Reserved judgment

Claimant: **Mrs B Starling**

Respondent: **Epsom & St Helier University Hospital NHS Trust**

Heard at London South Employment Tribunal on 26-28 June 2017 and (in chambers) 29 & 30 June 2017.

Before Employment Judge Baron

Lay Members: **Ms C Bonner and Mr G Henderson**

Representation:

Claimant: ***Rachel Barrett***

Respondent: ***Lance Harris***

JUDGMENT

It is the judgment of the Tribunal as follows:

1 That the Claimant was unfairly dismissed within the meaning of sections 95(1)(c) and 98(4) of the Employment Rights Act 1996;

2 That the claims made by the Claimant under the provisions of the Equality Act 2010 fail and are dismissed.

REASONS

Introduction

1 I apologise for the delay in the issuing of this judgment. This has been caused by the current considerable pressure on judicial resources.

2 The Claimant presented a claim form to the Tribunal on 19 July 2016 in which she alleged that she had been unfairly dismissed. She also made claims under the Equality Act 2010 based upon the protected characteristic of disability.

3 The Claimant and her husband, David Starling, gave evidence. Evidence for the Respondent was given by the following:

Heidi Barron – Matron, Gynaecology
Donna Harris - People Business Manager, Women's and Children's Directorate
Emma Manley – People Business Adviser, Women's and Children's Directorate

Sadhbh Nolan – People Business Manager, Surgery
Anna Stedeford – Matron, Theatre

4 We also read the witness statement of Carolyn Croucher, Consultant Obstetrician and Gynaecologist, who did not attend to give live evidence and be cross-examined. Applications for a postponement of the hearing had been made on the basis that she had booked annual leave. Those applications were refused by an Employment Judge. Miss Barrett did not oppose the Tribunal reading the statement but submitted that we should place little weight on her evidence. We have read the witness statement but noted that Dr Croucher was not present to be cross-examined on it.

5 We were provided with two lever arch files of documents. We have taken into account only those documents, or parts of documents, to which we were referred during the hearing.

The issues

6 The legal and factual issues had largely been agreed at a preliminary hearing held on 30 September 2016. The final version was settled during this hearing, and is as follows:

Unfair Dismissal

1. Was the Claimant dismissed for the purposes of s. 95 (1) Employment Rights Act 1996:
    a. For the purposes of s. 95 (1) (a) ERA 1996, by Donna Harris' emails of 12, 22 or 29 February 2016; or
    b. For the purposes of s. 95 (1) (c) ERA 1996, by the Claimant's letter to Heidi Barron on 24 July 2015?
2. In the case of the latter did the Respondent commit a repudiatory breach of contract by:
    a. Unilaterally varying the Claimant's terms on or about 2 July 2016 by Dr Croucher issuing a rota which required the Claimant to begin working on Fridays; or
    b. Breaching the implied term of mutual trust and confidence, by issuing an Improvement Notice abusively
3. If proven, do the breaches at 2 (a) and (b) amount to fundamental breaches of contract?
4. Did the Claimant accept that breach by her letter to Ms Barron of 24 July 2015? Alternatively, did the Claimant affirm the employment contract by her delay in resigning or her conduct?
5. Is the Respondent able to show a potentially fair reason for the Claimant's dismissal, namely some other substantial reason?
6. Is the Claimant's dismissal fair with reference to s. 98 (4) ERA 1996?

Wrongful Dismissal

7. Did the Respondent dismiss the Claimant on 12, 22 or 29 February 2016?

8. If so, did the Respondent breach the Claimant's contract by giving her less notice than that which was required by her contract of employment?

Disability Discrimination:

9. The Respondent accepts that the Claimant was at the material times a disabled person for the purposes of s.6 Equality Act 2010, by reference to a mental impairment, namely a brain tumour / related symptoms (forgetfulness, confusion, headaches and fatigue, soreness in her eyes, stress)

Failure to make reasonable adjustments

10. From what date (if at all) did the Respondent know, or ought it reasonably to have known, that the Claimant was disabled and that the PCPs would place the Claimant at the disadvantages set out under paragraph 13 below?

11. Did the Respondent apply the following PCPs to the Claimant:

    a. Automatically engaging its recruitment procedures upon receipt of a resignation [PCP conceded by the Respondent – para 40 (a) GOR]

    b. On the 24 July 2015 to the 29 February 2015 requiring employees wishing to take flexible retirement to complete flexible retirement / pension forms

    c. Requiring absent and / or non-engaging employees to confirm (repeatedly on 12, 22 and the 29 February 2016) their willingness to accept a position that they had already indicated a wish to perform

    d. For employees who are absent and / or not engaging, imposing a date by which their employment will terminate.

12. Did the PCP place the Claimant at a substantial disadvantage compared to non-disabled employees, namely on account of her mental impairment:

    In respect of a) – The Claimant (suffering from a mental illness) was more prone to resigning due to confusion / impaired judgement. Further, and in the light of this, reducing the Claimant's prospects of being able to successfully retract her resignation form and thus return to her original post

    In respect of b) – Due to the memory and concentration required to complete the form, which were impaired.

In respect of c) – Due to her mental impairment, the Claimant was less able to make decisions or respond, heightening the risk of termination of employment.

In respect of d) – Due to her mental impairment, the Claimant was less able to make decisions or respond, heightening the risk of termination of employment.

13. Were the following steps reasonable to take and did the Respondent fail to take them?

    a. Disregarding the Claimant's letter to Ms Barron of 24 July 2015;

    b. Permitting the Claimant to retract her letter to Ms Barron of 24 July 2015;

    c. Allowing the Claimant to return to her Band 7 position within ACU, whether on a full-time basis or a part-time basis;

    d. Offering the Claimant another position within ACU (part-time Band 6 role);

    e. Offering the Claimant any of the other positions within the Respondent listed at page 424 of the bundle;

    f. Completing the flexible retirement / pension forms on the Claimant's behalf for her to sign

    g. Allowing the Claimant additional time (beyond 29 February 2016) to formally respond to the Respondent's emails of 22 February 2016 and / or 29 February 2016

    h. Continuing to employ the Claimant

<u>Discrimination arising from disability</u>

14. Did the Respondent dismiss the Claimant (expressly or constructively), such that it treated her unfavourably?

15. Did the reason for the unfavourable treatment arise from:

    a. her sickness absence, i.e. between September 2015 and 29 February 2016;

    b. her failure to reply to Donna Harris' emails of 12, 22 and 29 February 2016 in the terms requested by Ms Harris.

    c. insofar as the Claimant was constructively dismissed, the improvement note issued on 8 July 2015 which arose from the Claimant's conduct on 9 June 2015

16. Did the above arise in consequence of the Claimant's disability?

17. Is the Respondent able to show that by February 2016, it did not know, and could not reasonably have been expected to know, that the Claimant was disabled?

