RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss D Dube**

Respondent: **The Centre for Health & Disability Assessment Limited**

Heard at: **East London Hearing Centre**

On: **17, 18 & 19 September 2019**

Before: **Employment Judge John Crosfill**

Members: **Mr T Burrows**
Mrs G Everett

Representation

Claimant: In person aided by Mr R J Whitbread

Respondent: Ms R Thomas of Counsel

JUDGMENT
(Liability only)

1. **The Claimant's claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.**

2. **In one respect the Claimant's claim that the Respondent failed to make reasonable adjustments brought under sections 20, 21 and 39 of the Equality Act 2010 succeeds. All other claims under that act are dismissed.**

REASONS

1. The Respondent is a company which provides independent health assessments to the Department for Work and Pensions ('DWP') to assist that

department in determining whether individuals are eligible for benefits due to long-term illness or as a result of a disability or health condition. The contract between the DWP and the Respondent commenced on 1 March 2015. Prior to that date the same service was conducted by ATOS Healthcare.

2. The Claimant is a Registered Nurse and Disability Analyst. She started work for ATOS on 20 August 2007 as a disability analyst conducting assessments for the DWP. From 2011 the Claimant has been affected by a mental health condition. Over time, this has resulted in her having difficulties conducting face-to-face assessments with clients. In these proceedings the Claimant says that not enough was done to accommodate her mental health condition and that as a consequence she had no choice but to resign. Her employment with the Respondent ended on 23 March 2018. She has brought claims of unfair dismissal and alleges that there have been failures to make reasonable adjustments required by the Equality Act 2010.

Procedural Matters

3. The Claimant's ET1 was by any standards remarkably spartan. The Claimant had indicated that she was bringing claims of unfair dismissal and discrimination based on disability but where invited to provide details of her claim had simply said "Discriminated at work, treated unfavourably and less favourably since March 2017". The Respondent had understandably responded to this claim in a short ET3 which suggested that the Claimant needed to provide particulars of her claim.

4. A Preliminary Hearing took place on 8 November 2018 before Employment Judge Reid. In the course of that hearing the issues were identified and are set out at paragraph 4 of record of the Preliminary Hearing that order is at pages 27 to 34 of the agreed bundle. It is those issues that were determined by the Tribunal in this decision.

5. At the time of the Preliminary Hearing the Respondent had not conceded that the Claimant met the definition of a disabled person set out in Section 6 of the Equality Act 2010. Employment Judge Reid made orders requiring the Claimant to provide a statement dealing with the impact of her condition upon her ability to carry out day to day activities and to provide the Respondent with any relevant medical records. Thereafter the Respondent was required to state its position as to whether it accepted the Claimant met the statutory definition. In compliance with Employment Judge Reid orders the Respondent sent an email to the Tribunal and Claimant on 22 February 2019 in which it said:

> *"The Respondent accepts that the Claimant was disabled by virtue of depression and anxiety at the relevant time.*
>
> *Whilst the Claimant is also asserting that she was disabled by virtue of post traumatic stress disorder, the medical evidence provided does not demonstrate conclusively that the Claimant would have been disabled by virtue of post-traumatic stress disorder at the relevant time, and so that is not accepted. That said, given that the Respondent accepts that the Claimant was disabled by virtue of depression and anxiety it should not matter in practice for the purposes of the Claimant's claim is whether the Claimant was also disabled by virtue of post-traumatic stress disorder."*

6. At the Preliminary Hearing the Claimant had indicated that she did not know whether she was sufficiently well to conduct Employment Tribunal proceedings. In the event the Claimant and Respondent showed a high degree of cooperation and the Tribunal was presented with an agreed bundle of documents running to 499 pages and a separate bundle of witness statements containing statement, from the Claimant, from her partner Mr Whitbread and from Munyaradzi Zowa who at the material times had been the Assessment Centre Manager for the Romford Assessment Centre.

7. At the outset of the hearing the Tribunal explained the process that it would ordinarily follow to the Claimant. We made enquiries about how the Claimant's ability to conduct the proceedings might be affected by her disability. We told the Claimant that she should let us know if she needed a break or whether there was anything we could do to assist her to give her best evidence. She told us that she would ask for a break if she needed one.

8. After our explanations we released the parties until lunchtime in order that we could read the witness statements and familiarise ourselves with the documents in the agreed bundle. After lunch on the first day we heard from the Claimant. Despite the fact that Miss Thomas conducted her cross examination in a measured and courteous way the Claimant became distressed and required a break in proceedings. When we resumed she indicated she was content to carry on but later became distressed again and we decided to stop her cross examination that day and resume the following day. The following morning we indicated that we would take a break after one hour, whether or not requested by the Claimant. In the event the Claimant was able to complete her evidence that morning. We then heard from her partner Mr Whitbread. In the afternoon we heard evidence from Mr Zowa. Mr Whitbread asked him questions to start with then the Claimant asked that she be allowed to take over. There was no objection from the Respondent and we permitted that. At one point we adjourned for 15 minutes to allow the Claimant time to ensure that she had asked all of the questions she wanted. His evidence was completed by the end of the second day of the hearing. We had suggested that it would be useful if the parties could provide bullet points of their key submissions. The Claimant was able to do so and produced a one-page summary of the reasons why she said her claims should succeed. Miss Thomas had produced written submissions which comprehensively set out legal framework for the claims and contained her submissions as to the findings of fact she invited the Tribunal to make.

9. Having heard the parties' submissions we were unsure that we would be able to reach a decision on that day but indicated that attempt to do so. The Claimant expressed a strong preference for receiving a decision in writing. In those circumstances, we formally reserved our judgment. We were able to reach a decision in what remained of the day. Unfortunately, it has taken some time for the Employment Judge to write up these reasons. We apologise for any delay.

Findings of fact

10. The Claimant commenced work with ATOS Healthcare on 20 August 2007. Her job was to provide medical assessments of individuals who were applying for benefits. The Claimant was initially based in Wembley and on occasions was expected to travel throughout the country to carry out assessments. In March 2011 there was an incident where the Claimant was

accosted by a person she had assessed in the street. There is no evidence that the Claimant was assaulted but it is clear that this incident caused the Claimant considerable distress. She reported the matter to her employer at the time and a risk assessment was carried out.

11. Some months after this incident the Claimant was still suffering from the after-effects and was referred by her General Practitioner to a Consultant Psychiatrist Dr Hema Ananth. On 6 February 2012 Dr Ananth wrote to the Claimant's GP in the following terms:

> *'Dorcas went on to explain why she had come to see me today. In March of last year when she saw a claimant who is being assessed the benefits in the context of her job, she had the misfortune of bumping into him again later that evening. He went on to accuse her of failing him during his assessment which made her feel quite threatened stop she sought please help but unfortunately you were unable to do anything unless she had actually been attacked. Then, in November last year, she started to feel increasingly anxious experiencing palpitations prior to further benefit assessment appointments.*
>
> *Dorcas' employer initially pulled her off assessment duty and put into file work. However, after a period, she was returned to the assessments department although she did fewer. She felt initially quite confident that she could manage the situation herself and did not get any more support from her employers. Prior to any assessment, usually the night before, Dorcas would start getting increasingly anxious and is also start worrying it might be the same [person] she had bumped into on the street. She described how her mind started racing, spiral out of control and she will be unable to concentrate. She would get no sleep the night before and even experienced chest pain. She would start worrying unduly about consequences of her decision during an assessment which would actually affect her ability to make any objective conclusions. She feels her mood has also taken a turn for the worst and her productivity has gone down. The symptoms seem to be very situational as they only occur when there is an impending assessment."*

12. Dr Ananth diagnosed the Claimant as suffering from an adjustment reaction with a mild depressive illness and some paranoid ideas which had not at that stage reached a delusional intensity. She did not meet the criteria for a diagnosis of PTSD. She was referred to the day care services at the Priory and was ultimately discharged from the care of Dr Ananth on 16 October 2012.

13. On 18 June 2013 a further incident happened at work which caused the Claimant to consult Dr Ananth once again. On this occasion a person who the Claimant was assessing became angry. Her access to the panic button was blocked and the Claimant felt that she might have been attacked. Dr Anath wrote to the Claimant's GP in the following terms:

> *"She has largely been doing office work within her old job since I last saw her in October 2013. She described a very traumatic work experience in 18th June whilst doing an assessment at a medical examination centre in the Highgate office. A very large racist man was incredibly abusive and threatening towards her and it took a while before she was able to reach*

> *her panic alarm and security came to her aid. She ran out of the room. As a result her old symptoms of not being able to sleep, palpitations, feeling low, tearful, paranoid, etc. have returned…..*

14. Dr Ananth arranged for the Claimant to recommence therapy at the Priory. In July 2013 the Claimant had suffered bereavement when her eldest son died in South Africa that led to complications as the Claimant was the administrator of his estate and there were legal disputes and between herself and other family members. In a consultation with Dr Ananth, recorded in a letter of 20 January 2014 the Claimant described her employers as being sympathetic and not putting too much pressure on her.

15. On 28 May 2014 a Dr Stipp engaged by ATOS's occupational health advisor, OH Assist, conducted a telephone interview with the Claimant and prepared a report on the same day. He said this:

> *"Management states Dorcas is currently at work with a medical issue and her GP has suggested that we need to stop her from doing face-to-face examinations.*
>
> *When interviewed today she says that she manages seeing two claimants a week (half a session of face-to-face work).*

He recommended that the level of face-to-face work remain the same until he had further medical evidence from the Claimant's treating psychiatrist.

16. By October 2014 the Claimant had returned doing some face-to-face assessments although the bulk of her work at that time was conducting file based assessments where she did not need to see a patient. At this time the Claimant complains that her work was being audited which caused her stress. In fact, the Claimant was given constructive and positive feedback when her work was audited. She was performing to a good standard. We find there was nothing unusual or improper in the auditing process and the Claimant was not being singled out for any special treatment in this regard.

