EMPLOYMENT TRIBUNALS

Claimant: Mrs N Lawler

Respondents: 1. The Co-operative Group Limited
2. D A Collingwood

Heard at: Liverpool **On:** 30 July to 3 August 2018
8 October 2018
(in Chambers)

Before: Employment Judge T Vincent Ryan
Ms F Crane
Mrs J C Ormshaw

REPRESENTATION:

Claimant: Mr M Mensah, Counsel
Respondents: Mr A MacPhail, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant resigned from her employment with the first respondent and she was not dismissed. The claimant's claim of constructive unfair dismissal fails and is dismissed.

2. The claimant's claim that the first respondent failed to make reasonable adjustments in respect of operations meetings held at the Altrincham office in 2016 (page 46 paragraph 1, all page references being to the agreed trial bundle unless otherwise stated) was presented to the Tribunal out of time in circumstances when it would not be just and equitable to extend time to the date of presentation of the claimant's claim on 2 August 2017. This claim is dismissed.

3. The claimant's claim that the respondent failed to make reasonable adjustments in respect of time spent by her at the first respondent's Ambrose Grove office (page 47 paragraph 2), in respect of arrangements for divisional meetings (page 47 paragraph 3), by requiring managers to be physically present at work at all times (page 48 paragraph 4), and by operating a policy that disallowed light duties

for managers (page 48 paragraph 5), and her claim with regard to arrangements made for a managerial meeting on 2 March 2017 (page 49 paragraph 6) are not well-founded, fail and are dismissed.

4. The claimant's following claims of harassment in respect of the protected characteristic of disability are well-founded and succeed, namely:

(1) Remarks made by the second respondent at a divisional meeting in March 2016 (page 51 paragraph 3);

(2) Remarks made by the second respondent to the claimant in July 2016 (page 51 paragraph 4) that caused her embarrassment;

(3) Comments made by the second respondent at a meeting in Altrincham in August 2016 (page 51 paragraph 6);

(4) Comments made by the second respondent on 2 November 2016 (page 51 paragraph 7);

(5) Comments made by the second respondent in late 2016 at Runcorn (page 51 paragraph 8);

(6) Comments made on the telephone by the second respondent on 13 February 2017 (page 51 paragraph 9).

5. The following claims of harassment are not well-founded, fail and are dismissed, namely:

(1) Comments made by Richard Lancaster (Managing Director) in July 2016 (page 51 paragraph 5);

(2) Claims in respect of a home visit conducted by the first respondent on 9 March 2017 (page 51 paragraph 10).

6. The claimant's claim of harassment in 2014 by the claimant's then line manager, Mrs R Hopkin-Hoggarth (page 50 paragraph 1), and her claim in relation to a telephone conversation with Mrs Hopkin-Hoggarth on 18 December 2015 (page 50 paragraph 2) were presented to the Tribunal out of time in circumstances when it would not be just and equitable to extend time to the date of presentation of the claimant's claim on 2 August 2017. These claims are dismissed; the tribunal does not have jurisdiction to hear them because they were presented out of time.

7. Case Management Orders will be issued separately.

REASONS

1. The Issues

The parties agreed a case specific List of Issues (C3) and the Tribunal has resolved each of the issues identified by the parties, which were as follows:

Unfair constructive dismissal – section 95(c) Employment Rights Act 1996 (“ERA”)

1.1 Following the claimant's involvement in an investigation into alleged wrongdoing among senior managers of the first respondent, did the alleged treatment of the claimant set out below (per paragraph 4 of the amendment to the ET1) form part of a course of conduct constituting a repudiatory breach of contract?

1.1.1 Visiting the claimant at her home on 9 March 2017, the first day of her absence from work and questioning her in a confrontational manner.

1.1.2 The failure of Mark Potts, the colleague assigned to be her point of contact while absent from work, to concern himself meaningfully with the claimant's welfare.

1.1.3 Lack of assistance and transparency on the part of the first respondent’s HR department, for example omitting to release a copy of the company policy on reasonable adjustments to her despite being advised to do by its ER Services team.

1.1.4 Taking six months to conclude the investigation into the claimant's grievance when the recommendation from the Occupational Health department was that it be concluded swiftly to aid the claimant's recovery. (The claimant confirmed her complaint was that the grievance took six months from start to finish)

1.1.5 Removing the claimant from Divisional email distribution lists without explanation or consultation while she was absent from work through illness.

1.1.6 Declining to reinstate her on the distribution lists despite numerous requests from the claimant for it to do so.

1.1.7 Removing the claimant from the email contact list for its Funeralcare Division in August 2017.

1.1.8 Failing to uphold the claimant's grievance after conducting a flawed investigation, omitting to gather all relevant evidence and/or consider evidence obtaining impartially (final straw).

1.2 Did the claimant accept or waive the breach?

1.3 Did the claimant resign in response to that breach?

Failure to make reasonable adjustments pursuant to section 20 Equality Act 2010 (“EA”) [further and better particulars of reasonable adjustments claim pages 46-49]

1.4 Did the claimant's condition give rise to a duty on the part of the first respondent to make reasonable adjustments?

1.5 Did the first respondent take steps to discharge that duty? Were those steps sufficient?

1.6 Ought the first respondent to have implemented specific adjustments as set out in paragraphs 1.6 of the claimant's further and better particulars?

1.7 Are any of the claimed failures to make reasonable adjustments out of time? If so, is there a continuing act or omission or would it otherwise be just and equitable to extend time limits in accordance with section 123 EA?

Harassment on the grounds of disability – section 26 EA (summary of instances of harassment alleged by claimant pages 50-52)

1.8 Did the respondent pursue a course of conduct as set out in the ET1 and further elucidated in the claimant's summary of instances of harassment?

1.9 Are any of the alleged incidents out of time? If so, is there a continuing act or would it otherwise be just and equitable to extend time limits in accordance with section 123 EA 2010?

1.10 Was this unwanted conduct related to the claimant's disability?

1.11 Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile or offensive environment for the claimant?

1.12 Was it reasonable for the conduct to have had this effect?

2. **The Facts**

2.1 **Miscellaneous Facts**

2.1.1 The Respondent

2.1.1.1 The respondent is a large employer divided into various divisions of which Funeral-care is one. It has a tiered management structure with in-house professional employment relations advisers (ER Services). It has a divisional and regional structure with Regional Managers covering wide geographical areas of the United Kingdom. It operates with several written policies and procedures, including a written policy on making reasonable adjustments in respect of employees with disabilities (pages 58-60), a grievance policy (pages 61-68), and absence policy (pages 69-74), a Manager’s Guide to Absence policy (pages 75-80B), Long-term absence policy (pages 80C-80F), a Manager’s Guide to the long-term sickness policy (pages 80G-80M), a Manager’s Guide to managing stress (pages 80N-80R), a work related stress policy (pages 80S-80U), a respect policy on antibullying and harassment (pages 81-87),

inclusion and diversity policy (pages 88-89). The respondent did not operate a policy to the effect that no reasonable adjustments would be made for its managers. The respondent was only reluctantly tolerant of operatives who were unable to complete their full duties, and informally adopted the policy that all operatives ought to be able to "carry the coffin"; by default, therefore the respondent's preference was not to permit light duties or adjustments to duties for operatives. The respondent did permit adjustments and therefore light duties for managers; the default position was that wherever possible managers ought to be visibly performing their managerial duties, albeit working from home or with varied hours was permissible.

2.1.1.2 Most of the first respondent's office premises are based on upper floors of buildings where the ground floors are used as receptions areas and chapels of rest. The premises used for Divisional and Regional meetings, save for those such as at Eastham and Ambrose Grove, Merseyside, were on first or second floors. They were exceptions to the general situation that the first respondent's offices suitable for holding meetings and confidential discussions were situated on upper floors. The first respondent had a practice of circulating Divisional Management meetings around the various Regional offices in any Division; this was to familiarise each manager with facilities, personnel and issues or activities in each Region and to be seen to be "flying the flag" and raising the company profile throughout the geographical area covered. Furthermore, centralising such meetings was seen to be retrograde and unfair to those required to travel away for each meeting whereas rotation shared the inconvenience. The first respondent considered such matters generally and specifically in the context of the claimant's request to meet regularly at Eastham, in ground floor offices.