18. Is the Respondent able to show that its treatment of the Claimant was objectively justified?

Jurisdiction

19. Was the Claimant's discrimination claim presented to the Tribunal before the end of the period of three months beginning when the relevant acts complained of were done with reference to s. 123 EA 2010 and s. 140B EA 2010?

20. Do the matters complained of amount to an act extending over a period ending within the period of three months prior to the presentation of the claim?

21. In respect of any alleged failures to do something, when did the person in question make the relevant decision?

22. To the extent that any of the Claimant's discrimination complaints are out of time, would it be just and equitable for the Tribunal to extend the time limit in the circumstances? The Claimant contends that time should be extended on account of her health.

The facts

7 We find the material facts as set out below based upon the above issues. It is not appropriate to record all the evidence we heard, nor to seek to resolve every difference in the evidence. There is in this case very little dispute on the facts.

8 The Claimant started working at St Helier Hospital in 1976, subsequently qualifying as a nurse. She has worked in the Assisted Conception Unit ('ACU') since January 2002. The ACU is part of the Women's and Children's Directorate, and it is the ACU with which these proceedings are principally concerned. The Claimant worked as a Band 7 (formerly F Grade) Fertility Nurse Specialist.

9 The ACU is a small unit. Dr Croucher was the lead Consultant, assisted by two other Consultants and a Registrar. The Claimant was one of two nurses, the other being Lucille Higgins. Matron Barron was technically the immediate line manager of the Claimant. However, because of the specialist nature of the ACU she did not have any day-to-day responsibility for the Claimant or contact with her.

10 The Claimant was employed on a full time basis. The Claimant had not worked on Friday afternoons in her previous post in the Gynaecology Day Surgery Unit. Her then husband needed care at that time. He died in 2008. The Claimant did sometimes work in other areas of the hospital on Friday afternoons as overtime. This arrangement continued when the Claimant moved to the ACU. As the Claimant put it, this arrangement tied in with the work flow patterns in the ACU at the time.

11 The Claimant had two contracts of employment. The first was dated 26 February 1998. The second document in the bundle was undated, but it was agreed that it was issued when the Claimant moved to the ACU. Both had the same provisions as follows:

> **4 Normal hours of work**
> 4.1 Your basic hours of work (exclusive of meal times) will be 37.5 hours per week.
> 4.2 Your normal pattern of work will be arranged as agreed locally.
> 4.3 The Trust will determine and may vary, following consultation with you in its discretion, how your normal hours of work are arranged, and will notify you of these arrangements in writing.

12 The Claimant had a good disciplinary record. There was some vague suggestion about some difficulties with paperwork at an earlier stage, but we have not taken this into account. A difficulty did arise on 9 June 2015. A patient was due to undergo a procedure on the following day, and it was necessary for incubators to be charged in advance of that procedure. They had to be turned on in advance of 10 June 2015 in order to be fully charged for the procedure to be carried out on that day. Nurse Higgins left early on 9 June, and as she was leaving she reminded the Claimant that the incubators needed charging. The Claimant said she would switch them on. It was agreed at this hearing that a failure to charge the incubators meant that the procedure could not be undertaken, and that that was a very serious matter with potential consequences for the patient, and also financial consequences for the Respondent.

13 During the afternoon the Claimant was feeling very unwell. The Claimant had a sudden headache and her vision was distorted. Miss Ding, one of the Consultants in the ACU, advised her to go to A&E immediately. Miss Ding suspected that the Claimant might have meningitis or be having a TIA. The Claimant then went to A&E in the middle of the afternoon before the end of her shift, and unfortunately forgot to charge the incubators. The Claimant was discharged from A&E at about 7 pm and was taken home. She was to undergo further tests.

14 On the following morning the Claimant realised her error in not switching on the incubators and she immediately contacted Dr Croucher. By then it was too late to use the Respondent's incubators, but fortunately alternative arrangements were made for the patient to undergo the procedure elsewhere.

15 The Respondent does of course have a Disciplinary Policy. It includes a provision for the service of an Improvement Notice. That is mentioned in the Summary at the beginning of the document and again in paragraph 18, which reads as follows:

> Where a problem exists with regards to a member of staffs conduct a manager may have an informal discussion with the member of staff. This discussion is intended as a basis for advising staff on conduct concerns. The manager will have an informal meeting with the member of staff and this may be followed up with an informal improvement notice letter to the staff member advising them of the issue(s) discussed and the manager's expectations going forward. Any such letter will not form part of an employee's disciplinary records. Formal steps

> may be taken under this procedure if the matter is not resolved, or if informal discussion is not appropriate (for example, because of the seriousness of the allegation).

16 Dr Croucher decided that an Improvement Notice be given to the Claimant and also to Nurse Higgins as a consequence of the failure to charge the incubators. Dr Croucher asked Matron Barron to serve the notices. That she did on 8 July 2015. The notices were issued in the name of Matron Barron although the decision to issue them was that of Dr Croucher. The letters were based on the precedent in the Disciplinary Policy. There was a brief discussion between Matron Barron and the Claimant before the pre-prepared notice was served, during which the Claimant told Matron Barron about her medical problem and her visit to A&E. Matron Barron had not previously been aware of the point. She wrongly assumed that Dr Croucher had been aware of what the Claimant had just told her.

17 The letter to the Claimant had a heading referring to an informal meeting on 8 July 2015. In the letter Matron Barron stated that the Claimant had failed to charge the incubators, and acknowledged that no harm had come to the patient and that the Claimant had notified the Respondent as soon as she had realised the error. It was noted that there had been a financial loss to the Respondent. The letter stated that as it was a serious oversight the Improvement Notice was issued, and while a copy was to be placed on the Claimant's personal file it was not to form part of her disciplinary records.

18 The Claimant wrote to Matron Barron on 27 July 2015 expressing concern over the issuing of the Notice. She said that there had not been any informal meeting before the Notice was issued, and that under the Disciplinary Policy the Notice was to act as a follow up to such a meeting. She further said that she was particularly aggrieved as if there had been any discussions then it would have been established that she had had to go to A&E and had remained there until about 7 pm. The Claimant made some technical criticisms of the contents of the Notice.