17. On 26th of January 2015 the Claimant sent an email to a manager. It is clear from this email that the Claimant had attended a meeting on 15 January 2015 in order to discuss an occupational health report. It does not seem that the relevant report was included in the bundle. The Claimant complained that Occupational Health Nurse who had conducted the assessment had not been sympathetic. She stated that her General Practitioner had suggested she should not do examinations until her CBT was completed but noted that after discussions she had agreed to do examinations 'once weekly half day only'. She said this: *'The anxiety (which is work-related) is ongoing during assessments especially in the presence of male clients or relatives but with time and appropriate treatment [I] will overcome this as in the past'*.

18. In March 2015 the work that had formerly been done by ATOS Healthcare was taken over by Respondent these proceedings. It is common ground that the effect of that was that the Claimant's contract of employment transferred to the Respondent under the Transfer of Undertakings (Protection of Employment etc) Regulations 2006.

19. Shortly after the transfer to the Respondent the Claimant was referred to the Respondent's Occupational Health Management Advisor 'Health Management Limited' an assessment took place on 12 May 2015. The report dated 18 May 2015 included the following:

> *'Ms Dube was assessed in May of last year for further supportive therapy, and at the time there were a number of work-related stressors. However, since been TUPE'd over into a new role in March of this year, she reported feeling much better within herself. She has a previous history of been signed off work for stress, however, is currently at work and remained in regular medication as part of the treatment plan …..*
>
> *Clinical assessment was consistent with her medical history, and a physician is of the opinion that she is medically fit for work, however she would benefit from a reassessment by her treating doctor, preferably psychiatrist in addition to her supportive therapy (CBT)…….*
>
> *She also told our physician that she is happy with the current working requirements, working 50% clinical work and 50% doing administrative related tasks but I would suggest that this arrangement is reviewed as part of her stress risk assessment proves to ensure that this remains the case [sic]'*

20. When we asked the Claimant about the reference in that report to '50% administrative related tasks' she explained to us that was meant as a reference to doing file based assessment (in contrast to the face-to-face assessments).

21. From September 2015 until January 2016 the Claimant had a further period of absence. On 21 December 2015 Dr Ananth wrote a report to the Claimant's GP which included the following passages:

> *'….there is a new Occupational Health Department, it seems, who have been incredibly supportive as well as slightly taken aback about the lack of support Dorcas has had from work until now. She feels that they are on her side and that they will be looking out for her and monitoring her progress when she does go back in January.*
>
> *I think the real test will be apparent when Dorcas does finally resume her work role and I suggest you come back come and see me on 1 February next year when she will have been back at work for a week and can inform me how things have gone for her.'*

22. The Claimant returned to work and it seems that a staged return to work was organised. Dr Ananth wrote a follow-up letter on 7 March 2016 in which she says this:

> '*I am absolutely thrilled that she has maintained improvement. Thanks to the new HR and OH departments, she was allowed a phased return and has continued to receive an awful lot to support even though she's back full-time. Her managers have given her straightforward cases tried to keep her stress levels as minimal as possible'.*

23. Throughout 2016 into early 2017 the Claimant was getting a great deal of support from her line manager Mr Zowa. We were told, and accept, that he

had provided both her and her partner Richard Whitbread with his mobile telephone number. He said that on any occasion whether Claimant felt overwhelmed, particularly on the journeys to and from work, she was able to, and did, telephone him. He said he has always been a position to offer her support allowing her to return home or to her base in Romford. The support he offered the Claimant is evidenced by the various reports made by Dr Ananth where both the Claimant and Mr Whitbread are recorded as having spoken of 'management' in glowing terms.

24. The Claimant's health was variable at this stage. Dr Ananth's reports show that her mental state would dip on occasions. In particular in January 2017 it is noted that she had recently returned from a period of three weeks absence. The Claimant is recorded as saying that *'in terms of her recovery the journey was not smooth but in the grand scheme of things she was making slow and steady progress'*. see page 413

25. By March 2017 the Claimant was conducting a mixture of file based assessments and face-to-face assessments. On 10 March 2017 she was asked to work at the Respondent's Croydon offices and spent the day doing file based assessments. Towards the end of the day she undertook a case where an applicant for benefits had been diagnosed with a terminal condition stemming from cancer. In completing her report the Claimant accidentally suggested that a further medical evidence was required. This would have involved the Respondent writing to the applicant's General Practitioner and, if no satisfactory response had been received, a letter would have been generated to the benefits claimant himself asking for medical evidence.

26. The Claimant knew that she had made a mistake and, on 13 March 2017, she sent an email to Dr Thobela where she drew attention to her error. She set out the error in full and identified where the file could be found in order that the error could be corrected. She then set out a number of reasons why she said she was distracted on that particular afternoon. Those reasons could be summarised as being a pressure of work. At the bottom of her e-mail she said; 'I do not justify the above error, I believe feedback to managers and admin staff would create a safe working environment to avoid such errors in future. Is it possible for urgent priority cases to be allocated in the mornings?'. The subject line of the email was 'significant error at scrutiny'.

27. We make the following findings in respect of this error. The Claimant in her evidence sought to minimise the error criticising the Respondent from categorising it as a 'critical incident'. Whilst we have some sympathy with the Claimant for making the error in the first place (that she did it was just a simple click of the mouse error) we do agree with the Respondent that the consequences that might have flowed from that error could have been significant. There was a possibility that a person who had been diagnosed with a terminal condition might receive correspondence questioning their right to ill health benefits. That is a matter which could have given rise to considerable distress for that individual and indeed significant reputational damage to the Respondent. We bear in mind that the Respondent had only recently taken over the contract from ATOS who had been castigated in the press for similar errors.

28. The Respondent has a policy specifically to deal with what it called 'significant events'. That policy is entitled "Significant Events and Serious

Complaints Code of Practice". That policy contains a definition of a significant event and reads as follows:

> '*A significant Event (a serious complaint, untoward or Critical Incident) is any event which could have or did lead to harm of one or more customers (clients, claimants or patients or how otherwise described in the contract). This includes unintended and unexpected incidents which did not cause harm but could have done or where the event could should have been prevented.'*

29. Mr Zowa gave evidence he explained to us, and we accept, that the expression 'significant incident' and 'critical incident' were used interchangeably by the Respondent. We find that the Claimant herself recognised that her conduct on this occasion fell squarely within this policy and that a significant event or critical incident had occurred and needed to be reported. That finding is strongly supported by the use of the phrase 'significant error' in the subject line of her own e-mail. The Claimant's subsequent attempts to downplay this detract from her responsible actions in reporting her own error.

30. Unsurprisingly the 'Significant Events' policy envisages that, where there is a significant event, an investigation would take place. We are satisfied that an investigation of sorts did take place in the present case however, as the Claimant's own explanation in her email was comprehensive and explained all of the circumstances which gave rise to the error, it is unsurprising that in this instance any investigation was fairly perfunctory. Whilst the policy was silent upon the matter Mr Zowa told us, and we accept, the general policy where a person made an error in respect of a particular task was that they would be taken off the task until two things happened. The first was that their work would be audited to ensure that there were no further errors that had occurred. The second which is a requirement both of the Respondent and of professional practice generally, is that they completed a 'reflective document'. Mr Zowa told us, and we accept, that the Claimant's regulator, the Nursing and Midwifery Council, would expect such steps to be taken. What was required was a document setting out details the error that occurred but also what steps would be taken out to prevent any recurrence in future. It was expected that such a document would demonstrate some insight into the error and some view as to how to avoid repetition. 'Reflective documents' were kept on file for the purpose of explaining to any third party that proper steps had been taken to prevent further errors occurring in future.

31. On 20 March 2017 the Claimant met with Dr Krawczyk to discuss the incident that occurred on 10 March. 2017. On 21 March 2017 the Claimant sent an email to Dr Krawczyk in the following terms:

> *'With reference to our conversation yesterday regarding "critical incident" can you please advise*
>
> *1. what criterion determines an incident?*
>
> *2. How long does this particular case so how does this particular case the fill the criteria since it was my action brought the instant the attention of our department?*

32. We find at this stage the Claimant was pushing back unnecessarily. She

had committed an error which she had at the time recognised as a significant incident. It is unsurprising that it was being treated as such. Dr Krawczyk responded to Claimant in the following terms:

> *'This case was reviewed by the CSL in Croydon and is no need to call for FME at all as we would be able to advise 'Terminally ill' on the basis the available evidence…….*
>
> *I appreciate you brought this case to our attention and you explained that you pressed FME/call to exam but instead of FME/review button. The Croydon team managed to locate it without the Nino as this was not provided by yourself and then a result of a case review and CAL feedback the case was reported as per the significant events policy…..*
>
> *I did provide feedback to unit email 14/3/2017 following receipt of feedback from Croydon AQAL and also discuss this case [face-to-face] with you yesterday. Please kindly provide me with your reflections asap.*

33. On 23 March 2017 that request for a reflective document was followed up by further email where Dr Krawczyk again asked the claimant for her reflections. The Claimant responded fairly promptly saying as follows:

> *Pardon me for the delay. I would want to discuss with my CPL regarding this case that I bought your attention and has now been classified as "critical incidents."*
>
> *I will be providing detailed response as may be applicable after my discussion with my CPL.*

We find the Claimant was surprisingly hostile and reluctant to follow what was a simple and straightforward process.

34. On 31 March 2017 Susan Holliman sent an email to the Claimant informing her that she had undertaken an audit of 24 files that she had undertaken at Croydon on 29 March 2017. Of those files she said there were 23 A's whereas at only one of the files was deemed to be unacceptable and required some modification to the report that had been produced. We find it broadly speaking that audit showed Claimant's work at that time was satisfactory.