2.1.1.3 Cast list:

ALDOM Gill – HR involved in grievance

BAKER Martin – grievance officer (witness to the Tribunal_

CHRISTIAN Lynsey – Business Development Manager (witness)

CLARKSON Melanie – HR Business Partner (witness)

COLLINGWOOD David (R2) – Claimant's line manager from March 2016 to the effective date of termination of employment (witness)

DANIEL Sylvia – HR Business Partner (witness)

FENTON Karen – Formerly Head of HR

HOPKIN-HOGGARTH Roberta (known as Bobbi) – Claimant's line manager until March 2016 (witness)

KIRBY Emma – HR Officer at grievance appeal hearing (witness)

LANCASTER Richard - former CEO of Funeralcare and Legal Services businesses (witness)

LAWLER Natalie – Claimant (witness)

McLOUGHLIN Robert – General Manager

NISBET Ruth – Occupational Health

POTTS Mark – Senior Operations Manager (witness)

POWELL Richard – Grievance appeal office (witness)

TURNER Leo – formerly Head of HR

2.1.2 <u>The Claimant</u>

2.1.2.1 The claimant was employed by the respondent from 5 March 1995 until her resignation on 11 September 2017. In July 2012 she was appointed Regional Manager for Merseyside overseeing three care centres comprising 33 funeral homes and a woodland burial ground. In this capacity she was responsible for approximately 130 members of staff with four Hub Managers reporting directly to her. The claimant was initially based as Regional Manager in Prescot and her office was on the first floor with access by stairs only. She did not complain about the Prescot office being her principal place of work despite having to use stairs to gain access, or at least not until immediately before she was moved to Ambrose Grove in July 2016.

2.1.2.2 Having been involved in two accidents the claimant has had multiple spinal disc collapses and spinal compression resulting in loss of strength in her left arm, restricted leg movement and reduced strength in her right leg causing her difficulty with her mobility and lower back/neck pain. She has been diagnosed with psoriatic arthritis causing

pain and fatigue and limiting her mobility; she takes painkillers which in turn cause drowsiness and short-term memory loss. In June 2018 the claimant had a surgical implant of a spinal cord stimulator by way of pain relief. The claimant is a disabled person within the definition of section 6 Equality Act 2010 ("RA"). At all material times the respondent was aware of the claimant's disability. She would frequently walk with the aid of a stick and on occasions when ascending or descending stairs would avail of assistance from her PA to steady her and give her at least reassurance if not physical support. The respondents believed, because the claimant did not complain specifically about access to the Prescot office, that she was managing adequately and to her satisfaction, albeit they were aware of her difficulty with stairs.

2.1.2.3 The claimant was self-conscious of the disabling effects of her physical conditions. She did not wish to draw attention to any problems encountered that could be thought of as limitations; she was not one to complain. She tried to perform the full range of duties to the best of her ability without being compromised by her disability. She was wary of management's attitude to its employees who were unable to fulfil full duties which, coupled with her sense of responsibility as a manager, made her very sensitive to what she considered criticism. Over the course of events described below the Tribunal felt that the claimant lost some objective self-awareness and became overly suspicious, suspecting that there was an effort on the part of the respondent to manage her out of the business. The Tribunal finds that there was no conspiracy on the part of the respondent's management to force her out of her employment or unfairly to encourage her to resign; there was no evidence to support such an allegation. On some occasions the claimant had some understandable grounds for her perception that she was the butt of certain managers, but save in the specific cases of harassment found below the Tribunal finds that in general the first respondent's managers treated the claimant fairly, considerately and reasonably. Subject to the claimant's sensitivity the Tribunal found her generally to be a credible witness although her occasional lack of objectivity tended to show some degree of exaggeration on her part, albeit the Tribunal did not consider that she was attempting to mislead.

2.1.2.4 At around the time of the claimant's appointment as Regional Manager for Merseyside in 2012 the second respondent, David Collingwood (DC), was appointed UK

Operations Director and he appointed Mrs Hopkins-Hoggarth (BHH) to the North-West Sector Manager position. BHH became the claimant's line manager and remained as such until she resigned from the first respondent's business in March 2016. Her resignation followed the receipt by the first respondent of several complaints of bullying and harassment against her by several employees and not just the claimant; there was no evidence that all of those or indeed any of those who complained were disabled people (apart from the claimant) or that the complaints concerned actual or perceived disability. They raised these matters with her. She felt the allegations were unfair but in any event decided for her own personal reasons that this was an opportunity to leave the business, and she did so. She was replaced as the claimant's line manager by DC. BHH under DC's management, and thereafter DC's management of the claimant and her colleagues once BHH had left, illustrated a firm regime on the part of the first respondent with regard to absence from work and performance of duties that may otherwise have been compromised by ill health.

2.1.2.5 There was little tolerance of compromise in the performance of operatives, as indicated above. Furthermore, DC's expectation was that managers would be seen to be actively involved in managing and would not be merely observers or spectators of their reporting staff. He would use the expression "on the pitch" to indicate his expectation that managers should be seen to be making an effort to carry out their role actively for the good of the business. This created pressure both on operatives and managers. BHH's approach was perceived by some of her colleagues to be somewhat brusque and demanding; she was forthright in expressing her views and giving instructions. Several of her reports found BHH's management style difficult and challenging, hence the allegations of bullying and harassment. The claimant found the approaches of both BHH and DC to amount to bullying and harassment, and certainly their approaches to her and the performance of her duties were on occasion challenging.

2.1.2.6 Notwithstanding the manner and objectives of both DC and BHH they were at all times guided by professional Employment Relations staff and, where appropriate, referred colleagues to Occupational Health advisers. The respondent's Employment Relations advisers ensured, insofar as they could, that the first respondent complied with its obligations in respect of staff with disabilities, those on short and long-term sickness absence, in

relation to making appropriate adjustments and following matters related to grievance and disciplinary policies.

2.1.3 The Tribunal has gone on to make claim specific findings of fact. In reaching its judgment the Tribunal not only considered the claim specific facts but all the facts in the round so that it could better consider whether it ought to draw inferences and to ensure a full contextual analysis of all the actual and alleged conduct of the parties.

2.2 **Claim Specific Facts**

2.2.1 Constructive Unfair Dismissal

The claimant made eight specific allegations of conduct on the part of the respondent which she said constituted repudiatory breaches of contract and these are listed in the agreed List of Issues (C3). The Tribunal find the following facts in respect of each of them, as follows:

1. Home visit 9 March 2017:

2.2.1.1 On 2 March 2017 the first respondent called a divisional meeting to brief managers about a planned divisional reorganisation. The reorganisation necessarily involved consultation with the trade union. DC met with each of the managers in advance of the formal briefing on a one-to-one basis to give an overview and also some indication of how the reorganisation might affect the individuals. DC met with the claimant. DC explained that the claimant had a role in the reorganised structure as he felt she matched up to one of the first respondent's requirements. There were several such managers in this position. DC's attitude and comment was that each of them, including the claimant, could take the new role if she/they considered there was a suitable match, or if not then it was her/their choice and she/they could leave the business. One way or another DC indicated that the claimant could take or leave the new role. The claimant took this as a disparaging and dismissive comment, which the Tribunal finds was not DC's intention. In speaking to the claimant specifically DC referred to her health as being a factor that she may wish to consider in making her decision as to whether to accept the matched role or to refuse it and leave the business. This was a reference to her disabling condition. This upset the claimant.

2.2.1.2 The claimant then attended the divisional meeting with her peers, but she could not see the screen presentation clearly. She asked that DC allow her to rearrange the

tables that were in a horseshoe and DC said that there was no need. She asked for a copy of the slide presentation but DC explained to her and all the others present that he was unable to provide this because to do so would trigger the need to consult with the trade union and it was premature to enter that stage of the overall reorganisation procedure. The claimant did not take the opportunity to swap places with any colleague or to move her chair (leaving aside the desk) so that she could see the presentation better. She took to heart DC's refusal to allow her to rearrange the furniture in the room and not to provide copies of the presentation, adding it to her sense of disquiet at the earlier conversation she had had with DC. She feared the worst and took it all very personally.