19 The Claimant and Matron Barron then met on 29 July during which the Claimant explained to Matron Barron in more detail what had happened on 9 June 2015. The Claimant told Matron Barron that Dr Croucher had not discussed the matter with her before the Improvement Notice was issued. Matron Barron noted the contents of the meeting in an email to Donna Harris who forwarded it to Dr Croucher. Dr Croucher emailed Ms Harris to say that she thought that the Notice should stand.

20 The Improvement Notice was at some stage rescinded, but none of the Respondent's witnesses were able to tell us exactly how that occurred or when. Ms Harris did consider the matter towards the end of August 2015 when she first discovered that the Claimant had had a brain tumour. Ms Harris was of the view that the Notice should be withdrawn, but did not consider informing the Claimant because, as she put it, the Claimant 'had far more challenging issues to consider'. The first that the Claimant knew of the rescission of the Notice was when she received the email of

12 February 2016 from Ms Harris mentioned below. Two paragraphs reads as follows:

> With respect to the Improvement Notice, this was issued prior to an understanding of your illness and therefore this could not, at that time, be considered as mitigation for your failure to act. Your letter of appeal, regarding your improvement notice was received by shortly after we became aware that you have been diagnosed with a brain tumour. I can confirm, that had we been aware of your current illness, as the point at which your improvement notice was issued that we would have considered this as mitigation for your failure to act.
>
> Due to the nature of your diagnosis, we felt it would have been insensitive to have communicated that the improvement notice no longer stood whilst you were undergoing treatment, and during your ongoing recovery. However I can confirm that this improvement notice has been retracted and removed from your records.

21 The ACU was expanding in 2015, although we were not provided with full details. A new laboratory was being constructed on the hospital site. There was a department meeting, probably on 24 June 2015, at which Dr Croucher raised the issue of the ACU having to have better coverage on Fridays. There was no detailed discussion of any changes. The Claimant did not object at the time, but said that any change should be shared. There were two further informal or *ad hoc* discussions between the Claimant and Dr Croucher. The issue was whether the Claimant was to have another half day on a fixed day of the week, or whether the half day was to rotate. The difference is in fact not material as it is not part of the Claimant's case.

22 Dr Croucher wrote to the Claimant on 2 July 2015 as follows:

> In was good to meet with you on Tuesday and discuss things further on Wednesday in theatre. I offered you the option of a set 1/2 day in keeping with your 37.5 hours per week, on either Tuesday or Thursday. You declined this and opted instead for a rotation of your half day throughout the week. So you can make plans attached to this letter is your half day rotation for 2015 and 2016. To give you notice of the change this will start from the 1st September.

23 The Claimant did not respond to that letter stating that she objected to the change in principle, nor that she had not elected for the rotation option.

24 The Respondent has a Retirement Policy. The relevant part relates to Flexible Retirement. The concept is that an employee resigns from employment with the Respondent, has a break of at least two weeks, and then returns on a part-time basis. That is usually to the same role, or a similar role, but on a reduced hours basis. The employee can then draw the NHS pension after retirement. There is a procedure set out in the policy for the employee to inform the line manager of what is desired, and then for there to be discussions. The Claimant sought a form of flexible retirement, but not in accordance with the policy.

25 Miss Barrett relied upon part of paragraph 28 of the policy:

> If the request is approved, the manager must complete the relevant forms and ensure that they have been signed off/authorised. The forms are:
>
> **Leavers Form** – Managers should complete the Leavers Form, clearly stating **flexible retirement** as the reason for leaving and send the form to HR. HR will ensure that the relevant

> details are forwarded to the Payroll Section and NHS Pensions who will, in turn, ensure that all the necessary processes are completed with regard to terminating the individual's current employment with the Trust and processing the pension application. The Pensions team will provide all the necessary information and support. There must be a break in service of at least two weeks before the individual can start a new contract with the Trust.
>
> **Starter Form** – Manager must complete a starter form to confirm that the individual will be returning to the Trust in a new role on a substantive basis and to provide the relevant details. This form must be completed so that the Human Resources and Payroll Departments can officially re-start the individual as a Trust employee.

26 That is very clear as to the process to be followed under the Policy. The Claimant adopted a different procedure. On 24 July 2015 she wrote two letters. One was to Matron Barron. After referring to a conversation and the Claimant's wish to take flexible retirement, the material part of the letter is as follows:

> Therefore, please accept this letter as formal notification of this intention, with a view to commencing work in the part-time post, co-terminus with my retirement and effective resignation from my current post of Fertility Nurse Specialist (Band 7) in the Assisted Conception Unit at St Helier's Hospital.
>
> I understand that I need to give three months notice of this intended action and therefore this notice period should commence on the date of this letter.

27 The Claimant also wrote to Matron Stedeford, who was responsible for the Theatre, as follows:

> As discussed last week, I have now informed the Trust of my intention to take flexible retirement at the end of my 3 month Notice period, as identified in the attached letter to Heidi Baron.
>
> Therefore, I should be able to take up the offer of part-time employment you have made, and I accept, for the post of Theatre Nurse Grade 6 working 2 eight hour shifts, or as otherwise agreed.

28 We find that the service of the Improvement Notice and the change to the rota each contributed to the Claimant's decision to resign from the ACU and move to a theatre role on a flexible retirement basis.

29 Following receipt of the letter from the Claimant on 29 July 2015 Matron Barron notified Dr Croucher and others that the Claimant would be leaving the ACU on 6 December 2015. She had prepared a Recruitment Approval Form, advertisement and job description so as to replace the Claimant.

30 The Claimant was diagnosed on 25 August 2015 with a brain tumour. She immediately telephoned Dr Ding, one of the Consultants in the ACU, to inform her of the diagnosis. She underwent an operation to remove the tumour on 1 October 2015, and was discharged from hospital on 8 October 2015. She was subsequently issued with forms Med3, of which the last in the bundle covers a period of two months from 22 February 2016.