35. Having dealt with this incident we need to go back to 14 March 2017 when the Claimant attended a further assessment with Health Management. A report was produced dated 16 March 2017 it contains the following material passages:

> *'Ms Dube is employed to work as a full-time Functional Assessor. She has been in her current role for the past nine years. At present, her work consists mainly of file work and assessing paper applications and she estimated she spends 95% of the time doing this type of work. The remainder of her time is spent conducting face-to-face assessments. She also explained that there is a UK travel involved in her role, dependent on business needs and this is regular but variable in frequency……*
>
> *At present, Ms Dube gets periods of overwhelming anxiety where she finds it hard to manage. These are occurring on average approximately*

once a week. She found it difficult to identify particular triggers for these. However, she did mention that face-to-face assessments are a source of anxiety for her because of the previous experience she had with the verbally abusive client…………

Do any temporary or permanent restrictions apply and the how long?

As discussed, Ms Dube has been undertaking mainly file work since 2014 with very little face-to-face work. I suggest that this pattern be continued as she does find it helpful in managing better at work..
Is the case covered by disability legislation?

In my opinion this case is likely to fall under the remit of the Equality Act 2010 given the long-standing symptoms and significant effect on day-to-day life. However, as you may be aware that this is ultimately a legal and not a medical opinion.'

36. On 30 March 2017 a rota was published which showed from the week commencing 3 April 2017 the Claimant was allocated face-to-face assessments for the entire week. On 3 April 2017 the Claimant was chased once again by Dr Krawczyk for the reflections document that she had not yet completed. Skipping ahead slightly we find that on 13 April 2017 the Claimant responded complaining that she was unable to access the "Significant Events and Serious Complaints Code of Practice" despite being sent a link to the same. On 18 April 2017 the Claimant finally completed the reflective document that had been asked for. Mr Whitbread had suggested in his witness statement that it was the fact that the Claimant had been rostered for face to face interviews that prompted a decision to go to South Africa. We find that cannot be correct. We were provided with a confirmation of the flight details that shows that the bookings were made on 25 February 2017, some time before the change in the rostering arrangements.

37. The Claimant was rostered to work doing face-to-face interviews for the week commencing 3 April 2017. As a matter of fact she did not work during that week as she fell ill. The reasons for absence been recorded as anxiety which we accept was an accurate description of her condition.

38. We were taken to a document that recorded the work done by the Claimant which was not disputed by her. The Claimant returned to work on the Monday, 10 April 2017 and on that day she completed four face-to-face assessments. She completed a further three assessments on the Tuesday, four on the Wednesday and three on the Thursday. That Friday was Good Friday and no work was done on that day. During this week the Claimant had one supervised session on 11 April 2017 and email sent by her supervisors congratulate her on the work that she did. The Claimant agreed during her cross examination that generally speaking when undertaking face-to-face assessments the ordinary target was to complete six such assessments in a working day including writing up the relevant reports. As such, whilst she was required to do face-to-face assessments she was not expected to do as many as normal.

39. The Claimant says in her witness statement that she was told by Mr Zowa that the decision to place the Claimant on face-to-face work was out of his hands. She suggests that neglected her. We would accept that it is likely that

the Claimant spoke to Mr Zowa and may have been told that the decision to place her on face-to-face work had not been made by him. From the evidence we have heard much of which was undisputed it seems that Mr Zowa was generally prepared to go the extra mile to assist the Claimant. It may be that the Claimant felt neglected but she has given insufficient detail for us to find that she was deliberately ignored.

40. The Claimant returned to work on Tuesday the 18 April 2017 and carried out two further face-to-face assessments. She then became unwell again and was absent from work until she commenced a period of annual leave. On 18 April 2017 the Claimant wrote to Mr Zowa in the following terms:

> *'When you were on annual leave, on 30 March 2017 I quite enquired from Emma Francis about the rotor allocation for week commencing oh 3/4/2017 as I have noticed that I was scheduled to do face-to-face assessments for the whole week. She informed me that management decided that "you have to do face-to-face assessments". I responded stating I was unable to and the response was "you have to do as management has decided that you have to". I further asked who the management was, she stated she was unable to tell me. I made her aware that I was unable to because of personal health reasons and she said there's nothing she could do as "management has decided", as I was leaving her desk she further stated that "management is cutting down on PBA".*
>
> *I have noticed rota allocation for face-to-face assessment is ongoing with no change and no one is informing me of what is going on.*
>
> *I am not well I feel so stressed and under pressure with all sudden changes not being informed every day is a struggle spending sleepless nights being anxious about the day ahead I am very much under pressure.'*

41. In her witness statement the Claimant suggests that on 18 April 2017 she asked Mr Zowa if she could go home having told him that she was feeling very anxious and experiencing palpitations. She suggests his response was unsympathetic. Given the undisputed evidence of the understanding and concern shown by Mr Zowa up to these more recent events it seems unlikely that Mr Zowa would behave as alleged. He denied that this was the case. On balance, we do not find that the Claimant's account is as reliable as that of Mr Zowa although we would accept that each was doing their best to assist us. The Claimant says that she suggested to Mr Zowa that the decision to put her on face-to-face work flew in the face of the recommendations in the occupational health report. We consider that it is likely that she said something to that effect. She goes on to suggest that Mr Zowa said "*the OH report does not mean anything".* Mr Zowa did not accept that he used those words. Given that we consider we are dealing with two honest witnesses we consider the possibility of a misunderstanding. We consider it likely that Mr Zowa pointed out that recommendations in an Occupational Health report are not binding upon the employer but are recommendations. That was a stance taken later and one of which explains what we find is a misunderstanding.

42. On 24th of April 2017 Dr Ananth and wrote a further report on the Claimant directed towards the Claimant's general practitioner. She said as follows:

I reviewed Dorcas at the Priory today 24 April 2017and she is not doing too well……

She was seen by occupational health who have advised that more desk working and less face-to-face contact with clients. Rather oddly in the last three weeks she has done more client work less paperwork despite her manager and others having access the occupational health report. This may well have contributed further to decline her mental well-being…

We shall not set out the details of the exacerbation of the Claimant's symptoms as it is unnecessary to do so. Suffice to say that the report details a marked decline in the Claimant's health.

43. The Claimant continued to chase Mr Zowa in respect of the same questions she had raised in her email of 18 April 2017. In particular, the question of who had made the decision to place her on face-to-face work. On 7 May 2017 she went at on prearranged annual leave to South Africa. Whilst in South Africa, with the assistance of her partner Mr Whitbread, she sent an email on 21 May 2017 which was headed 'informal grievance' in which she raised the same issue of not being told the identity of the person who had amended her duties. She asked for a response within 48 hours.

44. Mr Zowa responded promptly the next day and agreed to hold a meeting with the Claimant discuss her grievance upon her return. He asked the Claimant to outline the grounds for any grievance.

45. The Claimant became very unwell whilst in South Africa and was admitted into hospital. This delayed her return to the UK. When Mr Whitbread returned to the United Kingdom he met with Mr Zowa at the shopping centre in Romford to discuss her situation. The fact that Mr Zowa was prepared to accommodate this meeting is indicative of his response to the difficulties faced by the Claimant. Whilst in these proceedings the Claimant has directed some criticism towards him the reality appears to be that he was always supportive and that the Claimant and her partner would turn to him for support when it was needed.

46. The Claimant travelled back to the United Kingdom on 15 July 2017 but did not return to work at that stage as she was not fit to do so. On 24 July 2017 the Claimant spoke on the telephone with Mr Zowa who advised her to seek a fitness for work certificate. The Claimant had provided a letter from the Doctor who had treated her in South Africa. She has taken exception to this not being accepted by the Respondent. We do not see anything sinister in a UK employer seeking a fitness for work certificate from a UK registered doctor. These documents are used to reclaim sick pay from the National Insurance fund and a request for a certificate in the usual form, whether strictly necessary or not, is not something to which reasonable objection could be taken. The Claimant has perceived this request as questioning whether she was truly unwell. We are satisfied that Mr Zowa never had any doubts that that was the case. We have seen e-mail correspondence between Mr Zowa and his Area Manager Dan Williams which refers to the fact that he had made contact with the Claimant in South Africa and received a 'sick note' from her treating Doctor. There is not the slightest suggestion that he or his manager were sceptical about the reasons for her absence. Later on 19 June 2017 an HR advisor Ben Townsend sent an e-

mail to both Mr Zowa and Mr Williams. He suggested that, claims to have fallen ill on holiday raised a 'red flag' and suggested that proof of a return flight was obtained. His suggestion, which is entirely routine, is promptly shut down by Mr Williams as being inappropriate given the contents of the sick note. We do not find that there was anything improper in asking the Claimant to provide a fitness for work certificate from her UK doctor. In the circumstances set out above that request was neither onerous nor an implied suggestion that the Claimant had exaggerated her illness. If she perceived it as such then that perception was not objectively justified. An informal welfare meeting was arranged to discuss the Claimant's illness.

47. On 14 August 2017 the Claimant was allocated a case officer to assist her by the Royal College of Nurses. E-mails sent on 14 August, 20 November, 3 & 4 December 2017 disclose that she had access to advice about her situation at work. By 3 December 2017 it is clear that the Claimant is contemplating a claim of constructive dismissal.

48. The informal welfare meeting took place on 15 August 2017 the Claimant was accompanied by her partner Mr Whitbread. Mr Zowa attended together with a representative from the Respondent's human resources department. What happened at that meeting is contentious. On the same day the Claimant sent an email to Mr Zowa describing it at as leaving her 'quite stressed, intimidated and threatened'. Mr Zowa responded to the Claimant's e-mail expressing his regret if the Claimant had felt stressed. He then set out a lengthy summary of the meeting. The fact that that summary accurately records the Claimant expressing her objections to her duties being changed gives us some confidence that the summary has been prepared neutrally. That note suggests that there was an initial discussion about the Claimant's health and her treatment. The Claimant is recorded as saying that she remains symptomatic despite the treatment she was having. She is recorded as expressing that she had found Mr Zowa very supportive but that she was dissatisfied with the decision to change her tasks without prior discussion. The note records Mr Zowa as explaining that the business needs are constantly changing meaning that it was difficult to guarantee what tasks the Claimant will be asked to do from one day to the next . It is recorded that he told her that she was employed primarily to carry out face-to-face assessments but that he would await her await report on psychiatrist report before discussing supportive measures such as a phase return to work plan. The Claimant is recorded as indicating that she wished to bring a grievance against the individuals who had made the decision to ask her to do face-to-face work. Mr Zowa's email note says that was willing to support the Claimant through that process and that he would send her the grievance policy. He sent the Claimant a copy of grievance policy and capability policy on the same day. The action plan identified in the note was that the Claimant will attend a further OH assessment and she would arrange an appointment with her psychiatrist obtain further information thereafter there would be a further meeting.

