimant on 16 February 2016.

If so, did the Claimant affirm any breach?

If the Claimant was entitled to resign by the Respondent's fundamental breach of contract and so claim constructive dismissal, has the Respondent shown the reason for dismissal and that it was a potentially fair one? [And in the event, subsequent questions identified in the list of issues are not relevant.]

88. The letter of resignation which was written by the Claimant and sent by email on 23 February 2016 addressed to her line manager, Mr McHale, and copied to Alison McCabe and others said:

> *"In the interest of my health I have decided that I can no longer work at Woodbine or for Redbridge Adult Social Care and therefore tender my resignation.*
>
> *I have asked to be redeployed outside of Adult Social Care, however, given the time element and the fact that you and Alison have gone so far to have me removed from my post, I felt it would be unlikely that I would achieve that given objective and have therefore decided to leave. …"*

89. It was not correct that the Claimant had been removed from post. Insofar as the Claimant had *"asked to be redeployed"* this was something under active consideration following the relevant referral to the occupational health physician who had recommended a *"non-medical redeployment"* which was being considered by the Respondent and in respect of which the Claimant's union representative was making some input at the time that the Claimant made her decision to resign. The Claimant knew that this was the case but in the face of the possibility of redeployment decided nevertheless that she would resign contrary to paragraph two of her letter of resignation. The first paragraph of that letter refers to her health as the reason for resignation and makes no reference to the allegations of discrimination which were subsequently formulated by the Claimant and her then solicitor.

90. As Mr McHale wrote immediately to the Claimant by email on 25 February:

> *"Your email indicates that you have asked for redeployment and that you did not feel this would be considered because management have tried to remove you from your post.*
>
> *I do not accept that I or any other manager has tried to remove you from your post; as you know from your most recent appointment with Occupational Health on 16th February 2016 the question of your redeployment was raised with Occupational Health. The first opportunity to discuss the recommendations regarding redeployment would have been yesterday, at the stage 2 sickness absence meeting that was*

arranged to discuss your absence and what could be done to support your return to work.

If your intention is to give 4 weeks' notice it is possible that this option could be considered during that time. If that is not your intention please confirm the date that you wish your resignation to take effect. Please note that if your intention is to give 4 weeks' notice you will be required to return to work or continue to submit fit notes until your last day of service.

Please confirm your intentions with regard to your resignation, in the meantime I wish you all the best for the future and hope that your health improves. …"

91. At the beginning of March the Claimant confirmed by email that her resignation was effective 25 February 2016. The Claimant did not seek to contradict the corrections expressed by Mr McHale in his email of 25 February nor did she take up that opportunity to allow the Respondent to consider redeployment. The context of this resignation was in anticipation of a Stage 2 meeting (which was to be rearranged because union representation was not available on the day and it was standard policy to allow one adjournment of such a meeting). That Stage 2 meeting could not have led to a final warning or a dismissal because such disciplinary sanctions could not be considered until Stage 3 had been reached.

92. In all these circumstances and where the Respondent was still considering redeployment and even encouraged post-resignation the Claimant to give notice so that redeployment could be considered going forwards, the Claimant has not demonstrated any fundamental breach of the relationship of trust and confidence. The claim for constructive dismissal accordingly cannot succeed. In the circumstances the Tribunal is left with the Claimant's own explanation for her resignation, *"In the interest of my health"*.

93. All the Claimant's complaints are dismissed.

Employment Judge Ferris

14 March 2017