31 We have to set out the resulting correspondence in some detail. Mr Starling wrote to Mr Rutt on 10 September 2015. Mr Rutt is a pensions adviser who works for the Respondent once a fortnight or so.[1] Mr Starling said that the Claimant was on certified sick leave, and asked for advice on her position in relation to her employment status and pension. Mrs Manley wrote to Matron Barron on 18 September 2015 as follows:

> In relation to [the Claimant] and her LTS, she was due to retire on 6th December 2015 and commence with surgery as part of flexible retirement arrangement.
>
> I do not want to put any additional pressure on her due to her diagnosis, but as she has [not] sent off her pension forms we will need to discuss this arrangement and confirm it still stands.[2]

32 There was an exchange of emails between Mr Starling and Sally Sivas, Head of Midwifery, on 2 October 2015, principally about the health of the Claimant. In his email Mr Starling said the following:

> Would it be possible for you to advise me (or provide a contact name if not) on how this impacts on [the Claimant's] Notice period and retirement plans, obviously this couldn't have happened at a worse time in this respect and I'm unsure on how to proceed.

33 Ms Sivas replied saying that Ms Harris would advise on the matter. In fact Ms Manley wrote to Mr Starling on 6 October 2015 as follows:

> In terms of her plans for her flexible retirement, [the Claimant] had planned, prior to her diagnosis to leave her post in Assisted Conception on 6th December 2015, take a four-week break and return to the Surgical Directorate in January 2016.
>
> [The Claimant] would have received forms to complete in relation to advising the pensions agency of her wish to claim her pension and I have confirmation that these were posted to her on 31 July 2015. The pensions agency have advised they have not received the completed forms back as yet.
>
> Please do keep me posted as to whether the plan for flexible retirement still stands or may change depending upon [the Claimant's] recovery.

34 Mr Starling wrote to Ms Manley on 2 November 2015. The relevant paragraph is as follows:

> My understanding of these circumstances on her planned retirement and Notice period is that, this will be held in abeyance until she is considered to be fit to return to work.

35 Ms Manley replied to that letter on 10 November. She said that the Claimant would remain on sick leave for the time being. She added:

> As you are aware [the Claimant] has notified us her intention to leave her current post on 6 December 2015 and moved to Surgery to take up flexible retirement. I will link with my Surgery colleagues regarding the current situation and the way forward.

36 Mr Starling wrote to Mr Rutt also on 2 November 2015 setting out the history of the Claimant's illness, and then saying as follows:

> Your advice on the implications of this on [the Claimant's] pension position would be appreciated, as I am now also aware that the necessary paperwork has not been submitted to the NHS Pension Organisation (although as she is on extended sick leave this may be of less

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[1] We are unsure of his exact status, but that is not relevant.
[2] The word 'not' was omitted from the email but it was agreed that that was an error.

> importance), and presumably, as is my understanding, her Notice period is held in abeyance until she is fit to return to work – can you confirm this?

37 Mr Rutt replied on 18 November 2015 confirming that the last day of service would be 6 December 2015, and he suggested that the Claimant complete the necessary pension forms without delay. To that Mr Starling then wrote:

> Thanks for the information, at the moment I am advised by the Hospital's HR team, that she is taken as being on certificated sick leave, and effectively her notice period is stayed.

38 Mr Rutt wrote to Ms Manley on 18 November 2015 reporting what Mr Starling had said, to which she replied:

> We have advised Mr Starling that we are currently managing [the Claimant's] long-term sickness absence but we are taking advice as to how to manage this going forward as her leaving date is 9.12.15 and we cannot retract her resignation as her post has already been recruited too. We have not confirmed her leaving date is "stayed".

39 An Occupational Health report was obtained dated 18 November 2015 advising as follows:

> At the moment [the Claimant] is not fit to return to work to do any kind of duties. We have discussed the options returning to work, flexible retirement and ill-health retirement and at the moment it is too early in her recovery for [the Claimant] to make any decision.

40 Following receipt of that report Ms Manley wrote to Mr Starling on 26 November 2015:

> To confirm that as [the Claimant] had resigned from her post in the Assisted Conception Unit and her leaving dated 6 December 2015, we are unable to retract her resignation from this post as the recruitment team are actively filling the vacancy.

41 After referring to the completion of the pension forms Ms Manley added the following:

> To enable [the Claimant] to get the forms completed and returned, we are happy to support an extension to her leaving date until the end of January 2016 (31 January 2016) where she will remain on our payroll on sick leave, with her current contractual hours.

42 Mr Starling then replied on the same day:

> Thank you for this update, however, there does appear to be a contradiction between this and your previous advice – viz. that while [the Claimant] is on certificated sick leave the position would effectively be that the Notice period was suspended. To aid our understanding of this matter would you please provide a copy of your formal policy in relation to this apparent issue.

43 To that Ms Manley replied on 8 December and the relevant parts of that letter are as follows:

> As stated in my previous communication we are unable to retract [the Claimant's] resignation from this post, however I can assure you that the offer of a post following Flexible Retirement remains in place and our Occupational Health Services will continue to advise us regarding the most appropriate time for a return to work programme.
>
> Given the difficult circumstances, we feel it is appropriate to extend [the Claimant's] retirement date by a further month (previously agreed 31 January 2016) to 29 February 2016. I would like to stress the importance of completing the AW8 Pension Form that have been sent to [her] and stating the new extended retirement date of 29.2.16, to prevent delay of pension payment.

> In the event that [the Claimant] remains unwell following her leaving date of 29th February 2016, then sick pay arrangements will recommence following a two-week break in service in line with our Flexible Retirement arrangements from 15th March 2016, in the new Surgical role on the newly agreed hours at Band 6, until such a time that Occupational Health provide advice on a return to work programme to Theatres.
>
> In summary we are eager to ensure we are sympathetic to the circumstances that you currently face, however we are unable to continue to extend [the Claimant's] leaving date in light of the fact that she has resigned from her post and will now need to complete the relevant joining forms to enable her to continue to be an employee of the Trust, within the Surgical Directorate as previously agreed.
>
> I would like to apologise if I have caused any distress in communicating these arrangements to you and would like to offer the opportunity to meet with you to discuss the way forward or offering support in completing the AW8 pension forms. Please do not hesitate to contact me should you require any further information. I would also like to remind you that Michael Rutt remains available to discuss pension arrangements.

44 A further OH report was obtained on 10 December 2015 stating that the Claimant had not discounted returning to work but she was not fit for any duties at the time.