49. The Claimant says that in the course of that meeting Mr Zowa's opening statement was that the file work was being moved to Scotland with the implication the Claimant would be forced to do face-to-face assessments only. We find it likely that the question of the file work being moved to Scotland was raised in the course of the meeting. The Respondent had a long-term plan to centralise its file work in Scotland and mentioning that is consistent with Mr Zowa's note where he says that business needs are changing and that particular

tasks could not be guaranteed. We do not consider that it was improper for this issue to be raised in the context of the Claimant asking for her work to be limited to file work.

50. The Claimant also says that in the course of the meeting the human resources advisor Claire Howard stated that the company was not bound to follow the reports of an OH advisor. Again, we accept that something to that effect would have been said in the meeting. It would be unsurprising if an HR advisor did express such a viewpoint as it is plainly correct. We accept that the Claimant has perceived this as a statement that the Respondent intended to ignore the advice from Occupational Health. We do not find that that perception was objectively justified. In the context of the conversation about whether the Claimant's duties could be limited in the manner suggested by Occupational Health it was perfectly proper to inform the Claimant that recommendations would not necessarily be implemented and would depend on business needs.

51. The Claimant's reference to being threatened relates to an implication that she attributed to Clare Howard that if the Respondent followed its Capability Policy, her employment may be terminated. It is clear both from the note in Mr Zowa's e-mail and from the fact that the Capability Policy was later emailed to the Claimant that there was reference to the Capability Policy during the meeting. Many if not all policies of that nature will contemplate the termination of the employment in circumstances where the employee proves incapable of reliably undertaking their work. Again, we would accept that the Claimant genuinely perceived this as being a threat but conclude that she is not objectively justified in categorising this as improper conduct. An employer is entitled to invoke a capability policy and could be criticised if it did not draw attention to the risk of termination. It was not suggested to Mr Zowa any threat had been made explicitly or in an improper manner.

52. On 24 August 2017 the Claimant had a telephone consultation with Health Management Ltd and, in a report produced on that date, the Occupational Health Advisor advised that the Claimant was unfit to work. Any recommendation that was made was for a face-to-face medical assessment with an Occupational Health Physician.

53. On 26 August 2017 Mr Zowa sent an email to the Claimant informing her that he had not had any feedback from HR on the informal grievance. He told the Claimant that he was away in the following week but he will contact her on his return. On the same day he sent another email to Mr Williams in which she set out the details of the Claimant informal grievance. Mr Williams asked whether official grievance documents had been completed. On 4 September 2017 Mr Williams sent Mr Zowa and email reminding him that the issue of the grievance was outstanding which prompted Mr Zowa to send an email to the Claimant telling her that he was now in a position to give her some feedback. The Claimant responded asking that any feedback be given in writing. Mr Zowa responded seeking to persuade the Claimant to meet with him indicating he would confirm the outcome in writing for her but the Claimant refused. On 13 September 2017 Mr Zowa wrote to the Claimant. He set out a brief chronology of the events from 10 March 2017 when the Claimant had made an error work through to the decision to change her duties. He attributed that decision to "Senior Management" and said that the decision was prompted by changing business demands at the time and the 'Significant Incident' on 13 March 2017 he

went on to say:

> *'All consideration was given to Dorcas's OH restrictions/recommendations but as I mentioned in the welfare meeting all HCPs is in the business are employed primarily conduct face-to-face assessments. With this in mind management can make decisions change duties to meet the needs of the business. This is not always an easy decision to make but is deemed necessary at times….*
>
> *Dan Williams London and Home Counties is willing to discuss this issue with you if required. ….*
>
> *I would like to reassure that the needs of the business are always changing and I am happy to revisit your future working patterns and duties on your return from sickness absence. Please feel free to contact me if you need to discuss this further'*

54. On 15 September 2017 at the Claimant attended a further Occupational Health assessment. A report was prepared by Dr Gaal. He concluded that the Claimant was not yet fit to return face-to-face assessment but that she would be able to return to file work at that time. He was uncertain when or if the Claimant would be able to return to face to face assessments and suggested that there may be difficulties if returned to this work at a rate she was uncomfortable with. He suggested that there was a further review of the situation in November.

55. On the same day the Claimant telephoned Mr Zowa and told him that her GP had said that she was unfit for any work until 30 November 2018. She subsequently sent in a fitness for work certificate that confirmed that. Mr Zowa quite reasonably assumed that the Claimant's GP had advised her not to return to work in any capacity at that stage.

56. During the entirety of the period that the Claimant was off work Mr Zowa contacted her regularly. The Claimant now categorises this is threatening. She says that on two occasions Mr Zowa suggested that as she was not in receipt of psychological therapy her condition was not that serious. Mr Zowa denied that was the case. He is a qualified nurse. The reports that he had seen made it very plain that the Claimant had a serious mental health condition. We find it highly unlikely that he would have used the words that the Claimant attributes to him. He may well have tried to encourage the Claimant to come back to work and it is quite possible that the Claimant has seen this as downplaying her condition. We consider that the Claimant's perception of events has become distorted. She was pressed in cross examination to give details of what it was that she said that Mr Zowa had done that she found threatening. She was unable to give any convincing answer. We expect that she genuinely believes that Mr Zowa was acting against her but there is no objective evidence to support that.

57. On 16 October 2017 the Claimant attended an appointment with Dr Ananth. The report to the Claimant's GP suggests that the Claimant was still very unwell. Dr Ananth records that the Claimant intended to start a nursing and midwifery course in the New Year in order to start practising again. She says that the Claimant had developed a phobic anxiety about her previous work and she considered it was going to be incredibly difficult for her to return there. There is reference in that letter to the Claimant obtaining a negotiated settlement.

58. On 25 October 2017 the Claimant sent an email to Mr Zowa which was headed "return to work assurance". In that email she attributed her recent breakdown to the "hostile working environment" saying that Occupational Health recommendations were not followed. She looked for assurance that sum form of staged return to work duties had been put in place and ask the details of those. Mr Zowa responded on 9 November 2017 he informed the Claimant that if she wished to maintain the serious allegations that she had put in her letter the proper route was through a formal grievance process. He went on to say that he could not give any assurances as the duties the Claimant would be carrying out as these are based on business demands. He did however go on to say that all consideration would be given to Occupational Health recommendations but the adjustments need to be reasonable and suit the demands of business.

59. The Claimant return to work on 1 December 2017. In advance of her return Mr Zowa prepared a return to work plan which he described as temporary until he got the updated Occupational Health report that had been recommended by Dr Gaal. The duties that were proposed were principally aimed at re-familiarising the Claimant with her workplace and did not require her to undertake any clinical duties or face-to-face assessment on her own. The Claimant suggests that on this date Mr Zowa told her that the only work available was face-to-face assessments. We do not accept that anything so definite was said. Mr Zowa was, as he had promised, awaiting a final OH report and pending that had taken steps to avoid face to face work. We accept that he had not ruled out asking the Claimant to do face to face assessments and may well have repeated that stance in any discussions. On 4 December 2017 Mr Zowa conducted a return to work meeting with the Claimant. The conclusions reached at that meeting were provisional because the Occupational Health report was still awaited. Mr Zowa agreed to offer the Claimant one-to-one support, he agreed that he should limit her exposure to clients in the first few weeks and that she should not be required to do any out of hours work whilst on the phased return to work plan. The plan that was produced accommodated the Claimant's need to attend a day hospital for treatment.

60. The Respondent's capability policy includes trigger points. The Claimant had been absent from work for 133 days and the relevant trigger point had been met. In her cross examination the Claimant accepted that in the course of the meeting that took place on 4 December 2017 Mr Zowa informed her that she had met the trigger point and that the capability policy anticipated that an Attendance Review Investigatory Meeting ('ARIM') would take place. We find that the Claimant understood that this was a general policy as it was not the first time that she had met the trigger points that would mean that an ARIM would take place. The Claimant was not told of the time and place of the meeting. Mr Zowa asked one of his team members, Neil Bailey to conduct the ARIM. His reasons for doing that were entirely sensible as, under the capability policy, it might have fallen to him to have conducted a formal capability meeting at a latter part of the process. We agree it may have been preferable to have informed the Claimant of the time and date of the meeting.

61. On her return to work the Claimant had exhausted her company sick pay. She had the benefit of a contractual PHI scheme with Legal and General which might have covered any shortfall. She was assisted in making a claim but in the event the insurers decided that she did not meet the conditions of the policy.

62. On 7 December 2017 a Doctor Weston from Health Management Ltd sent a report to Mr Zowa. She concluded that the Claimant was fit to return to work provided that adjustments were made for her. She recommended that the Claimant's need to attend the day hospital was accommodated and she went on to say:

> *'With regards to performing face-to-face assessment, Ms Dube does feel able to perform these however she continues to have anxiety in relation to performing these assessments. Hence, I suggest that face-to-face assessments are phased in gradually and are interspersed with file work. As per my previous report, I suggest that Ms Dube is allocated a room next to the office where she feels more easily able to summon help should this be required. I advise that Ms Dube is able to take short breaks in a quiet area during periods of heightened anxiety. I also advise performing a stress risk assessment….. I suggest that Ms Dube is initially given a longer period of time which to complete her face-to-face assessments. I also suggest that Ms Dube is allowed time off to attend medical appointments. I am aware that any adjustments are matter for the employer to determine.'*

63. The Claimant complains that on her return to work she was not allocated a desk, she had nowhere to sit and confidential discussions with Mr Zowa were conducted in the staff kitchen. Mr Zowa accepted that the Claimant was not given a desk but explained that there were no desks available other than those used for the purposes of consultations. The Claimant was not expected to do consultations at that time. We accept that evidence. Desks were not allocated on a fixed basis to anybody. The Claimant might have liked to have had a desk but that was unnecessary and impracticable given the work she was doing. Mr Zowa took exception to the suggestion that he would have confidential discussions with the Claimant where other people would overhear. He explained to us and we accept that he is an experienced nurse and has a thorough understanding of the need to preserve confidentiality. He accepted that on occasions he would speak to the Claimant in the kitchen but observe that he was acutely alive to the possibility of being overheard and did not discuss anything that was personal to the Claimant in front of any other person. The Claimant did not press him on this point in cross examination and we accept his evidence.