2.2.1.3 Following on from the above, on Friday 3 March 2017 the claimant was very upset at work and was witnessed being upset by Ms Clarkson. The claimant was observed to be in a very distressed state. The claimant subsequently described her condition as amounting to a breakdown. The claimant referred to her concern that DC was bullying her. Ms Clarkson tried to console her and find out the nature of her problem and said that she would follow up matters with the claimant the following week. On Monday 6 March 2017 Ms Clarkson attempted to contact the claimant and discovered that she was absent from work with stress. Ms Clarkson was very concerned because of what she had observed and heard, which was then compounded by the claimant's absence. Ms Clarkson took advice from the Employment Relations team and it was agreed that it would be appropriate to have a welfare meeting with the claimant, both because of the claimant's distress and because she had explained to Ms Clarkson that her distress was caused by DC and his comments and behaviour. Ms Clarkson wanted to get to the bottom of the matter and attempt to resolve it. She was genuinely concerned for the claimant's wellbeing and she also wanted to deal with the allegations against DC. She liaised with the claimant and arranged to meet the claimant at the claimant's home on 9 March 2017. This was earlier than most welfare meetings would be in accordance with the standard policy and procedure but there were special reasons for it, namely the claimant's considerable distress and the nature of the allegations which amounted to bullying and harassment against DC. The claimant was agreeable to the meeting at her home.

2.2.1.4 Ms Clarkson attended the meeting at the claimant's home with Mr Mark Potts, who was subsequently assigned as the claimant's welfare liaison. Ms Clarkson and Mr Potts found the claimant, and her husband who was in

attendance, to be defensive and confrontational throughout the meeting. There was nothing in fact untoward on the part of the first respondent in arranging the meeting, which it was entitled to arrange at an earlier date than the policy normally provided for at its own discretion. Ms Clarkson and Mr Potts were not confrontational during the meeting but they did become defensive and pressed the claimant for answers to questions so that they could better understand the situation, and particularly regarding the serious allegations being made against DC. The situation became confrontational and very difficult. Ms Clarkson's and Mr Potts intention always was to assist the claimant constructively towards a return to work, resolving the issues she had with DC and addressing serious allegations of bullying against a senior manager. The defensive and confrontational attitude of the claimant and her husband exacerbated the situation. Ms Clarkson was new to the post and therefore relatively inexperienced insofar as working for the first respondent, and she was upset both at the way that she was spoken to by the claimant and her husband and at her becoming emotional in front of Mr Potts when she was the Employment Relations expert at the meeting.

2. Alleged failures by Mark Potts:

2.2.1.5 Mr Potts conscientiously and sincerely applied himself to his role as the claimant's welfare liaison. He contacted the claimant in a constructive manner, regularly but not so frequently as to, to his mind, apply undue pressure on the claimant. He contacted the claimant appropriately by both email and telephone during her incapacity. Mr Potts agreed the levels and extent of contact with the claimant, under her instruction as to the requirement, frequency and speed of response. Mr Potts took matters at the claimant's own speed and dealt satisfactorily and meaningfully with the claimant's welfare insofar as he was able.

3. Lack of assistance and transparency by HR:

2.2.1.6 The claimant requested that the first respondent's HR department provide her with "the no light duties policy". The first respondent attempted to make it clear to the claimant that there was no such policy, that is there was no policy that disallowed light duties for the claimant. The claimant did not believe that and continued, as she did throughout the hearing, to assert that there was a specific policy on the part of the respondent not to allow light duties. The first respondent's HR department offered to

send the claimant the reasonable adjustments and disability related policies recited above but the claimant did not take up that offer as these were not what she wanted. What she wanted did not exist in writing (or otherwise) and could not have been provided by the first respondent.

2.2.1.7 After the hearing and prior to the Tribunal's consideration of its Reserved Judgment in chambers the parties exchanged emails and disclosed to the Tribunal an email sent by Audrey Furness of the first respondent's Logistics HR Team to various managers dated 30 July 2018 referring to Employment Tribunal litigation and "a myth within Funeral-care regarding 'light duties'". The Tribunal has considered this email, which is open to interpretation. It also considered the respective submissions made on behalf of each of the parties in relation to this email, albeit it was not put in formal evidence. It has been considered in relation to the Tribunal's judgment. It does not establish that, as the claimant asserted, the first respondent operated a "no light duties" policy to her or others.

2.2.1.8 The Tribunal's finding of fact is that the first respondent did not operate a policy where there was a rule that no employees were entitled to the benefit of light duties. The Tribunal finds as above that there was a degree of intolerance of absence and/or light duties in the case of operatives, or reluctant tolerance short of sympathetic acceptance, but there was no general rule and each case was viewed on its merits with light duties and/or adjustments being allowed at various times for various people as appropriate; the first respondent applied a rigorous regime in respect of operatives but it was not one of zero tolerance. The situation was different regarding managers where light duties and reasonable adjustments were more easily agreed than with operatives. The claimant benefitted from reasonable adjustments during her employment with the respondent. The Tribunal considers that the claimant has become somewhat confused between the expressions "light duties" and "reasonable adjustments". The respondent complied with its statutory duty to make reasonable adjustments in respect of the claimant as detailed below.

4. Six months to conclude grievance:

2.2.1.9 The claimant raised a written grievance on 23 March 2017 (page 155) addressed to Mark Potts. The claimant's grievance email is relatively short. She complained of harassment and bullying because of her disability over a few years, and in particular by DC. She also raised a

complaint about the welfare visit on 9 March 2017 by Ms Clarkson and Mr Potts (see above 2.2.2.4). She proposed changes to her role as Regional Manager which was a reference to the restructuring exercise. She requested that the grievance be dealt with by correspondence.

2.2.1.10 Subsequently the claimant submitted further representations in respect of her grievance and further allegations and details. She wrote to the Mr Baker who had been designated as the grievance officer on 24 April 2017 in response to his request for information of 1 April 2017. Her detailed letter of 24 April appears at pages 202-212. She offered to provide further information if requested. She also wrote to Gill Aldom who was assisting Mr Baker by email on 24 April (page 213).

2.2.1.11 Mr Baker conducted investigatory interviews and spoke to Melanie Clarkson on 10 May 2017 and on the same date he also interviewed Mark Potts. Gill Aldom updated the claimant with progress on 11 May 2017 (page 269) explaining there had to be a full review of all the facts gathered. The claimant suggested witnesses that she wished to have interviewed and was not exactly prompt in all her correspondence with the respondent, although the Tribunal makes no criticism of her for that. Nevertheless, the grievance outcome was sent to the claimant on 31 May 2017 (pages 334-388). Mr Baker confirmed his interviews with DC, Mr Potts and Ms Clarkson and that he had considered all the claimant's documentation. He gave a detailed and conscientious response to each of the claimant's points of grievance during the course of his lengthy outcome letter, concluding that DC had supported the claimant and allowed various adjustments in the workplace, which he detailed at page 335; and that he was supportive of the claimant in relation to the conduct of BHH who had left the business. He concluded that there was no evidence to support the allegation that DC had failed to implement reasonable adjustments or demonstrated bullying and discriminatory behaviour. Similarly, he did not uphold the allegation of inappropriate behaviour from Ms Clarkson at the welfare visit, nor allegations of bullying behaviour by Mr Potts and another colleague called Tony Molyneux whom the claimant suspected of checking up on her. It is noted that the claimant's complaint was about the delay in the initial grievance, that is in the period from 23 March 2017 to 31 May 2017 outcome.

2.2.1.12 The claimant's appeal was dated 6 June 2017 and that appears at pages 362-369. Mr Powell was appointed to consider the claimant's grievance appeal. Mr Powell

liaised with the claimant over additional information and she provided a further email dated 24 July which appears at pages 473-475 in which she also commented she would be sending comprehensive notes at a later stage. The claimant wrote again in August 2017 and Mr Powell became concerned that it would be difficult to reach an end to the consideration of the appeal if he did not bring it to a head. The claimant appeared grateful to Mr Powell that he was making these efforts. Mr Powell did not unduly delay the investigation or consideration of the appeal.

2.2.1.13 The Tribunal finds that there were various factors that caused whatever delays there were with the outcome of the grievance. In its entirety the grievance took from 23 March 2017 until the appeal outcome on 5 September 2017. In her oral evidence the claimant's particular complaint was about the two-month period between the grievance and the outcome on 31 May 2017. Taking into account the claimant's holidays, Mr Powell’s holidays, other business commitments, the need for a thorough investigation, the need to request information from the claimant, reasonable delays in obtaining the information from the claimant and arranging requisite interviews, the first respondent acted fairly and reasonably at all times in its conduct of the grievance and appeal, and did not wilfully or negligently cause or contribute to any undue or unreasonable delay; these things happen and in so far as the handling of the grievance is concerned neither party acted in a way designed or likely to damage the relationship let alone destroy it.