45 A report was provided to the Claimant's GP by Mr Andrew Martin, a Consultant Neurosurgeon, dated 14 December 2015. A copy was sent to Ms Manley by Mr Starling on 18 December with the email mentioned below. The relevant paragraph for the purposes of this claim is as follows:

> She is beginning to consider a return to work and despite having loved her previous job as a Clinical Nurse Specialist, is keen on the idea of resuming her old role as a theatre nurse, probably on a part-time basis. Although she had resigned from her previous job at a time when she felt she could no longer cope, this was clearly on the basis of her organic pathology and if in the future she wishes to return to her CNS post I suspect that she would have a very good case to make.

46 Mr Starling replied to Ms Manley on 18 December 2015. He referred to the OH advice, and also attached a copy of Mr Martin's report. There then follow two important paragraphs:

> In the circumstances identified (notwithstanding that I have not yet, as requested, had sight of the Trusts Policy on these matters), it would seem sensible to move on and consider [the Claimant's] future employment arrangements. To that end, the proposals and option you identify in your email dated 8 December around her move to a post within the Surgical Directorate, after 29 February, is accepted.
>
> However, [the Claimant] will need assistance with the completion of the various employment and pensions forms, as you suggest.

47 There was a casual meeting between the Claimant and Ms Manley at some stage in December 2015 before Christmas when there was a brief discussion about completion of the retirement forms. The Claimant was in the building in connection with an OH appointment and, as she put it, she 'popped up' to Ms Manley's room. Ms Manley said that she would seek to assist the Claimant and there was a loose arrangement to meet in the New Year. Such meeting did not take place. We accept that the

Claimant may also have tried to meet Mr Rutt, but without success because of the limited number of days he works for the Respondent.

48 An important letter was then sent to Matron Barron by the Claimant on 4 February 2016. It is necessary to cite a substantial part of it.

> Further to previous correspondence on my illness, operation and surrounding issues. I note, in particular, that I have yet to receive a response to the letter sent to you on the 27 July 2015 concerning an "Improvement Notice" issued by you on the 8 July 2015 on the instructions of Dr Croucher.
>
> This was a matter, as the letter identifies, which caused (and continues to cause) me much stress and on which I feel particularly aggrieved and was an issue, aggravated by my illness, which very much influenced my decision to leave.
>
> I have now recovered sufficiently to properly consider my future and feel that my decision to leave, issued to a greater extent under duress and the stress of my illness, together with its surrounding circumstances, was an ill considered reaction taken at a time were my judgement was significantly impaired by illness.

The Claimant then referred to the report by Mr Martin. She continued as follows:

> I therefore wish to advise you that I am withdrawing my letter of 24 July 2015, informing you of my resignation and as a result will not be resigning on the 29th February 2016.

49 Ms Harris replied to that letter by email to Mr Starling on 12 February 2016, and we have already mentioned it above. In summary it made two points in addition to the one already mentioned. The first point was that the resignation could not be retracted as there were no current vacancies. The second was that the Respondent was happy to keep the offer of the Band 6 Theatre post open, but confirmation of the Claimant's intentions were requested.

50 Mr Starling responded on 22 February saying that the letter from Ms Harris did not accurately reflect the circumstances and was disingenuous. He concluded by saying:

> Your response, on any reasonable reading of these facts, is unfortunate, and raises a number of matters I must more carefully consider and respond in due course.

51 Ms Harris replied on 22 February reiterating the Respondent's position, and saying that the Respondent needed to know the Claimant's intentions by the end of the month at the latest. On 29 February at 14:28 Ms Harris sent a further email stating that the Claimant's employment with the Respondent would end that day unless feedback was received concerning the post in Surgery.

52 There was no further contact that day, but on 1 February 2016 Mr Starling sent an email saying that a grievance was being registered. It is not necessary to record anything further concerning the grievance process save to say that the Claimant declined to attend a hearing on 6 June 2016, and the grievance was not pursued.

53 The Claimant saw Mr Martin again on 13 April 2016 and his report to the Claimant's GP states that she felt 'that she is entirely back to her normal

self.' The Claimant started work for the Respondent again on a bank / casual basis from 18 October 2016.

54 As mentioned, there is an issue as to completion of forms, and the forms in question are the NHS pension forms. We were in the end shown the form and guidance note in question.[3] Parts 1 – 6 are to be completed by the employer, and Parts 7 – 15 by the employee. Some sections are very simple, such as the employee's name and address and other formal details, and details of the bank account into which the pension is to be paid. Others, particularly Parts 10 and 12, are complex and in our view require financial advice. They are certainly not suitable for completion by Ms Harris on the Claimant's behalf.

The Equality Act 2010

55 The relevant provisions of the 2010 Act, apart from those relating to time limits, are set out below.

> **15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
>
> **20 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.
>
> **Schedule 8**
> **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 other case referred to in this Part 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.

Submissions

56 Each of Miss Barrett and Mr Harris provided written submissions to which they spoke. We will refer to those submissions below as appropriate. Miss Barrett referred to the following authorities:

[3] Pages 746-761 of the bundle.

United Bank Ltd v Akhtar [1989] IRLR 507, EAT
UB (Ross Youngs) Ltd v Elsworthy EAT/264/91
Braganza v BP Shipping Ltd [2015] UKSC 17; [2015] 1 WLR 1661
Buckland v Bournemouth University [2010] EWCA Civ 121; [2011] QB 323
Wright v North Ayrshire Council [2014] ICR 77, EAT(S)
Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, [2016] IRLR 216
Lamb v The Business Academy Bexley UKEAT/0226/15/JOJ
British Airways Plc v Starmer [2005] IRLR 863, EAT
Cosgrove v Caesar & Howie [2001] IRLR 653, EAT
Project Management Institute v Latif [2007] IRLR 579, EAT
Hinsley v Chief Constable of West Mercia UKEAT/0200/10/DM
Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, EAT
Risby v Waltham Forest LBC UKEAT/0318/15/DM
City of York Council v Grosset UKEAT/0015/16/BA

Discussion and conclusion

57 We considered the various issues following the order set out in the agreed list of issues.

Cessation of employment

58 There was no dispute that the Claimant's employment ended on 29 February 2016. Miss Barrett for the Claimant submitted that the employment ended as a consequence of one of the emails of 12, 22 or February 2016. She accepted that if the employment in the ACU had in fact ended on 6 December 2015 then it would have been as a consequence of the Claimant's resignation. By 29 February 2016 the position was, she said, 'not so clear'. She submitted that the employment ended on a date chosen by the Respondent and that that was the effective cause of the termination. She referred to an unreported case (*Senews Ltd v. Baker* UKEAT/318/87) which is very briefly summarised in an IDS Employment Law Handbook.