64. On 14 December 2017 the Claimant was at work when Mr Zowa asked her to attend a meeting with Neil Bailey. It appears that this meeting was a complete disaster. The Claimant described Neil Bailey as being intimidating and lacking empathy. She also describes being invited to sign a form saying that it included the words "if within six months I will be off sick, significant action will be taken and this interview is regarded as warning, for now no action will be taken". This is most unlikely to be a literal quotation given the poor use of language. It is highly likely that the Claimant was asked to sign a form. The manager conducting the ARIM has a discretion whether to proceed to a formal capability meeting. If the Claimant's recollection is correct then it appears she was told that no further action would be taken. That is not an outcome she could reasonably complain of. It is common ground that the Claimant became tearful and distressed. The meeting was abandoned. The Claimant says that Mr Zowa came into the room and expressed his concerns about her well-being and suggested that if she was not fit for duty she should go and see her GP. That strikes us as being a responsible approach.

65. A further meeting took place on 15 December 2017. The Claimant says that Mr Zowa encouraged her to visit her GP if she was not well enough to work. That is broadly consistent with an email sent by Mr Zowa after the meeting in which he summarises the discussions. It seems that the Claimant raised once again the decision made in March to swap her duties and Mr Zowa repeated his advice that she remain dissatisfied she could have raised a formal grievance. He pointed out that given the passage of time a grievance might not be accepted at this point. He noted that the Claimant had said that her specialist was not happy that she had returned to work. Mr Zowa stressed that he would never have forced any employee to come back to work if they were unfit to do so. It was in that context that there was reference to the Claimant's General Practitioner. Mr Zowa records that the meeting ended on a good note and whilst the Claimant had been disappointed by decisions taken by others she was grateful for his support. The email records that the Claimant was given a copy of the most recent Occupational Health report and an agreement was reached to discuss the recommendations made on the following Monday at which a supportive and reasonable return to work plan would be discussed. The email does record Mr Zowa stating that any adjustments would have to meet the needs of the business. Although she later sent an e-mail disputing the content of Mr Zowa's meeting before us the Claimant did not dispute that all of the issues identified in that email were covered in the meeting. She did not identify any particular omissions. We find that Mr Zowa's e-mail that was a broadly accurate summary of the meeting.

66. The Claimant had been asked to give her consent to the Respondent obtaining a report from her consultant psychiatrist. We find that at this stage Mr Zowa's principal concern was that the Claimant may be unfit to take clinical decisions. His evidence which we accept was that he had observed the Claimant behaving in a way that showed she was anxious and detached. He was also aware of the events of 14 December 2017. We conclude that he had reasonable grounds for wanting to obtain further information about the Claimant's fitness to practice. In any event the Claimant agreed to the provision of a report by her psychiatrist.

67. The meeting that had been anticipated following the meeting on 15 December 2017 did not in fact take place. The Claimant took some time off because she was unwell and the meeting was not reorganised.

68. On 1 January 2018 the Claimant resigned from her employment giving contractual notice of three months. She suggested in that email that she would be presenting a case for constructive dismissal but did not spell out the grounds for that. Mr Zowa met with the Claimant on 2 January 2018 and asked her to reconsider her decision. He explained that he intended to devise a supportive phase return to work plan and that a meeting had been organised for that to take place. He raised with the Claimant his concerns about her fitness to practice and told her that he wanted a letter from her psychiatrist or general practitioner confirming that she was fit enough to undertake her clinical duties. The Claimant explained to Mr Zowa that her resignation was because of the decision that had been taken in March 2017 to change her duties. Mr Zowa followed up that meeting by sending the Claimant an email summarising what had been discussed. There was little dispute between the parties about what was said during that meeting.

69. The Claimant told Mr Zowa that having spoken to her key worker and psychiatrist who had advised her to resign she would not reconsider her decision.

70. The Claimant asked whether she could be paid in lieu of notice. There were then some discussions which led to a decision by the Respondent to place the Claimant on garden leave her last day of employment was therefore 31 March 2018. We have not referred to the content of those discussions because due to the nature of the claims we are considering we need only focus on the events leading up to the Claimant's resignation. It is very probable that the negotiations that took place were "without prejudice" and therefore inadmissible. As we do not need to refer to them we shall not determine whether they are or are not admissible. They have had no bearing on our decision.

The Law

The legal framework – reasonable adjustments

71. When dealing with a claim that there has been a failure to make reasonable adjustments the Tribunal are obliged to have regard to the relevant code of practice. For claims brought in the employment sphere the relevant code is the Equality and Human Rights Commission Code of Practice on Employment 2011. Paragraph 6.2 of that code describes the duty to make reasonable adjustments as follows:

> *'The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled.'*

72. The reference in that paragraph to the right to have 'additional steps' taken reflects the guidance given by Lady Hale in ***Archibald v Fife Council*** **[2004] UKHL 32** which whilst referring to the Disability Discrimination Act 1995 is equally applicable to the Equality Act 2010.

> *……this legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.*

73. The material parts of Section 20 of the Equality Act read as follows:

Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)…..

74. The phrase 'substantial' used in sub-section 20(3) is defined in section 212(1) of the EA 2010 and means only 'more than minor or trivial'.

75. Sub-section 39(5) of the Equality Act 2010 extends the duty to make reasonable adjustments to an employer of employees and job applicants.

76. The proper approach to a reasonable adjustment claim remains that suggested in ***Environment Agency v Rowan*** **[2008] IRLR 20**. A tribunal should have regard to:

a) the provision, criterion or practice applied by or on behalf of the employer; or

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant.

77. The code gives guidance about what is meant by reasonable steps at paragraph 6.23 to paragraph 6.29. Those paragraphs read as follows:

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a

significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

6.26 [deals with physical alterations of premises].

6.27 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise. Duty to make reasonable adjustments

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial or other resources;*
- *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
- *the type and size of the employer.*

6.29 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

78. Whilst the code places emphasis on the desirability of an employer investigating what adjustments might be necessary for a disabled employee, a failure to carry out such investigations will not, in itself, amount to a failure to make reasonable adjustments although that might be the consequence ***Tarbuck v Sainsbury's Supermarkets Ltd*** **2006 IRLR 664, EAT**.

79. An employer will not be under a duty to make reasonable adjustments until it has knowledge of the need to do so. This limitation is found in schedule 8 paragraph 20 of the Equality Act 2010 and the material parts read as follows:

Lack of knowledge of disability, etc.

20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

> *(b)in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

The legal framework – unfair dismissal

80. Section 94 of the Employment Rights Act 1996 (hereafter 'the ERA 1996') sets out the right of an employee not to be unfairly dismissed by her or her employer.

81. For the Claimant to be able to establish her claim of unfair dismissal she must show that she has been dismissed. Dismissal for these purposes is defined in Section 95 ERA 1006 and includes in Sub-section 95(1)(c) *'the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct'.*

82. ***Western Excavating (ECC) Ltd and Sharpe*** **1978 IRLR 27** established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that that breach must be sufficiently important to justify the employee resigning; the employee must leave in response to the breach not some unconnected reason; and that the employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.

83. In ***Mahmood v BCCI*** **1997 ICR 607** it was confirmed that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is implicit in the case of ***Mahmood v BCCI*** that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed and the reason for that it is necessary do serious damage to the employment relationship. That position was expressly confirmed in ***Morrow v Safeway Stores Ltd*** **2002 IRLR 9**.

84. Where the breach alleged arises from a number of incidents culminating in a final event, the Tribunal may, indeed must, look at the entire conduct of the employer and the final act relied on need not itself be repudiatory or it even unreasonable, but must contribute something even if relatively insignificant to the breach of contract see ***Lewis and Motor World Garages Ltd*** **1985 IRLR 465** and ***Omilaju v Waltham Forest London Borough Council*** **2005 IRLR 35**. In ***Omilaju*** it was said:

> *'19. … The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*
>
> *20. I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a*

series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.'

85. The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of the particular employee nor the opinion of the employer as to whether its conduct is reasonable or not see ***Omilaju v Waltham Forest London Borough Council*** and ***Bournemouth University Higher Education Corpn v Buckland*** **[2011] QB 323**.

86. There is no general implied contractual term that an employer will not breach some other statutory right such as the right not to suffer discrimination ***Doherty v British Midland Airways*** **[2006] IRLR 90, EAT**. However, the same facts that might support a finding of unlawful discrimination or any disregard of such a statutory right may, depending on the facts, suffice to establish a breach of the implied term of mutual trust and confidence see ***Green v Barnsley MBC*** **[2006] IRLR 98**.

87. Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed - ***Bournemouth University Higher Education Corpn v Buckland***.

88. The breach of contract need not be the only reason for the resignation providing the reason for the resignation is at least in part because of the breach ***Nottinghamshire County Council and Meikle*** **[2004] IRLR 703**.The employee need not spell out or otherwise communicate her reason for resigning to the employer and it is a matter of evidence and fact for the tribunal to find what those reasons were ***Weatherfield v Sargent*** **1999 IRLR 94**.