5. Removing the claimant from the divisional email distribution list:

2.2.1.14 The respondent circulates various publications to regional and other managers. Some are distributed centrally. The respondent circulates weekly KPI figures, financial reports, bulletins and there is also an email publication list. Mr Potts, acting on advice from the Employment Relations Services team, took the view that during the claimant’s absence with stress related symptoms it would not assist her if she was included in all the distribution lists. He stopped sending her the divisional team cascades. He did this with all good intent and not with a view to disadvantaging the claimant, who still received and could access other reports, bulletins and emails. The claimant complained in July 2017 that she was not receiving the divisional team cascades. On 1 August 2017 Mr Potts explained that he had not wanted to overload her and said that he would update her on her return to work in respect of all relevant points in issue. In

any event he also took further advice and it is clear from the ERS response and advice to him that the first respondent was not attempting to exclude the claimant. ERS queried why the divisional team cascades had not been sent to the claimant, and again Mr Potts explained that he had not wished to overload the claimant.

2.2.1.15 The Tribunal is satisfied there was nothing at all suspicious, untoward or in breach of contract in the first respondent deciding not to send the divisional team cascades to the claimant. In any event the cascades were reactivated on 17 August following the claimant's complaint in July. At about that time Mr Potts felt it was better, bearing in mind the complaints about him and the claimant's appeal against the grievance, that he step aside as the welfare contact, and he did so.

6. Declining to reinstate the claimant on distribution lists:

2.2.1.16 The claimant was reinstated on the said list. Mr Potts instructed reinstatement on 17 August and the claimant certainly recommenced receiving the divisional team cascades by 4 September 2017 in response to her July complaint.

2.2.1.17 The Tribunal was satisfied that this was the soonest available divisional team cascade following Mr Potts revised decision on the matter. The respondent responded appropriately to the claimant's complaint.

7. Removal from email contact list in August 2017:

2.2.1.18 The Tribunal finds that the claimant had remote access to emails throughout her absence and was not removed from the contact list. This finding is based on the respondent’s witness evidence which on this point the tribunal found to be more convincing than the claimant’s assertion.

8. Failing to uphold the claimant's grievance/flawed investigation:

2.2.1.19 Mr Baker, with the advice and assistance of Gill Aldom, considered the claimant’s grievance, listed her allegations and checked with the claimant by a letter of 11 April 2017 (pages 193/194) that they had understood the grievance properly by summarising the points of complaint. They also raised enquiries of the claimant. The claimant responded on 24 April 2017 at page 202 following which Mr Baker interviewed Mr Potts, Miss Clarkson and DC. Mr Baker made an executive decision not to interview others about historic or ancillary matters, that is specifically

relating to BHH. He understood erroneously that Karen Fenton, who was mentioned by the claimant, had left the business and so he did not interview her. He decided not to interview Mr Molyneux whom the claimant had accused of checking up on her.

2.2.1.20 The claimant appealed against the decision and Mr Powell interviewed all those witnesses who remained in the business, including Ms Fenton. He interviewed DC, Mr Potts, Ms Clarkson, a Mr Dawson, Mr Payne, Ms Sidlow, Mr Whiscombe, Ms Oldham, Mr Baker, Mr Lancaster, albeit the interview with Mr Baker was informal and more of a conversation. The Tribunal finds that Mr Powell improved upon and corrected any shortcoming that may have existed in the initial investigation by Mr Baker, albeit it is not critical of Mr Baker's investigation. The Tribunal finds that overall the investigation was not flawed. Mr Baker was reasonably thorough. Mr Powell was more thorough.

2.2.1.21 Four of the claimant's complaints were partially upheld, six were rejected, in four the outcome was said to be inconclusive and none was expressly and wholly upheld. The Tribunal finds that Messrs Baker and Powell, appropriately advised by ERS, conducted an appropriate investigation within contractual terms and reached conscientious and reasonable decisions impartially.

2.2.1.22 The claimant was dissatisfied with the outcome of the grievance and grievance appeal. She was unhappy at the proposed reorganisation. She was upset at comments that were made to her in and around the time of the reorganisation. She resigned because of her dissatisfaction with the state of affairs, none of which she accepted as being fair and reasonable or as she had wished.

Appeal outcome – pages 604-610

2.2.2 The claimant resigned on 11 September 2017. Her resignation letter is at page 636 citing bullying, discrimination and harassment over the past few years, her "nervous breakdown at work" on 2/3 March 2017, the handling of the grievance and grievance appeal which she says was orchestrated and controlled by Gill Aldom and not taken seriously. She accused the first respondent of having an agenda other than treating her with respect and allowing her to prepare for a return to work. The claimant also said that the first respondent's policies and procedures were manipulated for the first respondent's own purposes which resulted in an irretrievable breakdown in trust. In all the circumstances, including what she considered to be "total absence of rigour and good faith in

addressing [my] complaints" she felt she had no alternative than to resign.

2.2.3 The Tribunal finds that these perceptions on the part of the claimant are her reasons for resignation. The Tribunal finds as a fact that the respondent did not act in a manner intended or likely to cause a breakdown of trust and confidence, albeit it did not fully uphold any of the claimant's grievances specifically. The respondent was supportive of the claimant's continued employment by making adjustments as detailed below at various times, and it dealt appropriately with both her grievance and grievance appeal notwithstanding the outcome which was not to the claimant's satisfaction.

2.2.4 Based on the evidence heard by the Tribunal, the Tribunal finds that both respondents were appreciative of the claimant's efforts at work and felt that she was a successful manager and an asset to their business, notwithstanding the second respondent's comments of a personal nature (see below).

2.2.5 Failure to make Reasonable Adjustments

1. Physical features of premises – Altrincham office

2.2.5.1 The first respondent's Altrincham office was used as a venue for operations meetings in April and May 2016. Access to the meeting room was via two staircases that the claimant found to be steep and narrow. Based on the evidence of DC the Tribunal accepted that the claimant was not required to attend an operations meeting in August 2016 as alleged. The meeting room, albeit approached by two staircases, is on the first floor. The claimant conceded in evidence that she did not know the dates of the meetings that she attended at Altrincham. The claimant used to use a walking stick on occasions to assist her with her mobility and she made it known to DC prior to July 2016 that her preference was to hold meetings on the ground floor level at the Eastern premises rather than at Altrincham. DC was aware of the difficulties that the claimant encountered in ascending and descending stairs, but he believed that the claimant was able to access the Altrincham meeting room because she did not complain about accessing her offices at Prescot which were not ground floor offices and which required her to climb stairs. She was moved from Prescot, at least in part and in large part, because of difficulties with her mobility, and it was felt that she could accommodate herself better at Ambrose Grove in July 2016.

2.2.5.2 The Tribunal is therefore satisfied that the claimant was put at a substantial disadvantage in being required to attend meetings at the Altrincham office in April and May 2016. Similarly, the claimant had difficulty in attending offices at the premises of Shaws in Bolton because of difficulty negotiating stairways. She attended meetings in Shaws of Bolton on 2 and 23 March 2016. The claimant was therefore at a substantial disadvantage in respect of attending meetings at Shaws.

2.2.5.3 The respondent has not advanced evidence to suggest it was unreasonable to relocate the meetings in March, April and May 2016 as above, and the Tribunal concluded that it would have been a reasonable adjustment to arrange these particular meetings at alternative venues on ground level. Access to meeting rooms was a live issue for the claimant in March, April and May 2016. She raised the matter. In consequence the first respondent made a reasonable adjustment to the claimant's principal place of work by transferring her from the upper floor offices in Prescot to Ambrose Grove in July 2016. The claimant's potential claims in respect of a failure to make reasonable adjustments regarding the premises at Altrincham and Shaws of Bolton therefore had crystallised by no later than the May 2016 Altrincham meeting. The claimant did not present her claim to the Tribunal in relation to this matter until 2 August 2017, some 15 months later.

2. Physical feature of premises – Ambrose Grove office

2.2.5.4 In July 2016 as a result of the first respondent’s concerns in the light of issues raised by the claimant she was transferred from the upper floor offices at Prescot to the premises at Ambrose Grove. DC required her to move because of her mobility issues and the difficulty in ascending and descending staircases, which put her at a substantial disadvantage. The claimant could locate herself as Regional Manager in any office at Ambrose Grove that was suitable to her. She chose not to because she did not wish to inconvenience colleagues who worked on the ground floor. She chose to occupy an office off a small kitchen that was small and lacked privacy office. DC told her in no uncertain terms that if she wished she could remove her colleagues from the more suitable ground floor office and that was his intention so that the claimant could occupy the better ground floor office.