59 Mr Harris disagreed. He pointed out that the Claimant had exercised her right to give notice of termination and that the extensions offered by the Respondent were accepted by the Claimant. It was not a correct analysis, he said, that such offers had the effect of rescinding the Claimant's notice, and create a fresh notice (or notices) by the Respondent.

60 We have recorded that it was not disputed that the contract continued beyond 6 December 2015 and ended on 29 February 2016. The question as to how and when the contract of employment ended is a matter of contract law. The legal position in not too dissimilar circumstances was helpfully summarised by HHJ Peter Clark in *Willetts v. The Jennifer Trust for Spinal Muscular Atrophy* UKEAT/0282/11 as follows:

> . . . as a matter of law, notice once given by an employee cannot be unilaterally withdrawn (see **Harris and Russell Ltd v Slingsby** [1973] ICR 454) but it can, during the operational period of that notice be extended (see **Mowlem Northern Ltd v Watson** [1990] ICR 751) or shortened (see **Palfrey v Transco** [2004] IRLR 916) by agreement between the parties. What the parties

cannot agree is a retrospective EDT (see **Fitzgerald v University of Kent at Canterbury** [2004] IRLR 300).

61 The Claimant gave three months' notice by her letter of 24 July 2015. For reasons of which are we not aware, and which were not explored at this hearing, that notice was treated as expiring on 6 December 2015. We have set out a summary of the subsequent correspondence above and do not intend to repeat it here. We conclude that before 6 December 2015 there was no express agreement that the notice be rescinded, nor any express agreement that it be extended. What Mrs Manley did do on 26 November 2015 was to offer to extend the notice period to 31 January 2016. In his reply of the same day Mr Starling referred to the notice period as having been suspended. We find that there was no specific agreement that there should be any 'suspension' of the notice period, whatever that might mean.

62 The date of 6 December 2015 came and went. The Claimant continued to receive sick pay from the Respondent. She did not assert that her notice had expired and therefore her employment had ended. The Respondent did not maintain either that the contract had ended. We conclude that by her action (or inaction) the Claimant had accepted the offer of the Respondent to extend the notice period to 31 January 2016.

63 Then what occurred was that on 8 December 2016 Mrs Manley offered a further extension of the notice period to 29 February 2016. That offer was explicitly accepted by the Claimant through her husband in the email of 18 December 2015. The contractual date of the termination of the Claimant's employment in the ACU therefore became 29 February 2016. The employment ended on that date as a consequence of the giving of notice by the Claimant, and the employment was not terminated by the employer. The Claimant was not therefore dismissed by the Respondent within section 95(1)(a) of the Employment Rights Act 1996.

Does section 95(1)(c) apply?

64 The next issue is therefore whether the Claimant was entitled to give notice so that there was a dismissal within section 95(1)(c) of the Employment Rights Act 1996. We were referred by both Miss Barrett and Mr Harris to *Western Excavating (ECC) Ltd* relating to the concept of a repudiatory breach, and to *Malik* relating to the implied term as to mutual trust and confidence. Those authorities are well known and we will not set out any extracts from them.

65 The term implied into all contracts of employment is that neither party must without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. The function of the Tribunal in such circumstances is to look objectively at the employer's conduct as a whole, and decide whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. Any breach of such term is of necessity a fundamental breach. The conduct amounting to a breach of that term may be a series

of actions which cumulatively amount to a repudiation of the contract by the employer.

66 There are two alleged breaches in question. The first relates to the change of the rota, and the second to the issuing of the Improvement Notice. There may be some ambiguity in the way that the list of issues has been drafted, in that the reference to the implied term is only in connection with the issuing of the Improvement Notice, and not the change of the rota. Both counsel appeared to accept that each matter was said to be a breach of the implied term.

67 We will consider each alleged breach in the order set out in the list of issues. Miss Barrett submitted that there was a breach of clause 4.3 of the contract of employment because there was a lack of consultation, and that the decision was irrational because the Respondent failed to take into account relevant factors, those factors being her long established work pattern, the failure to investigate the impact on the Claimant of her working on Friday afternoons, and the lack of a fair allocation across the team. Miss Barrett also submitted that this was a breach of the implied term. She referred to *Elsworthy* and *Braganza* but without drawing our attention to any particular passages.

68 Mr Harris submitted that there had not been any breach of the express contractual provision. He said that there was no requirement to negotiate with the Claimant, and that any consultation was to be at the Respondent's discretion. Further, he pointed out that Dr Croucher thought that the Claimant had agreed to the change,[4] and that in fact she did not object to it.

69 We do not find *Elsworthy* of any assistance. It was clearly a case decided upon its particular facts, and the issue before the Employment Appeal Tribunal was whether the Employment Tribunal had been entitled to conclude as it did. We also consider *Braganza* not to be relevant to these circumstances. That case involved consideration of the *Wednesbury* principle or the principles applicable to judicial review. This is not a case where the decision was 'so unreasonable that no reasonable employer could have come to it.'[5]

70 We now look at whether there was an actual breach of the express term in clause 4.3. We have found that after the general staff meeting when the issue was raised in principle there were two occasions when there were discussions between the Claimant and Dr Croucher, although they were not formal discussions. The extent of any consultation was to be decided by the Respondent in its discretion. The consultation or discussions could be described as 'thin', but the change did not come simply out of the blue. We find that there was no actual breach of contract. The Respondent had a discretion to vary the hours of work, and it did do so. We return to the rota issue below.

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[4] See the letter of 2 July 2015
[5] Quoting from paragraph 15 of Miss Barrett's submissions.

71 It was agreed that the failure to charge two incubators was a serious failing and could have resulted in more formal disciplinary action rather than the issuing of an Improvement Notice. Miss Barrett submitted that it had been issued without reasonable and proper cause and that the Claimant was not culpable. Further, it was issued before there had been a discussion with the Claimant. That, said Miss Barrett, constituted a breach of the implied term.

72 Mr Harris submitted that the issuing of the Notice was entirely appropriate because of the seriousness of the incident. Further, Matron Barron met the Claimant and discussed what had happened with her. He drew attention to the comment in the Claimant's witness statement that she had not been given a chance to defend herself, and that her complaint was about the procedure. He submitted that Matron Barron had in fact discussed the matter with the Claimant.

73 Mr Harris also submitted that it was difficult for the Claimant to argue that there had been a fundamental breach of trust and confidence in circumstances where she had later sought to return to work in the ACU.