89. The proper approach, in the main distilled from the cases set out above has been set out by the Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust*** **[2018] EWCA Civ 978** per Underhill LJ at paragraph 55.

> *'it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*

90. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for 'some other substantial reason'. If it cannot do so then the dismissal will be unfair.

91. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the Employment Tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

> '*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.'*

92. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *'any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to*

the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.'

93. The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

Discussions and conclusions

94. In this case the Claimant relies upon what she says is a failure to make reasonable adjustments as a central plank in her claim that she was entitled to resign and treat herself as constructively dismissed. As set out above ***Doherty v British Midland Airways*** explains that a breach of the Equality Act 2010 will not necessarily entitle an employee to treat themselves as dismissed but might do so if the facts giving rise to that breach, alone or with other matters, amount to a serious breach of contract. We shall therefore address the reasonable adjustment claims before turning to the claim of unfair dismissal.

95. In some respects, the case that the Claimant presented before us went further than the issues identified by Employment Judge Reid in the case management order of 8 November 2018. Given that the Claimant had not provided any formal particulars of her claim in her ET1 and, given that the Respondent had prepared only for the claim as identified we did not consider it fair to allow the Claimant to expand her claim beyond what had been understood by the Respondent. We considered that that approach still permitted the Claimant to present the points which were at the heart of her case without unduly prejudicing the Respondent. We refer to some of the additional points below.

96. In the list of issues, the 'Provision, Criterion or Practice' ('PCP') identified by the Claimant as placing her at a substantial disadvantage was said to be the requirement that she conduct face-to-face assessments five days a week. She says that this was imposed in March 2017 and then again in December 2017 when she returned to work. The Respondent's position was set out at paragraph 43 of Ms Thomas's skeleton argument. She says that the Respondent did not apply any such PCP to the Claimant. She accepts that briefly in April 2017 the Claimant was rostered to do only face-to-face assessments but only completed four days in the first week and two days the second. She points out that even when face-to-face assessments were carried out the Claimant only undertook between two and four assessments when the target was to do six in one day.

97. We would accept that an Employment Tribunal only has jurisdiction to deal with the case that has been pleaded by the parties, see ***Chapman v Simon*** **[1994] IRLR 124**. Generally speaking that will include looking only at the ET1 and ET3. However occasionally, as here, further particulars or an amendment may be identified during a preliminary hearing. If that is the case then it would not be unfair to the opposing party to treat the record of that hearing as amounting to further information about, or an amendment to, a party's case. Generally speaking once an agreed list of issues is identified the Tribunal should limit its consideration of the case to those agreed issues. That said a tribunal should not stick slavishly to the issues where to do so would impair our duty to hear and determine the case – see ***Parekh v London Borough of Brent*** **[2012] EWCA 1630** and ***Saha v Capita plc*** **UKEAT/0080/18/DM**.

98. It was the Respondent's case that the Claimant was employed principally to carry out face-to-face assessments. It appears to be common ground that ordinarily the Claimant might have been required to have carried out face-to-face assessments as and when required by the Respondent. That is consistent with her contract of employment issued by ATOS which states that the Claimant would be required to undertake such duties as may reasonably be required of her, commensurate with her experience and qualifications. Mr Zowa had on a number of occasions stated that the Respondent could not guarantee that the Claimant would be restricted to certain duties.

99. It is correct that throughout the period that we have been asked to examine the Claimant was given less face-to-face assessments than might ordinarily have been expected. As such, some adjustments were made to her duties in order to accommodate her disability. What this case is all about is whether those adjustments were adequate. The requirement, or PCP, that the Claimant complains of is being asked to conduct a higher volume of face-to-face assessments than she could cope with. Identifying the PCP as being required to do so 'five days a week' is in our view a departure from the substance of the case that we have heard. We do not consider there is any injustice to the Respondent in identifying the PCP as being the requirement to conduct face-to-face assessments if instructed to do so.

100. The question of whether or not the PCP thus defined, placed the Claimant at a substantial disadvantage is not as straightforward as it might appear. The evidence before the Tribunal was that at various times the Claimant could and did conduct face-to-face assessments without difficulty. On the other hand, there were periods, when she was more seriously unwell, when she could only carry out very few face-to-face assessments without difficulty and some periods when she could not carry out any at all. The manner in which the claims have been identified in the agreed list of issues invites the Tribunal to look at two periods only. The first is the period commencing 30 March 2017 when the Claimant was rostered to undertake face-to-face assessments on each working day. The second period is upon her return to work on 1 December 2018 through to her resignation on 1 January 2018. We shall examine each period in turn.

101. It was not argued before us that by March 2017 the Respondent did not have actual knowledge that the Claimant had a mental impairment which had a substantial effect on her ability to carry out day to day activities and which had lasted for more than 12 months. Had such an argument being raised by the Respondent we would have found that the Occupational Health report of 16 March 2017 made it abundantly clear that the Claimant had a disability satisfying the statutory definition set out in section 6 of the Equality Act 2010.

102. Knowledge of disability is by itself insufficient to give rise to a duty to make reasonable adjustments it is also necessary that the employer knows that employee is placed at a disadvantage by reason of the PCP applied to them. Again, it seems to us quite clear from the Occupational Health report of 16 March 2017 that the Respondent had actual or constructive knowledge that undertaking face-to-face assessments increased the Claimant's anxiety. There is an express recommendation in that report that the present pattern of the Claimant doing 95% file work be maintained to alleviate this difficulty. We find that the Respondent had actual or constructive knowledge that at that particular time the Claimant will be placed at a substantial disadvantage if the amount of face-to-face

assessments she did were increased beyond the level that she was doing at that time. That is not to say that the Respondent ought to have known that she could not do any at all. None of the medical reports up to that point suggested that she would be unable to return to face-to-face work at all. Each report suggested that the amount of face-to-face work be gradually introduced. At this stage the Claimant did not suggest that she could do no face-to-face work at all.

103. We are satisfied from the evidence before us that the Claimant did suffer increased anxiety as a consequence of doing face-to-face assessments. The clearest evidence of that is that she suffered a substantial reaction when she was required to undertake face-to-face assessments in the beginning of April 2017. We have no doubt that her reaction was genuine as it is consistent with all of the medical evidence placed before us.

104. We consider that rostering the Claimant to undertake face-to-face assessments during the weeks commencing 3 and 10 April 2017 is the application of the PCP that we have identified above namely the contractual right to require her to undertake such duties. We are satisfied that the Claimant struggled to comply with that requirement which ultimately caused her to take time off work. As such we are satisfied that the PCP placed her at a substantial disadvantage compared to people without her disability.

105. We must then turn to the question of whether it was reasonable for the Respondent to have made any adjustments to alleviate that disadvantage. The two adjustments contended for by the Claimant in the agreed list of issues are that she should have been permitted to continue with file work and/or face-to-face assessments should have been introduced on a phased basis. It seems to us that the Claimant has identified the only means of reducing the disadvantage that she suffered. That disadvantage could only be removed by reducing or eliminating face-to-face assessments. The question then becomes whether making that adjustment was reasonable. It is important to note that to a certain extent the was an adjustment made for the Claimant in that the work she was asked to do was significantly less than the ordinary target imposed on other employees. The question is therefore whether it should have been further reduced.

106. The Respondent has put forward two separate reasons why it says it was not reasonable to make that adjustment. Firstly, it relies upon the significant incident policy to suggest that the Claimant could not have been allocated file work at that stage. Secondly, it says that its need for file work had greatly reduced as a consequence of a decision to centralise that work in Scotland.

107. As will become apparent from our conclusions below we have been impressed by the care taken by Mr Zowa to assist the Claimant with her difficulties in the workplace. It is notable that the key decision in this case was taken not by Mr Zowa but by his manager Mr Williams at a time when Mr Zowa was on annual leave. We suspect that the impugned decision would never have been taken by Mr Zowa had he been around at the time.

108. Our findings of fact set out above are that the Claimant had made an error at work which was quite properly dealt with under the significant incident policy. The question that we need to address is whether the ordinary requirements of that policy that a person be taken off the relevant tasks until an

enquiry or audit has been carried out and they complete the reflective document meant that it was reasonable to suspend the reasonable adjustments that had been put in place to accommodate the Claimant's disability.

109. We have expressed some disquiet at the Claimant's attempts to minimise her actions after this event. That said, as soon as she made an error, it was she who drew it to the Respondent's attention. Her very first email in connection with this incident went some way towards meeting the requirements of a reflective document. That said, it was not entitled as such and the Respondent could reasonably have expected her to have complied with the request to provide a reflective document much sooner.

110. The audit of the Claimant's file work was complete by 31 March 2017. That audit provided no reason why the Claimant could not continue with file work. By that time the Claimant had been continuing with file work for nearly 3 weeks and nobody had thought it essential to patient safety that she should be removed from this work.

111. The nature of the mistake made by the Claimant was that through a lapse in concentration she pressed the wrong computer button. An error of this nature is not exclusive to file work and errors caused by a lapse of concentration could occur when writing face to face reports as well. We note that it was not thought necessary to remove the Claimant from clinical work but just from a particular type of clinical work which also required concentration and accuracy. We see no rational basis for concluding that a move off file work and on to face to face work was justified by concerns about clinical safety. If any regard is had for the information given in the Occupational Health reports the opposite conclusion is more appropriate.

112. If, which we do not accept, there were concerns about clinical safety or a compelling need for the reflective document before the Claimant continued with her file work we do not accept that the answer to this was to make her do face-to-face consultations. We accept that the Claimant was chased for her reflective document but rather than simply put her on face-to-face consultations a manager could have sat down with her and explained that unless it was completed she would not be allowed to continue with file work. As a last resort the Claimant could have been threatened with suspension if she had not done what was asked.

113. For the reasons set out above we consider that the error made by the Claimant or the terms of the Significant Incident policy provide any compelling reason to alter the regime that had been put in place for the Claimant involving 95% file work.