2.2.5.5 The first respondent’s relevant provision, criterion or practice (“PCP”) after July 2016, as instigated by DC,

was that the claimant's principal place of business was at Ambrose Grove. There was no PCP necessitating the claimant's use of a first-floor office. She was not placed at a substantial disadvantage by being at Ambrose Grove. In order to make the transition work to her advantage she would have had to relocate her colleagues which she was entitled and able to do as Regional Manager and their line manager. She chose not to do so and that was a matter for her. In so far as there was a practice that her colleagues occupied the ground floor office(s) which put the claimant at a disadvantage, this was varied by DC telling the claimant that she could remove them; any disadvantage was therefore not substantial not least as the claimant was the line manager.

3. Physical feature of premises being venues for divisional meetings

2.2.5.6 The geographical division in question stretched from Lancaster in the North to Shrewsbury in the South, and from North West Wales in the West to Nottinghamshire in the East. Divisional meetings were held around the divisional area at various venues. There were several meetings per annum, two of which were hosted by the claimant at her local base office. The claimant would have to undertake relatively lengthy journeys to attend offices, such as at Oldham and Nottingham, and she found the journeys tiring. The driving requirement caused her tiredness and pain for which she took medication.

2.2.5.7 The Tribunal finds that the respondent had a PCP that divisional meetings were held throughout the divisional area. The reason for this was that the first respondent was anxious to ensure that managers saw the work of each region and area within the division, and wished to "fly the flag" in each of its regions; it was considered important that managers would understand local issues and practices, which objectives would not have been achieved had all meetings been held in a single central or designated office. There was no PCP requiring the claimant to drive at peak times, and the respondent allowed the claimant to stay overnight in paid for accommodation, both before and after such meetings; it gave her assistance with her transport and it was flexible in that it allowed family members to take her to and from work locations so as to reduce her driving commitments. The claimant conceded as much, and that these measures were helpful to her, in an Occupational Health

assessment with Dr Ruth Nisbet in September 2016 (pages 106-108).

4. Physical features of premises and first respondent's alleged requirement that the claimant "in the office everyday"

2.2.5.8 The respondent stated in evidence that DC would frequently say that he required his managers to be "on the pitch". DC conceded he may well have used that expression on the occasions alleged and that he used it to mean that he required his managers to be seen to be visibly active in the management of their responsibilities and not be spectators of others' efforts. The Tribunal finds that DC used the expression "on the pitch" and by that he meant the interpretation he explained.

2.2.5.9 Prior to DC's direct involvement with the claimant as line manager the then Head of HR, Leo Turner, had authorised the claimant to work from home. DC allowed that arrangement to continue. As of September 2016, the claimant could work from home, and this is reported upon in an Occupational Health report where the claimant told the Occupational Health adviser that that was the case (page 106).

2.2.5.10 At page 107 Dr Nisbet confirms that she was told by the claimant that the claimant could work from home as required as well as having reduced driving commitments. The Tribunal finds that the claimant felt uncomfortable working from home because she believed that DC wanted her to be physically present in the offices she managed, but there was no PCP in force by either the first or second respondent requiring the claimant's physical presence in her office every day. The PCP was that the claimant be seen to be working actively and managing her areas of responsibility as opposed to being a spectator watching others perform their duties under her management.

5. Physical features of premises – "no light duties" policy

2.2.5.11 The Tribunal has already made findings of fact above in respect of the claimant's allegation that there was an active policy on the part of the Funeral-care Division of the first respondent not to allow light duties. The respondent was intolerant of operatives who were unable to "carry the coffin" and were reluctant to allow any adjustments but rather chose to performance manage such operatives.

2.2.5.12 Regarding management, the respondent was more flexible in providing reasonable adjustments in accordance with its appropriate policies and its statutory duties. The claimant did not wish to draw attention to the difficulties that she had because of what she considered to be, and the Tribunal finds was, a relatively severe regime and culture. That said, the Tribunal finds that there was no PCP to the effect that reasonable adjustments would be refused to managers and that there was never a case where managers were allowed light duties by way of a reasonable adjustment.

2.2.5.13 The Tribunal considered that there were two different regimes, the harsher regime being in respect of operatives and a more relaxed approach being taken for managers; the first and second respondents maintained pressures on management and it was not a truly relaxed approach but it was not one where there was a PCP contrary to the provisions of the Equality Act and the statutory duty to make reasonable adjustments. The respondent made appropriate reasonable adjustments, such as allowing the claimant to work from home, to relocate to Ambrose Grove so that she could use ground floor offices, by providing her with an iPad and work chair, by reducing her driving commitments and allowing flexibility with family members taking her to and from work locations. All those adjustments removed substantial disadvantages that would otherwise have been suffered by the claimant, and this undermines the claimant's allegation and assertion that there a "no light duties" policy applied to her.

6. Physical feature of premises – meeting 2 March 2017

2.2.5.14 DC met with various managers on 2 March 2017 to explain to them a planned reorganisation. The presentation was given on a screen. Tables were organised in a horse shoe shape around the screen. DC did not allow the claimant to rearrange the furniture. The PCP was that the desks were to be arranged in a horse shoe shape so that those seated at the desks could adequately see the screen. There was no PCP to the effect that any particular manager, including the claimant, had to sit at a particular seat. The claimant could have but did not ask to move her chair, or to swap places with somebody else, and she was not required to sit in a place where viewing the screen was difficult or put her at any substantial disadvantage. She could have stood or sat anywhere that she wished. The PCP with regard to the layout of the room did not put the claimant at a substantial disadvantage.

2.2.5.15 The claimant further contends that she was not allowed to take away copies of the slideshow presentation. She has difficulty with her concentration because of fatigue and pain. This put the claimant at a substantial disadvantage in fully understanding and retaining details of the reorganisation. In the light of that DC explained the reorganisation to her three times during the presentation, having already met with her alone to outline the proposal and how it affected her. He also explained that he could not give a copy of the presentation to any of the managers. The restriction was not placed on the claimant alone. The restriction was because of the implications for trade union consultation and agreements that had already been reached. That was a reasonable explanation, and it would not have been reasonable to break the agreement and agreed procedure in circumstances where a clear and adequate explanation was given to the claimant three times at the meeting, which itself followed a one-to-one session between DC and the claimant where again he explained the reorganisation and its implications. The claimant fully understood the implications because that was at least in part what had upset her in the pre-meeting one-to-one session with DC on 2 March 2017.

2.2.5.16 The Tribunal finds that the explanation given three times was a reasonable adjustment to remove any disadvantage of the claimant not being able to take away the slideshow, particularly in the context of the pre-meeting one-to-one session. It would not have been reasonable in all the circumstances to give the claimant or any other of her peers a copy of the presentation at that stage in breach of an agreed procedure.

2.2.6 Harassment

1. BHH displayed hostility and bullying behaviour towards the claimant and others, both privately and during meetings.

2.2.6.1 The claimant perceived BHH's conduct as being aggressive, paying attention to her disability and criticising and undermining her. However, in the light of all the evidence heard, including from BHH, it is apparent that BHH's management style was at least robust and at worst perceived to be aggressive to many of her reports. The claimant was not the only person who said that they felt bullied and harassed by BHH. BHH's management style towards the claimant was not related to her disability but reflected her approach to her subordinate colleagues in general.

2.2.6.2 The claimant was conscious of disquiet about BHH from 2014 until BHH's departure from the first respondent's business in March 2016 by which time any claims had crystallised. The claimant did not present her claims to the Tribunal until 2 August 2017. The claimant had no further dealings with BHH from her departure in March 2016, and before the claimant's own termination of employment on 11 September 2017, a period of some 16-17 months. There was no evidence that BHH's approach was continued by DC, albeit the tribunal finds that his own approach amounted to harassment on occasions. The tribunal did not find collusion between either of the respondent's and BHH relating to how she and then DC ought to or could manage the claimant.

2. On 18 December 2015 BHH telephoned the claimant to discuss with her a conversation that the claimant had had at a meeting with Robert McLoughlin, the then Regional Manager.

2.2.6.3 BHH asked the claimant whether she had raised the question of her disability with Mr McLoughlin and accused the claimant of drawing attention to BHH by using disability related issues. BHH said that she would speak to DC about the claimant's conversation with Mr McLoughlin, and stated words to the effect that she had an issue with the claimant's "health issues". Those words were unwanted. BHH comments appeared to put pressure on the claimant not to mention her disability and to therefore draw attention to both herself and to BHH's management of her; she put the claimant on the defensive by threatening to speak to DC; BHH saying that the claimant's disabilities were "a real issue" undermined the claimant's confidence in her post.