74 We agree with Mr Harris that the complaint by the Claimant is really that the Notice was issued without there having been a prior discussion with the Claimant. We conclude that it would clearly have been preferable for Dr Croucher or Matron Barron to have had a discussion with each of the Claimant and Nurse Higgins to find out what had occurred before deciding to issue the Notice. That accords with the spirit of the policy. What we have to decide is whether the failure to do so in the circumstances amounted to a breach of the implied term.

75 We have considered this matter with particular care. It is not straightforward and involves a judgement as to whether what occurred was likely to destroy or seriously damage the trust and confidence which the Claimant had in the Respondent. Clearly the Respondent had no intention so to do. We acknowledge that the incident was a serious one. Our concern is that Dr Croucher did not make any effort to ascertain from the Claimant what had occurred. Dr Croucher's witness statement refers in paragraph 6 to having been told by Dr Ding that the Claimant had attended A&E with a headache. We do not know what Dr Croucher was in fact told, but the Claimant's symptoms were such that Dr Ding thought the Claimant may have had meningitis or that she was having a TIA. Dr Croucher would have found that out if she had discussed the matter with the Claimant. We have also noted that the Notice was in fact at some stage rescinded, and we note the evidence of Ms Harris and the contents of the email of 12 February 2016. We have also taken account of the fact that the tumour had not been diagnosed at the date that the Notice was issued. The important point is that the Claimant had been advised to go to A&E straight away on the basis that a serious illness of some kind was suspected. The precise nature of the ultimate diagnosis is not relevant to the position as at 9 June 2015.

76 We have concluded that what the Respondent did was likely seriously to damage the trust and confidence which the Claimant had in it. The

Respondent's policy clearly anticipates that there will be an informal meeting with the employee before a decision is made to issue a Notice. If there had been such a meeting then Dr Croucher (or Matron Barron) would have been fully informed of what had occurred, and would have been able to make a decision in full knowledge of the facts. The Notice was prepared without there having been such a meeting.

77 The serving of a Notice is said in paragraph 18 of the disciplinary policy not to form part of the employee's disciplinary records, but the procedure forms part of the disciplinary policy. Further, in the introductory para' a clear link is made between the issuing of such a Notice and the more formal procedure:

> The formal disciplinary procedure will begin when this informal discussion and subsequent improvement notice had failed to achieve the desired effect or when an offense is serious enough to warrant formal action.

78 It is of the essence of fairness that appropriate enquiries be made before any disciplinary sanction is imposed. Although not considering the issue of fairness within section 98(4) of the 1976 Act at this stage, we do consider that point to be a material one when considering the issue as to whether there had been a breach of the implied term. Further, the Claimant had been employed for nearly 40 years. There had not been any previous disciplinary incidents. She was entitled to receive better treatment than this.

79 There is the further point raised by Mr Harris that the Claimant sought to return to work in the ACU. We are required to consider the actions of the Respondent in July 2015 on an objective basis, and our conclusions are set out above. We have also concluded that the Claimant resigned partly as a result of the service of the Improvement Notice. The fact that the Claimant later sought to return to work in the ACU does not affect the decision we have made. The Claimant explained to us her nervousness about returning to work in the Theatre as a Band 6, and we can understand her reasons for seeking to return to the ACU despite what had occurred.

80 Mr Harris did not press the next point in the list of issues as to any affirmation of the contract by the Claimant by delay or other conduct. The delay was minimal – a matter of 16 days. During that time the Claimant had discussions about the possibility of a move to Theatre.

81 We therefore conclude that there was a dismissal within section 95(1)(c) of the 1996 Act.

<u>Reason for the dismissal and fairness</u>

82 In the response the Respondent maintained that the statutory category of the reason for the dismissal was some other substantial reason within section 98(1)(b) of the Employment Rights Act 1996, and that it was fair. The issue was not addressed in Mr Harris' written submissions. In oral submissions he said that the reason was that the Respondent understood that the Claimant wished to retire, and come back to work in a different role. That submission could in our view only be relevant if we

had found that there had been an actual dismissal, which we have found did not occur.

83 We therefore find that the dismissal was unfair.

Wrongful dismissal

84 This claim cannot succeed. The employment ended pursuant to the notice given by the Claimant as subsequently extended by agreement. The Claimant was paid throughout her notice period at full pay.

Reasonable adjustments

85 We find that the Respondent became aware of the Claimant's impairment and that the Claimant was a disabled person from 25 August 2015. Further we find that the Respondent could not reasonably have been expected to know of that fact any earlier. Between 9 June and 25 August 2015 the Claimant was undergoing tests. The duty under section 20 therefore arose on 25 August 2015.

86 It is well established that the Tribunal must approach such claims in a systematic way in accordance with the provisions section 20 of the 2010 Act. The Tribunal must first of all find that there was a provision, criterion or practice ('PCP'), then that it caused a substantial disadvantage to the claimant, before considering whether any adjustments ought to have been made to reduce or remove that disadvantage.

87 The list of issues sets out four alleged PCPs and one alleged disadvantage in respect of each. There are eight adjustments suggested. We will deal with each PCP and alleged disadvantage first, and then consider if necessary each of the adjustments.

88 The first alleged PCP is of the Respondent automatically engaging its recruitment procedures upon receipt of a resignation. Mr Harris accepted that there was such a PCP. Miss Barrett submitted that the disadvantage was confusion and impaired judgment affecting the decision to resign, and she drew the attention of the Tribunal to the Claimant's letter of 4 February 2016, and the letter from Mr Martin of 14 December 2015. She said that the further disadvantage was of being under a notice period when going on long-term sick leave. We note that that is different from alleged disadvantage in paragraph 12 of the list of issues.

89 Mr Harris submitted that what the Tribunal was being asked to decide as a fact was whether the Claimant resigned due to confusion or impaired judgement, and that that was not in accordance with the evidence, both written and oral. He said that the Claimant had confirmed that she had been considering resigning for some time, that she had discussed the matter with her husband, and had confirmed that after conversations with Matron Stedeford that flexible retirement was a good idea. Mr Harris correctly submitted that the statement in Mr Martin's letter of 14 December 2015 was not tendered as expert evidence, and that it appeared to be no more than a passing remark.