114. We accept that the Respondent intended to centralise all of its file work in Scotland. We do not accept that that had occurred in April 2017. It would be remarkable if that file work had dried up overnight. Mr Zowa told the Claimant in August of 2017 that the work was in the process of being moved to Scotland. That is some months later and the clear implication is that that had not been done in April 2017. We are not satisfied that there was at that time any lack of work in the London region within which the Claimant might be expected to travel that explains adequately or at all why she was allocated face to face duties.

115. The issue for us was whether it was a reasonable adjustment to restrict the Claimant's face to face appointments in April 2017. We have had regard to the two reasons put forward by the Respondent. We have also had regard to the effect on the Claimant on not making that adjustment. That is a material factor in deciding whether any adjustment was reasonable. We conclude that it was a reasonable adjustment to maintain the level of face to face work that the Claimant did at the level set in March. We find that any concerns flowing from the incident report on 10 March 2017 were insufficient reasons for departing from the adjustments in place and that the shortage of file work as a reason has simply not been established on the evidence before us. Accordingly, we find that there was a failure to make reasonable adjustments in April 2017. Subject to any jurisdictional points that claim succeeds. We deal with the time issue below.

116. We now turn to consider the position in December 2017. As we have said above the question of whether the Claimant suffered a substantial disadvantage by being asked to do face to face work at all was not static. We accept that the position in December 2017 was as set out in the Occupational Health report dated 7 December 2017. The Claimant believed that she could do face to face assessments and a recommendation was made that they were phased in gradually. We find that had that advice been followed there would have been no substantial disadvantage or, if that advice had proved to be incorrect, that the Respondent would have established that it could not reasonably have known that what it was told by the Claimant and its OH advisor was incorrect.

117. The Claimant has said that she was told that there was no file work for her to do. Our findings above are that that was never said in quite such clear terms. We do accept that there was a diminishing supply of file work and that the move to centralise the work in Scotland was nearing completion. From the moment of her return to the point that she left the Claimant was not instructed to do any face to face work. Whilst the Claimant was informed that any adjustment to her duties would be subject to business needs she was not told that she would only be offered face to face work. Mr Zowa expressly told her that the recommendations of the OH repost would be taken into account.

118. We have concluded that during this period the PCP complained of, being required to undertake face to face work, was not imposed on the Claimant. Mr Zowa was trying to re-integrate the Claimant and work out an effective back to work plan. Face to face work had not been ruled out but that was in accordance with the Claimant's own stated belief that some face to face work was a possibility and the advice that it should be re-introduced slowly.

119. No plan was ever put into effect prior to the Claimant resigning and she was not asked to do any of the work that placed her at a disadvantage. As we have said above the adjustment that would alleviate the PCP was to reduce any face to face work. During this period the face to face work was reduced to nil. If any adjustments were necessary then they would be done. The Claimant's complaint appears to be that because Mr Zowa would not give her any 'guarantees' there would be a possibility of her being given more face to face work than she could cope with. Mr Zowa's e-mail of 15 December 2017 includes a record of an agreement being reached to meet and discuss the OH report and discuss a supportive and reasonable return to work plan. We find that whatever the mistakes made in March/April there was no reason to suspect that they were going to be repeated. Had the PCP complained of been applied to the Claimant

we would have had to address the issue of whether any adjustment was at that stage reasonable. We have accepted that the file work was dwindling and it is by no means clear to us that there was sufficient file work to keep the Claimant occupied.

120. For these reasons, the fact that the PCP was not applied to the Claimant during this period, the claim for reasonable adjustments for the period in December fails.

121. There were a couple of additional matters referred to by the Claimant in her witness statement and in her evidence and submissions. The first was a suggestion that she ought to have been given a particular room to do any face to face consultations where she felt secure. This was a matter dealt with in the OH report of 7 December 2017. After that date the Claimant was not asked to do any face to face consultations. We heard some evidence from the Claimant and Mr Zowa about the availability of rooms. We were persuaded by Mr Zowa's evidence that there were limited rooms. However, we do not consider it necessary or right that we entertain what is a separate claim introduced informally in evidence. Had the matter been formally introduced there may have been further evidence from the Respondent. We have therefore reached no separate conclusions in respect of this.

122. The Claimant has suggested that as an alternative to attending the office she could have worked from home. This could only be referring to file work. We consider that given the sensitive nature of the information handled this would have been no simple matter. In any event it was unnecessary in March 2017 as the Claimant could attend the office without difficulty and we have found that there was sufficient work available for her to do. In December 2017 the PCP complained of was not applied to the Claimant and as such the issue of what adjustments were reasonable simply does not arise.

123. Finally, the Claimant has suggested that the Respondent permit her to take a sabbatical. This was not a matter that was raised by the Claimant at the time. Had no effective return to work plan proved feasible we accept that this might have been an adjustment that might have been considered. However, given our findings that the impugned PCP was applied in December 2017 we do not need to consider this point.

124. As we have found that there has been a breach of the Equality Act 2010 we need to consider the jurisdictional point raised by the Respondent who argues that the Claim has been presented outside the time limit imposed by Section 123 Equality Act 2010.

125. We need to identify the date of the discriminatory act. The Claimant was placed on a rosta for the week commencing 3 April 2017. This effectively removed the adjustments that had previously been put in place. It implements a decision taken on or around 30 March 2017 when the rosta was drawn up. Given that there are only four days between those dates it is unnecessary to decide which one of them is the date of the discriminatory act. We shall proceed on the basis that it was the decision rather than the implementation of the removal of the adjustments which is the act of discrimination.

126. To have brought the claim within the ordinary time limit imposed by section 123 of the Equality Act 2010 the Claimant would have needed to contact ACAS by no later than 29 June 2017. The claim was issued on 16 July 2018. It has therefore been presented at least 12 months outside the primary time limit. We therefore need to consider whether or not it is just and equitable to extend time.

127. ***Robertson v Bexley Community Centre t/a Leisure Link*** **[2003] IRLR 434, CA** reminds a tribunal that whilst the discretion to extend time is wide the burden is on the Claimant to show why time should be extended and as such an extension is the exception and not the rule. In deciding whether or not to extend time a Tribunal might usually have regard to the statutory factors set out in the Section 33 of the Limitation Act 1980 see ***British Coal Corporation v Keeble and ors*** **[1997] IRLR 336, EAT**. Whether there is a good reason for the delay or indeed any reason is not determinative but is a material factor ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** **2018 ICR 1194, CA**. It will be an error of law for the Tribunal not to consider the relative prejudice to each party ***Pathan v South London Islamic Centre*** **EAT 0312/13**

128. We have considered all of the evidence in this case but consider the following factors to be the most material. The Claimant was clearly alive to the fact that there had been some wrongdoing in April 2017 as she pursued an informal grievance through as far as mid September 2017. Thereafter she did not take matters much further either internally or externally although she continued to complain informally. We have regard to the fact that the Claimant was unwell through much of the period of delay. We have noted her struggling with the Tribunal process. She was noted in the preliminary hearing to have been unsure whether she could cope with the process at all. We consider that her difficulties in that regard mitigate in some respect against the delay.

129. We accept that the Respondent will suffer the prejudice of losing what is in effect a limitation defence if we extend time. We do not consider that in respect of the single allegation of a failure to make reasonable adjustments we have otherwise upheld there is any forensic prejudice to the Respondent. There was little factual dispute about the substantial disadvantage suffered by the Claimant when required to undertake face-to-face assessments. The Respondent was able to put forward its case as to why it rostered the Claimant to work as it did. There is no evidence that its defence was diminished because of any delay.

130. We are in the position of having decided the case on its merits and absent any limitation defence the Claimant would succeed in her claim. If we were not to extend time then the Claimant would be debarred from any remedy for what we have held to be an unlawful act. That is a substantial prejudice.

131. The delay is clearly lengthy. We are prepared to infer that a significant contributory factor to the delay was the Claimant's mental health condition. Apart from that no good reason has been put forward for such a long delay. Having said that when we conduct a balancing exercise we have concluded that the factors that point towards extending time narrowly outweigh the countervailing factors and find that it would be just and equitable to extend time.

132. It follows from the reasons above that the Claimant's claim that the Respondent failed to make reasonable adjustments in April 2017 succeeds. All

other claims that there have been a failure to make reasonable adjustments are dismissed.

Unfair dismissal

133. As in the claim brought under the Equality Act 2010 the Claimant's claim of unfair dismissal has expanded somewhat in the evidence. As we have said above the ET1 has no particulars at all and the list of issues which we would accept we should treat as being further information limits the factual matters said to amount to a serious breach of contract to 5 categories of failure which are said to have amounted to a breach of the implied term that the employer shall not without reasonable cause act in a manner calculated or likely to seriously damage trust and confidence. These are identified at paragraph 4.1 of the case management order of Employment Judge Reid as follows:

133.1. the Respondent's failure to put in place reasonable adjustments for her (failing to allow had to office-based/file work rather than face-to-face assessments and failing to have a phased return to face to face assessments); and

133.2. failing to follow the Occupational Health advice (including the Respondents own psychologists' recommendations)

133.3. failing to obtain medical evidence during her employment from her own doctor; and

133.4. treating another (also said to be disabled) employee 'D' differently by allowing her to continue with office-based/file work and

133.5. discussions with her manager in October and December 2017 when she says she was threatened with dismissal.

134. We do not consider that it would be fair to depart from the list of agreed issues which do generally encapsulate the case that we have heard. We shall deal with each one in turn.

135. We have found above that there was a failure to make reasonable adjustments when adjustments that had been made were removed on 30 March 2017. That decision was made without any consultation with the Claimant. We have already found it to be unlawful contrary to the Equality Act 2010. We have set out above that a breach of the Equality Act 2010 does not necessarily amount to a breach of contract. That said the same fact might amount to a breach of the implied term of trust and confidence. We have regard to the circumstances of the breach. We consider that Mr Zowa had been an exemplary manager. There were numerous occasions of him going the extra mile for the Claimant. In particular, we were impressed by the fact that he gave her his personal mobile telephone number and was prepared to meet with her partner during the summer of 2017. It was therefore most unfortunate that he was not consulted when the decision to alter the Claimant's duties was taken. Whilst the Respondent has attempted to justify that decision we noted that in his correspondence Mr Zowa was always at pains to stress that he had no part of the decision-making process. We infer that he did not approve of it. We find that the decision was both substantially and procedurally clumsy. It must have come as a shock to the Claimant. We conclude

that this allegation by itself was, without reasonable cause, and was likely to seriously damage trust and confidence. The breach took place on 30 March 2017 but the effect of the changing duties continued up to the point where the Claimant took annual leave.