2.2.6.4 The claimant felt a harassing effect from each of these statements. The comments were made by BHH on 18 December 2015; BHH left her employment in March 2016. The claimant had complained of them. The claimant decided not to take any action because BHH was removed from the business, and she felt that matters would then improve. Nevertheless, she took no formal action regarding BHH, who was generally considered to be overbearing and was accused by others of being a bully. The claimant presented her claim to the Tribunal in August 2017 in relation to events that occurred in December 2015, and that is approximately 21 months after the incident.

3. At a divisional meeting in March 2016 DC again used the expression that he expected managers to be "on the pitch".

2.2.6.5 The Tribunal has already made findings as to what DC meant using this expression. At that time the claimant frequently worked from home to alleviate symptoms of her disability. She was genuinely and conscientiously concerned about what she considered to be management's attitude to employees who were unable to fulfil their full duties. She knew that reasonable adjustments were permitted for managers because she was at that time working from home, but she was wary of DC's attitude. DC made no effort to explain to the claimant or reassure her as to what he meant by the expression "on the pitch". His expectation was of visible work, and each time the comment was made the claimant felt that it was aimed at her because she was not "on the pitch" in terms of being physically present every day in the office.

2.2.6.6 The Tribunal finds that the use of that expression by DC was unwanted by the claimant and it emphasised to her that she was not in fact physically present in the office at all time. DC did not explain his comment or re-assure the claimant that he understood she could not always be in the office. In the context in which that phrase was used DC could have anticipated that the claimant would feel as she did about not being in the office every day. It was not DC 's purpose to create an intimidating or hostile working environment, however in all the circumstances the Tribunal finds that the claimant did feel the harassing effect. In context she was self-conscious and aware that she was not physically present as much as the second respondent may have liked. The Tribunal finds that there were circumstances relating to the context of DC's comment that could give rise to the claimant's interpretation or at least to her sensitivity to such comments. The claimant was upset and worried.

4. In July 2016 DC said to the claimant either that she was an embarrassment to him because of her disability, or her disability was embarrassing to observe.

2.2.6.7 In any event, and whilst the Tribunal cannot make a finding as to the exact quotation, it is satisfied that DC referred to the claimant's disability in terms of embarrassment. The claimant did not want to hear this. She was upset by the comment. The claimant's evidence was credible, cogent and consistent on each of these allegations of harassment by DC (where the tribunal found in the claimant's favour) which themselves were consistent with DC's reluctant tolerance of sickness absence and the regime at large in respect of "light duties" as described above. For his part DC either had

no recollection or he denied such allegations but the tribunal found his denials less convincing on balance than the claimant's evidence. Even allowing for sensitivity on her part, and maybe because of it, it is likely that the claimant would recall such comments whereas DC may not if he was being flippant or trying to be jovial; the comments to the claimant in context were serious and hurtful.

5. In July 2016 the claimant was introduced to Richard Lancaster, the Managing Director.

2.2.6.8 In the introductory conversation the claimant referred to having been bullied by BHH and she alleged that this had continued under DC's management. Mr Lancaster said that the claimant needed to move on, and he gestured to her with his hands to the effect that she ought not to continue with that line of complaint. He said words to the effect that she ought to stop and move on. He had been concerned about complaints regarding bullying and harassment by senior management and had taken action to look into matters. BHH had left the business. Mr Lancaster did not admit to having made the comment or using the hand gesture, however the Tribunal finds as a fact that he did both; the claimant's recollection was clear and there was a witness to the event. These were unwanted words and it was an unwanted gesture.

2.2.6.9 The Tribunal is satisfied in the context, and considering all the evidence heard in relation to this episode, that Mr Lancaster merely sought to draw a line under past events involving BHH generally, particularly those that had been dealt with. The claimant was disappointed. The Tribunal is satisfied that Mr Lancaster's comments were not related to the claimant's disability; they were related solely to what he considered was a resolution of issues and a need to carry on.

6. At an operations meeting in Altrincham in April or May 2016

2.2.6.10 Whilst the claimant was ascending the stairs to the meeting room DC made a comment along the lines of, "There we are, it's you and the stairs again".

2.2.6.11 The Tribunal finds that words to that effect were spoken in that context, and that those words were unwanted. DC meant no harm and it was not his purpose to harass the claimant, however she felt a harassing effect and was upset at his drawing attention to her compromised capacity to ascend the stairs.

7. On 2 November 2016

2.2.6.12 Prior to a divisional meeting in Nottingham the claimant stayed in a hotel along with other colleagues. The claimant had enquired at reception about the lift to her room. DC commented to the claimant that he had overheard the claimant discussing the lift or asking about the lift at reception, and made a remark about not wanting her to cause “any fuss”. This was a reference to the claimant's mobility. These words were unwanted by the claimant.

2.2.6.13 Once against the Tribunal considers that it is likely DC thought that he was being light-hearted. However, the claimant was upset that he was commenting on her disability and drawing attention to her with an apparent criticism and instruction.

8. At premises in Runcorn in late 2016

2.2.6.14 DC said to the claimant that she was drawing attention by using a walking stick and he may have said she was drawing attention to him. Once again, he made some reference to the use of the walking stick being embarrassing, either to the claimant or to him.

2.2.6.15 The Tribunal finds that DC did say that using the stick drew attention and did refer to embarrassment. Those comments or words of that nature were repeated by DC to the claimant on 25 January 2017 and 8 February 2018. The claimant had never wanted attention to be drawn to her mobility issues. She was embarrassed and upset at the comments made. The words were unwanted.

9. On 13 February 2017

2.2.6.16 DC spoke to the claimant about the forthcoming restructure. In the context of saying that the restructure could give the claimant an opportunity to consider her long-term future, either within the business or leaving; DC made a reference to the claimant's health. He was referring to her disability. He indicated to the claimant that her health was something that she might want to consider and it could be an opportunity for her to do what she thought was best in the light of her disability. The claimant did not wish to be considered by reference to her disabilities, particularly about her long-term future. Such matters were personal to her. As far as she was concerned the first and second respondents’ considerations should only have been about whether her

role matched within the new structure, and she did not wish her disability to be a factor for them. DC's words were unwanted.

2.2.6.17 The Tribunal considers that DC's purpose was to set out valid considerations that the claimant may wish to bear in mind. The effect of the comment was to upset the claimant, and she conflated that comment with all the other circumstances to create the impression in her mind that the second respondent was trying to engineer her exit from the business.

2.2.6.18 The Tribunal has already made a finding of fact that there was no conspiracy or effort on the part of management, including DC, to force the claimant's departure from the business.

10. On 9 March 2017

2.2.6.19 The claimant was visited at her home by Ms Clarkson and Mr Potts as detailed above.

2.2.6.20 The Tribunal finds as a fact that neither Ms Clarkson nor Mr Potts were oppressive or confrontational during the visit; they eventually became defensive owing to the confrontational attitude of the claimant and her husband. The visit was arranged at an earlier stage than usual under the first respondent's absence management policy because of the particularly serious symptoms displayed by the claimant on 3 March 2017 at which time she made serious allegations against DC, a senior manager, and then was absent from work with work-related stress. Ms Clarkson was genuinely motivated by concern for the claimant and took appropriate advice from ERS. The meeting was arranged with the claimant's consent. It was entirely reasonable of Ms Clarkson and Mr Potts to seek reassurances about the claimant's wellbeing and to try to get to the bottom of her concerns over DC's conduct with a view to seeing to her speedy, amicable and healthy return to work and so that the first respondent could address allegations of bullying in the workplace as appropriate.

2.2.6.21 The Tribunal finds that this was not an opportunistic bid to force her out of the business quickly because of her disability as alleged. It was an attempt at a constructive meeting because of the seriousness of the claimant's condition and her complaints on 3 March and the esteem in which she was held in the business as a Regional Manager. The claimant had consented to the visit but was then confrontational and suspicious about it from

the outset of the meeting, causing Ms Clarkson and Mr Potts embarrassment, concern and frustration.