90 Our conclusions on this point are as follows. The reasons put forward by the Claimant for her resignation were the issuing of the Improvement

Notice, and the change in the rota. Those reasons do not fit altogether comfortably with the bald statement by Mr Martin that the Claimant 'could no longer cope'. We are not persuaded on the evidence that the impairment which the Claimant had when she wrote her letters on 24 July 2015, and during the conversations which she had been having with Matron Stedeford preceding the writing of those letters, had any influence on the Claimant's decision to resign and seek to move to be a Theatre Nurse. We therefore find that the Claimant was not at a substantial disadvantage by reason of the PCP.

91 We were also addressed on the issue of reasonable adjustments, and we have considered the matter. The first proposed adjustment was to ignore the letter of 24 July 2015. We do not accept that point for two reasons. The first is that the Respondent was not under any duty at that date as it had not been made aware of the disability. The second is that it would simply be quite wrong for an employer to ignore such a letter. The second, third and fourth matters proposed were that the Respondent should have allowed the Claimant to retract the letter and return to work in the ACU possibly on a part-time basis. We accept that agreeing to a request to retract a resignation could be a reasonable adjustment – *Hinsley*. Miss Barrett sought to persuade us by an analysis of various documents that there was some money available in the ACU budget amounting to 0.14 FTE, and that the Claimant should have been offered part-time work. We are wholly unpersuaded. We are satisfied that the Claimant's role had been filled by 4 February 2016, and further she did not express any interest in anything less that her pre-existing role in ACU. She did not give evidence at this hearing that she would have been prepared to return on such a limited basis. We bear in mind that she had been intending to move to Theatre duties on about a 0.4 basis.

92 The second alleged PCP was that the Respondent required employees wishing to take flexible retirement to complete flexible retirement / pension forms. There was mention during this hearing generally of 'forms', but in the end it was agreed that the forms in question related to the occupational NHS pension and neither counsel referred to the Respondent's own flexible retirement policy forms in this connection.

93 Mr Harris submitted that the requirement to complete the form was not that of the Respondent but that of NHS Pensions. Miss Barrett submitted that that was splitting hairs, and that the Respondent imposed the requirement. She referred to paragraph 28 of the Retirement Policy. We are entirely with Mr Harris on this point. If the Claimant wished to draw her pension then she had to complete the forms required by the pension provider. The overall evidence was clear in that the Respondent was quite properly and entirely reasonably seeking to assist the Claimant to ensure that she did not have a period after the cessation of her employment without income before she drew her pension. The Respondent was encouraging her to complete the forms for her benefit. There was no requirement placed upon her. Paragraph 28 of the Retirement Policy is not on the point.

94 Further we are not satisfied that the Claimant was at any substantial disadvantage in connection with the completion of such forms by comparison with a non-disabled person at the material time. Also it would have been wholly inappropriate for anyone in the Respondent to seek to complete them, save for basic details available from the Claimant's personal file. The forms are complex, and require detailed knowledge of the individual's financial affairs.

95 The next alleged PCP is that absent or non-engaging employees were required to confirm their willingness to accept a position that she had indicated a wish to perform. Miss Barrett relied upon *British Airways* as relating to a one-off or discretionary decision. Mr Harris submitted that there was no PCP, and that all the Respondent was doing was requiring confirmation as to whether or not the Claimant intended to take up the position in surgery which she had sought in July 2015 following the receipt of the email of 4 February 2016.

96 The PCP as formulated in the list of issues does not entirely accord with what actually occurred. It ignores the very important fact that on 4 February 2016 the Claimant had sought to resile from having resigned from her ACU post and be moved to Theatre. Miss Barrett also failed to mention that letter in her submissions. This was not a case where an employee had simply stated that they agreed to take a new post, and then the Respondent kept asking her for further confirmation of the decision. We accept that in the circumstances prevailing in this case the Respondent would have adopted exactly the same procedure if the Claimant had not been a disabled person, and therefore there was a PCP. We do not accept that there was a substantial disadvantage accruing to the Claimant as a disabled person. We did not have the evidence. Further, we do not accept that it was reasonable for the Respondent to provide further time to the Claimant. It is not possible for any employer to keep a post open indefinitely, and we can understand that it is particularly important to ensure that an operating theatre is fully staffed. The Claimant had been asked on 12 February 2016 to inform the Respondent of her intentions. She did not do so. There was no indication from as to when she would indicate her intentions.

97 The final PCP is that a date is imposed on absent or non-engaging employees for the termination of employment. Mr Harris submitted that there was no such PCP. The Claimant had given notice creating a termination date. Extensions had been proposed and the final extension to 29 February 2016 was not imposed by the Respondent but offered and accepted. There was no general PCP he said. Miss Barrett submitted that it was the Respondent that decided upon the date. As a matter of fact it is of course true that it was the Respondent which proposed the final date, and that date was agreed by the Claimant through her husband.

98 This alleged PCP in our judgement also misrepresents what actually occurred. This was not simply a case where an employee was 'absent and/or not engaging' and the Respondent imposed a termination date.

As already set out it was the Claimant who initiated the termination of employment and the termination date was subsequently extended by agreement between the parties, although initiated by the Respondent. The PCP as identified in the list of issues was not applied to the Claimant.

Section 15 claim

99 We can deal with this relatively briefly. In considering this head of claim the Tribunal has to find that there was unfavourable treatment. The unfavourable treatment alleged was a dismissal by the Respondent. Miss Barrett submitted that the Tribunal's findings on express or constructive dismissal will determine this question. As we understand it, Miss Barrett was accepting that the Tribunal would have to find that there was an express dismissal before section 15 could come into play. We have found that there was a constructive dismissal caused at least materially by the service of the Improvement Notice on 8 July 2015. We have considered section 15 in that context. The Claimant gave her notice on 24 July 2015. At that time the Respondent was not aware of the Claimant's disability.

Jurisdiction

100 It was accepted by Miss Barrett that matters occurring before 23 February 2016 were *prima facie* outside the statutory time limit as extended by the ACAS early conciliation process. She submitted that what occurred amounted to an act extending over a period, and we were referred to the well-known passage in *Hendricks*. In the alternative Miss Barrett submitted that time ought to be extended under the just and equitable principle. Mr Harris did not make substantial submissions on the point and left the matter to be decided by the Tribunal.

101 The claim of unfair dismissal was presented in time, in fact on the last day according to our calculations. We have found against the Claimant on the merits of the claims under the 2010 Act, and therefore we did not consider the question of jurisdiction.

Employment Judge Baron
Dated 09 October 2017