136. Insofar as this first allegation is intended to encompass the period where the Claimant was not at work and include the period after she had returned to work in December we repeat our findings made when considering the question of reasonable adjustments. During the whole of this period the Claimant was not required to conduct face-to-face assessments at all. Insofar as the Claimant has suggested that she was told by Mr Zowa that that was all that would ever be available to her we have rejected that case.

137. We find that Mr Zowa recognised the need for further Occupational Health advice was necessary and that he was prepared to have regard to that advice when determining what duties the Claimant should be asked to perform. He did tell the Claimant on several occasions that he would have to have regard to the business needs. Given the fact that he knew that file work was diminishing, or was expected to do so, there is nothing improper in him being truthful with the Claimant. He could have been criticised had he made false promises which he could then not fulfil. Whilst he awaited the further information he did not instruct the Claimant to perform any face-to-face duties. We do not therefore find that there was any further failure to make reasonable adjustments after the Claimant went to South Africa in 2017.

138. The second allegation made by the Claimant overlaps substantially with the first. We have found that there was a failure to follow the occupational health report which had been produced on 16 March 2017. That report clearly recommended that the Claimant's pattern of work remain unchanged in order to prevent her suffering from undue anxiety. As we have found above that was part of the serious breach of contract occasioned by rostering the Claimant for continuous face-to-face work.

139. It appears that the Claimant also criticises the Respondent for failing to follow the Occupational Health report produced on 7 December 2017. That report made a number of recommendations. We would accept that had that report been ignored it might have been a matter contributing to a breach of contract. However, the meeting of 15 December 2017 took place shortly after the receipt of that report. We have found that Mr Zowa gave the Claimant a copy of that report in that meeting and organise a further meeting in order to discuss the report and organise a back to work plan. We have rejected any suggestion that the only option available was to do face-to-face work full-time and from the outset. The Occupational Health report itself does not rule out face-to-face work and there was clearly a need for some discussion as to how much the Claimant could do and what she could do when not doing that work. That discussion never took place because the Claimant resigned before the was an opportunity for it to take place. We do not accept that there was any failure to follow that Occupational Health report. In fact had Mr Zowa had the opportunity we find it likely that he would have bent over backwards to accommodate the Claimant notwithstanding his concerns about her health at that time. The clearest indication of that is his request that the Claimant reconsider her decision to resign.

140. The Claimant suggests that the Respondent should have obtained a medical report from her consultant Psychiatrist earlier than it did. The difficulty for the Claimant is that she has not identified any part of the Occupational Health advice which the Respondent did obtain which differs substantially from the advice of her own Psychiatrist. On one occasion when advised by its Occupational Health advisor that the Claimant would be fit to return to work the Respondent through Mr Zowa subsequently accepted that she was not when informed of that by the Claimant's General Practitioner. The advice that the Respondent had was clear in showing that the Claimant had difficulties with face-to-face work. It did not need any further medical evidence to ascertain that fact. We do not find that the failure to approach the Claimant's Psychiatrist any earlier than the Respondent did amounted to a serious breach of contract, or contributed to one.

141. The fourth allegation concerns what is said to be more favourable treatment of another employee 'D' by permitting her to continue with file work whilst taking the Claimant off it. It was not at all clear what timeframe the Claimant was referring to but it is to be inferred that that was the earlier part of 2017 rather than December 2017 when the Claimant was back in the workplace. Mr Zowa gave unchallenged evidence that in fact 'D' did do face-to-face work two days a week. As such she did slightly more than the Claimant had been doing up to the point where Mr Williams decided that the Claimant should be rostered to do such work full-time. There is nothing in this allegation that adds to the earlier allegation. We are satisfied that had the Claimant remained at work Mr Zowa would not have treated her any less favourably than any other employee when organising a return to work plan.

142. In dealing with the final allegation that the Claimant was threatened with dismissal we shall review the entirety of Mr Zowa's dealings with the Claimant. As such we may be dealing with matters which were not strictly identified as issues in the case but our findings mean that there is no prejudice to the Respondent.

143. Before the Claimant actually went to South Africa she says that she raised informally with Mr Zowa that she wished to know who had taken the decision to roster her for face-to-face work. There may indeed have been such a conversation and it appears that if there was the Claimant did not get a response at that time. The Claimant has referred to this as an informal grievance. That is followed up by an email on 18 April 2017 in which the Claimant complains but does not expressly ask Mr Zowa to do anything. We do not find that Mr Zowa acted without reasonable cause or improperly by not recognising the fact that the Claimant was bringing a grievance at that time. That is to be contrasted with the Claimant's email sent on 21 May 2017 where she refers to the first time to bringing an "informal grievance". That elicited a prompt response by Mr Zowa who entirely reasonably asked the Claimant to outline the grounds for her grievance and offering to organise a meeting on her return from South Africa. That was somewhat overtaken by events because the Claimant did not in fact return until mid July.

144. We consider that whilst the Claimant was in South Africa Mr Zowa's attempts to keep in touch and keep informed were exemplary. He agreed to meet with Mr Whitbread and discuss the Claimant's health. He quite properly declined to discuss her duties with Mr Whitbread at that meeting. He then maintained

contact with the Claimant whilst she was in South Africa. He met with her promptly upon her return and organise an informal welfare meeting on 15 August 2017. We have rejected the Claimant's perception of that meeting as unjustified. It is unfortunate that the Claimant mistook being informed about the possible consequences of a performance review policy as being a threat that she would be dismissed. It is unfortunate that she perceived reference to the diminishing file work as being an absolute indication that she would be dismissed if she did not do it. Whilst these perceptions were honestly held we have rejected the suggestion that they were objectively justified. This was information that needed to be conveyed whether or not it was well received.

145. We consider that Mr Zowa was somewhat slow to acknowledge that decision to change the Claimant's duties in April 2017 was taken by Mr Williams but he ultimately did so in his letter of 13 September 2017. Thereafter a meeting was offered with Mr Williams which was not taken up and several suggestions to raise any outstanding grievances formally were made by Mr Zowa again were not taken up.

146. Whilst during this period the Claimant complains of Mr Zowa's conduct we note that on a number of occasions it is recorded that she thanked him for his personal assistance to her. We have found that at the time she did express her gratitude towards him. We note that on 6 October 2017 it is she who seeks an informal meeting with Mr Zowa. That is inconsistent with any suggestion that his contact with her was improper or oppressive.

147. We have rejected the Claimant's case that she was forced to discuss her personal circumstances in circumstances giving rise to a breach of confidence. We have accepted Mr Zowa's evidence that he was always careful that any conversation that he had with the Claimant was not overheard.

148. We have rejected the Claimant's case that she was treated oppressively in a meeting that took place on 14 December 2017 (the ARIM meeting). It is unfortunate that the Claimant did not have a letter telling her of the time and place of this meeting but she have reasonably expected that meeting to take place and we do not find that it was conducted in an improper manner.

149. We are at risk of repeating ourselves but during the period that the Claimant was back at work Mr Zowa was working with her with the aim of identifying a workable return to work programme. We find that he was willing to take into account the recommendations made in the Occupational Health report and balance them against the business needs pertaining at the time. We find he was willing to work with the Claimant to find a solution. We do not accept that he ruled out any work other than face-to-face interviews.

150. Sweeping all of those conclusions up together we do not find that Mr Zowa acted without reasonable cause in a manner in which he dealt with the Claimant's absence and return to work other than in the delay in identifying the manager responsible for the decision to change the Claimant's duties.

151. The approach that we should take is that identified in ***Kaur v Leeds Teaching Hospitals NHS Trust***. The last act or acts identified by the Claimant as entitling her to treat herself as dismissed are the events that took place when she returned to work in December 2017.

152. We have concluded that there was nothing whatsoever that took place after the Claimant was told who was responsible for the decision to change her roster which was communicated to her on 13 September 2017 which was by itself either a serious breach of contract or which had the quality identified in ***Omilaju*** that is conduct which was itself not necessarily unreasonable contributed to or formed part of a serious breach of contract.

153. We would accept that, whilst it was somewhat close to the line, the delay in dealing with the Claimant's informal grievance in circumstances where she was plainly agitated was capable of permitting the Claimant to resurrect the serious breach of contract that had taken place in April 2017 in other words that did have the quality identified in ***Omilaju***.

154. The issue for us is therefore whether the Claimant had affirmed the contract of employment between 13 September 2017 and her resignation on 1 January 2018. Delay itself is not evidence of affirmation. In the present case factors which point towards the Claimant objectively indicating that she and the Respondent remained bound by the terms of the contract included her return to work on 1 December 2018, her receipt of sick pay and thereafter wages for the period when she was in work and her indication that she was willing to engage in discussions about her ongoing duties. She requested and was given assistance applying for the benefits of the contractual PHI scheme. She had not reserved her position or given the Respondent any indication that she was minded to treat the contract as discharged. We bear in mind the fact that the Claimant had been unwell which might point away from a finding of affirmation but note that at the time had advice from the Royal College of Nurses.

155. We have concluded that the Claimant had affirmed her contract of employment since 13 September 2017 and that she has therefore lost the right to treat herself as dismissed. She cannot show that she was dismissed for the purposes of Section 95 of the Employment Rights Act 1996 and therefore her claim of unfair dismissal must fail. It is therefore dismissed.

156. Issues of remedy will be decided at a separate hearing to be listed in due course.

Employment Judge John Crosfill

15 January 2020