2.2.7 Facts relating to timing

2.2.7.1 The claimant complains of the conduct of BHH from 2014-2016 whereupon BHH left the business. The claimant then had the benefit of various reasonable adjustments, including a workplace assessment, admin and IT support, she could work from home, she was kept informed, there was flexibility around transport and overnight accommodation before meetings, her workload was monitored and reviewed, all which matters are contained, mentioned or referred to in an Occupational Health report of 27 September 2016 at pages 106-108. It seems, therefore, that subject only to the claimant's perception that she was under pressure from DC and his harassing comments. The respondent had adequately addressed the claimant's concerns by 27 September 2016.

2.2.7.2 The claimant presented her claim to the Tribunal on 2 August 2017. The claimant had had concerns and they had been addressed regarding both BHH and adjustments long before the claimant presented her claim. No evidence was put forward as to why the claimant could not have presented claims in respect of those matters within three months of the issues crystallising. Latterly the claimant had concerns over DC's conduct and the restructuring exercise, and it appeared to the Tribunal that this caused the claimant to go over the past working history and resurrect matters that ought properly to have been made the subject of any intended claims much sooner. Particularly bearing in mind that the respondent had dealt with BHH and the claimant's various respects of adjustments, when the claimant worked on apparently content (save in respect of comments made by DC), it did not appear to the Tribunal to be just and equitable to extend the time to allow her to prosecute those claims. Carrying out a balancing exercise the Tribunal felt it would be unfair and inequitable. The respondent would be disproportionately prejudiced, and no good reason had been advanced by the claimant for her delay. As Regional Manager the claimant was in a position of trust, responsibility and power and she was further empowered, to an extent, by the adjustments that were made in her favour to remove disadvantages suffered by her.

3. The Law

3.1 Constructive unfair Dismissal

3.1.1 S.94 Employment Rights Act 1996 (ERA) establishes an employee's right not to be unfairly dismissed. S.95 ERA sets out the circumstances in which an employee is dismissed which includes where an employee terminates the contract of employment (with or without notice) in circumstances in which he or she is entitled to terminate it without notice because of the employer's conduct (a constructive dismissal).

3.1.2 It is well established that for there to be a constructive dismissal the employer must breach the contract in a fundamental particular, the employee must resign because of that breach (or where that breach is influential in effecting the resignation), and the employee must not delay too long after the breach, where "too long" is not just a matter of strict chronology but where the circumstances of the delay are such that the employee can be said to have waived any right to rely on the respondent's behaviour to base resignation and a claim of dismissal.

3.1.3 The breach relied upon by an employee may be of a fundamental express term or the implied term of trust and confidence and any such breach must be repudiatory; a breach of the implied term will be repudiatory meaning that the behaviour complained of seriously damaged or destroyed the essential relationship of trust and confidence. Objective consideration of the employer's intention in behaving as it did cannot be avoided but motive is not the determinative consideration. Whether or not there has been a repudiatory breach of contract by the employer is a question of fact for the tribunal. The test is contractual and not one importing principles of reasonableness; a breach cannot be cured and it is a matter for the employee whether to accept the breach as one leading to termination of the contract or to waive it and to work on freely (that is not under genuine protest or in a position that merely and genuinely reserves the employee's position pro temps).

3.1.4 As to whether a claimant has resigned because of a breach of contract it is established that where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, rather than attempting to determine which one of the potential reasons is the effective cause of the resignation.

3.1.5 Even if an employee establishes that there has been a dismissal the fairness or otherwise of that dismissal still falls to be determined, subject to the principles of s.98 ERA. That said it will only be in exceptional circumstances that a constructive dismissal based on a repudiatory breach of the implied term will ever be considered fair.

3.2 Reasonable Adjustments

3.2.1 Section 20 EA imposes a duty to make reasonable adjustments on an employer in certain circumstances. By section 20(3) where a provision, criterion or practice of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage.

3.2.2 There must therefore be a provision, criterion or practice ("PCP"), a substantial disadvantage, and the Tribunal must consider what steps would be reasonable to have to take to avoid that disadvantage. It is not essential for a party to prove that the steps taken would necessarily be successful in removing the disadvantage. Failure to comply with a statutory duty to make reasonable adjustments is a form of discrimination.

3.3 Harassment

3.3.1 Section 26 EA defines harassment as unwanted conduct related to a relevant protected characteristic where the conduct has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. Disability is a relevant protected characteristic.

3.3.2 In deciding whether conduct has the effect referred to above ("the harassing effect"), the Tribunal must consider the perception of the person alleging they were harassed, the other circumstances of the case and whether it is reasonable for the conduct to have the harassing effect.

3.4 Time Limits

3.4.1 Claims of unfair dismissal, be they constructive or otherwise, should be presented to the Tribunal within three months of the effective date of termination allowing for the extension of time allowed under the early conciliation procedure. Where a claim is presented out of time a Tribunal shall decide whether it was reasonably practicable for the claim to have been brought in time, and if it was out of time whether the claim was presented within a reasonable time once it became reasonably practicable.

3.4.2 Discrimination claims should be presented to the Tribunal within three months of the acts complained of or the last of a series of acts; where discrimination claims are presented to the Tribunal late a Tribunal may extend time if and for so long as it considers it to be just and equitable to so extend. The just and equitable discretionary extension is the exception to the rule and is not a

given, and therefore is to be applied in exceptional circumstances and in the interests of justice.

3.5 Regarding discrimination claims, it is for the claimant to prove facts from which a Tribunal could conclude that there was discrimination, and only if the claimant succeeds in doing so does the burden pass to a respondent to prove a non-discriminatory defence.

4. **Application of Law to Facts**

4.1 Constructive Unfair Dismissal – this claim fails and is dismissed

4.1.1 The claimant has complained of seven breaches of the implied term of trust and confidence that were set out in the List of Issues at paragraph 1(i)-(viii). Based on the Tribunal's findings of fact it concluded that the respondent did not act in a way calculated, designed or likely to seriously damage or destroy the relationship of trust and confidence. The claimant was dissatisfied about the respondent's conduct in respect of the eight issues which she raises; her view is entirely subjective and lacks any objective analysis. The first respondent had good reason to be concerned at the claimant's absence through ill health in March 2017, not only because of her extreme reaction on 3 March 2017 but also because of the allegations that she made against DC, a senior manager. Ms Clarkson clearly acted compassionately and professionally, as did Mr Potts, both as regards the meeting and the subsequent welfare involvement. Their actions were those of a caring employer, and of an employer faced with very serious allegations against a line manager in circumstances where they had previously overseen the departure from the business of BHH, having faced allegations of bullying and harassment. The home welfare meeting on 9 March and Mr Potts' subsequent involvement is evidence of efforts by the first respondent to support the employer/employee relationship of trust and confidence, and to see to a constructive and healthy return to work on the part of the claimant, with an attempt to address her concerns.

4.1.2 The claimant sought sight of a "no light duties" policy. The first respondent activated its reasonable adjustments policy and denied the existence of a "no light duties" policy. It could not send to the claimant a document it did not have, and therefore its explanation is perfectly plausible and its actions did not breach an express or implied term of the contract.

4.1.3 The claimant complains that the grievance took six months to conclude. In all the circumstances, not least the holidays of those involved (including the claimant), the provision of information and the way if came forward from the claimant in answer to the respondent's requests, the need to interview several witnesses, the decision of the claimant to conduct the grievance process in

writing necessarily involved some months of work. It is not ideal that it took six months to conclude the grievance procedure from start to finish, however the claimant's complaint was particularly in respect of the initial handling of the grievance and time it took, which was only two months. This was a serious and complicated matter and one that required care and attention. If the respondent had failed to deal with the matter conscientiously, such as by deliberately dragging its feet perhaps in the hope that the claimant would give up the ghost and resign or would reconcile herself to matters, then that may have been designed to undermine the relationship. Such behaviour could have amounted to behaviour designed or likely to destroy the relationship of trust and confidence. In fact, however, the respondent got on with the job in hand insofar as it was able and kept the claimant fully informed. The delays were unavoidable and kept to a reasonable minimum, permitting of a sufficiently thorough investigation and due consideration of the complaints that were made. There was nothing suspicious or untoward in the first respondent's handling of the grievance. Ultimately the claimant complains that there was a fundamental breach of contract because her grievance was not upheld. It cannot be a requirement of the implied term of trust and confidence that every complaint made by an employee is upheld by the employer. The relationship requires that a grievance is investigated and dealt with conscientiously, fairly and impartially. The Tribunal finds that that was the case in this instance, and that the respondent did not breach the contract, either in respect of any express term or the implied term, in relation to its handling of, and the conclusion of, the grievance.

4.1.4 The claimant has misunderstood the situation regarding the divisional email distribution lists and other distribution lists. When she complained she was re-instated. Until she complained the respondent quite reasonably believed, as is evident from the background email correspondence between Mr Potts and the employment relations adviser, that he was doing his best by the claimant in saving her the aggravation and stress of cascading divisional team news when she was absent through ill health. Upon her request she was then reinstated to the distribution list. Otherwise she had access to reports, bulletins and information, and was not disqualified from IT contact. The claimant has misunderstood what occurred. There was no conduct on the part of the respondent designed to, or that could reasonably be taken to have, destroyed or seriously damaged the relationship.

4.1.5 The Tribunal does not criticise the claimant for resigning for her own reasons and at a time of her choosing. That is a matter for the claimant. She was clearly disgruntled. That is understood. The fact that the claimant was disgruntled does not necessarily indicate that there was a fundamental breach of contract by the respondent, and the Tribunal finds that there was not. It is true to say that the respondent need not have attempted to save the

claimant the aggravation and stress of receiving copious emails and team news during her absence, and could possibly have dealt with the grievance more quickly, but in all the circumstances it cannot be said that its actions were such as to amount to a fundamental, repudiatory, breach of contract. The first respondent was supportive of the claimant and the relationship, which it valued.

4.2 Reasonable Adjustments – these claims fail

4.2.1 The claimant suffered substantial disadvantages owing to pain and impaired mobility because of her disability. She also complains that owing to the pain and medication there was some deficit in her concentration. The respondent made several reasonable adjustments for her, including regarding her hours, working from home, provision of transport, overnight accommodation, and transferring her from the office in Prescot to Ambrose Grove. The claimant's difficulties thereafter seem to stem from her reticence. She was wary of the respondent, perhaps because of her previous interactions with BHH. She was self-conscious. She wanted to keep her problems to herself and not to appear to be problematic for the respondent. Again, the Tribunal does not criticise her for that and fully understands her sense of privacy and her wish to work regardless of disability as opposed to highlighting it. That said, the Tribunal did not find any evidence from which it could conclude that the respondent unreasonably failed to make adjustments. The physical features of some of the offices were not ideal but it would not have been reasonable to insist that all the divisional meetings were held locally to the claimant, bearing in mind the geographical distance between the regional offices and the respondent’s requirement to maintain a profile in each region, finding out locally at each region what its particular concerns were. Those matters would have been diluted and lost if every meeting had been at Eastham as the claimant had requested. It would not have been reasonable for the respondent to have to arrange meetings at a central or designated site within the division for the convenience of the claimant to the detriment of all other regions or areas and their respective managers. That said, the respondent was relaxed about the claimant's attendance at divisional meetings in that it made reasonable adjustments regarding her being accompanied, transport, overnight accommodation and to her hours. Significantly she was allowed to work from home. The claimant was aware of this notwithstanding DC’s comments about being “on the pitch”. The respondent appropriately considered and justified its decisions as to the venue for meetings, having a good reason to circulate around the divisional offices.

4.2.2 The Tribunal made several references in its judgment above to Occupational Health reports, and that what was reported was what was said by the claimant to Dr Nisbet. The claimant then

gave in evidence that she was not given the benefit of any adjustments, having explained them in some detail to the Occupational Health adviser. It must also be borne in mind that the claimant was a Regional Manager and she was in a position of authority such that, for example, whilst at Ambrose Grove she could make her own adjustments; the reasonable adjustment required of the respondent was to place her in Ambrose Grove. DC sanctioned, if sanction was even required, the claimant moving colleagues from ground floor offices. What she did when she was there was down to her.

4.2.3 Overall the Tribunal considered that the claimant had, perhaps through oversensitivity, misconstrued the application of the respondent's reasonable adjustments policy and comments such as "on the pitch". Perhaps because she was so upset at the restructure her interpretation of the conduct of the meeting of 2 March 2017 is unreasonable. The Tribunal accepts that she was upset because of the restructure proposal. That does not necessarily mean that the presentation and the arrangements regarding the screen, the furniture and the presentation slides were as portrayed by the claimant. The Tribunal feels that there has been an overstatement of the claimant's complaints in this regard and a lack of fair and reasonable, objective, consideration.

4.2.4 The Tribunal finds that where there was a substantial disadvantage to the claimant because of a PCP the respondents made the appropriate adjustments where they could; there was no policy applicable to the claimant that there would be "no light duties", and in a sense the "light duties" sought by the claimant were the reasonable adjustments that the respondents made. She could do her duties but required adjustments, and the adjustments were made such that she was able to fulfil her full role, and this is not the same situation as an operative who could not physically lift and carry. An operative who could not lift and carry would have required "light duties" in the common meaning of those words, such as administrative chores or cleaning and sweeping or the like. That was not appropriate for the claimant and she never sought that. What she sought she got, except in relation to the presentation, but her needs were adequately catered for by the respondent and any disadvantage was down to the claimant not swapping her seat, moving her seat or positioning herself otherwise than she chose to. She was not required to sit in a place where she could not see the screen. Insofar as there was a disadvantage that she could not take away with her the slides, it was reasonable for the respondent to explain then to her three times, having already had a one-to-one meeting with her. The Tribunal is satisfied in any event that the claimant fully understood the reorganisation proposal and was not disadvantaged.

4.3 Harassment

4.3.1 The claimant's claims of harassment in respect of BHH pre-dated the claim by over a year in each case. They did not form part of a continuous course of conduct because BHH had left and there was no evidence to suggest that DC was actually continuing the same conduct as BHH had displayed; they were distinct and independent managers and the Tribunal was unable to make any finding of fact that they had acted in tandem or in accordance with an agreed policy, or indeed that there was anything to directly link the allegations made against BHH from 2014 and 18 December 2015, to the conduct of DC from March 2016 onwards. As for the first respondent, it saw to BHH's departure from the business and there is no evidence that it operated a policy whereby the behaviour complained about in respect of BHH was continued by DC or any other manager; if BHH harassed the claimant there was a break in any such behaviour before any finding of harassment against DC.

4.3.2 The Tribunal is satisfied that DC made comments that had a harassing effect on the claimant in March 2016, July 2016, April/May 2016, November 2016, "late 2016", January and February 2017 (including 13 February 2017), all of which matters were then contained, mentioned or referred to in the claimant's grievance which commenced on 23 March 2017. The claimant pursued that grievance, providing additional information as requested. When the outcome was not to her satisfaction she appealed and she resigned swiftly following the outcome of her appeal. The Tribunal is satisfied, therefore, that there was a course of conduct on the part of DC from March 2016 when he took over as her manager until her absence on sick leave commencing on 3 March 2017. The claimant sought to resolve the matter through the grievance procedure thereafter up to the date of termination of employment. She presented her claim to the Tribunal before her employment had terminated. The Tribunal concludes that the claims in respect of DC were in respect of his continuous course of conduct and were presented in time, and if any had been out of time then it would be just and equitable to extend time to start running with the claimant's resignation that was based on the unsatisfactory outcome of the grievance appeal. The Tribunal considered the perception of the claimant, all the circumstances of the case and considered that it was reasonable for DC's conduct to have the claimed harassing effect on the claimant; it had that effect on each of the occasions and dates referred to in this paragraph above. Those claims therefore succeed.

4.3.3 The Tribunal concluded that the Mr Lancaster's comments to the claimant about moving on and his hand gesture were not related to the claimant's disability. Concurrence should not be confused with causation, as the cliché runs. He did make the comment and

gesture as alleged, but the claimant has construed this as being related to her disability when it was not, and it was not reasonable for her to consider this to have the harassing effect claimed notwithstanding her perception and sensitivity. This claim fails.

4.3.4 The claimant's allegations regarding the meeting of 9 March 2017 were not made out. The Tribunal has found as a fact that she was not subjected to an oppressive and confrontational home visit and there was no opportunistic bid to force her out of the business quickly because of her disability. Ms Clarkson's and Mr Pott's visit was in the context of the claimant's extreme upset and her allegation against DC but it was not related to her disability; their actions, despite that context, were not related to a protected characteristic; they reacted defensively to the confrontation that they encountered. The claimant has failed to prove facts from which the Tribunal could conclude that Ms Clarkson and Mr Potts harassed her on 9 March 2017, and it was not reasonable for her to consider that their actions had a harassing effect taking into account the factors we are obliged to take into account by section 26 EA. This claim fails.

Employment Judge T Vincent Ryan

Date: 25.10.18

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

13 November 2018

FOR THE TRIBUNAL OFFICE

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