EMPLOYMENT TRIBUNALS

Claimant: Mr H E Brook

Respondent: Capita Customer Management plc

HELD AT: Leeds **ON:** 14, 15 16 February 2018, 3 April 2018, 24 25 April 2018

BEFORE: Employment Judge D N Jones
Mr R Grasby
Ms J Noble

REPRESENTATION:

Claimant: In person
Respondent: J Gidney, counsel

JUDGMENT

The Tribunal holds, unanimously:

1. The respondent discriminated against the claimant in breach of section 21 of the Equality Act 2010 (EqA), by failing to provide him with auxiliary aids for the period from 9 December 2016 to 28 February 2017.

2. The complaints of breach of section 21 of the EqA for earlier periods are out of time and are dismissed, the Tribunal considering it is not just and equitable to entertain them.

3. The complaints that the claimant was unfavourably treated because of something arising in consequence of his disability and harassment are dismissed.

4. The claimant resigned as a consequence of a fundamental breach of contract, the implied term of trust and confidence.

5. The dismissal was unfair and discriminatory. It was not reasonably practicable for the claimant to present his complaint of unfair dismissal within the normal time limit and he presented it within a reasonable period thereafter. It is just and

equitable to consider the claim that his dismissal was discriminatory albeit it was presented outside the normal time limit.

REASONS

Background/findings of fact

1. On 15 January 2007, the claimant commenced employment with Telefonica as a technical adviser. His employment transferred to the respondent in July 2013. On 15 February 2017 he resigned, for health reasons. He informed his manager that he felt he could no longer stay at the respondent due to the stress caused by the management and the impact it was having upon him.

2. The claimant has fibromyalgia. It is a disability and he is a disabled person for the purposes of the EqA. The respondent, and its predecessor, knew of the condition and had obtained occupational health advice for the purpose of consideration of adjustments required in the workplace. The latest report, dated 12 September 2016, described the condition and its symptoms. Following a motor cycle accident in 2008, the claimant has had ongoing pain in his back and body. He has muscle stiffness, extreme tiredness, problems with mental processes (fibro fog). The condition is exacerbated by stress. The occupational health advisor advised that whilst the claimant was able to manage his condition and undertake his duties most of the time, when there were exacerbations of symptoms he would be unable to move around normally and there would be a slight impact on his cognitive ability. The duration and frequency of any flare-ups were difficult to predict. He suggested frequent changes of position and micro breaks built into his working day.

3. Arrangements worked well up until March 2015, whilst the claimant was managed in a team by Fariah Shanaz. She had allowed the claimant to take micro breaks and these did not impact on his bonus entitlement, because targets were adjusted to recognise that he had taken these breaks. In addition, the claimant was provided with a raised desk, an adapted mouse and keyboard and adjusted lighting to prevent headaches. With these adjustments the claimant was able to work without any prolonged sickness absence for a period of eight years.

4. Following a reorganisation, the claimant reported to a new manager, Ms Danielle St Clair. Problems arose. The claimant's raised desk was not moved to his new workstation so he had to use a standard height desk. Ms St Clair was not prepared to adjust the targets by reference to the use of micro breaks. The claimant informed her that this had been recommended by the occupational health advisor. He also asked for a hydraulic desk.

5. Ms St Clair responded by informing the claimant that he would have to submit a new DSE report and it would be necessary to obtain a new occupational health report. She could not find the claimant's personal folder in which the early occupational health reports, medical reports and other personal information were contained. It had been lost in the move.

6. A new manager was appointed at the end of June 2016. Mr John Walker acted up in that role. In a handover of the claimant's management Ms St Clair provided Mr Walker with a report, but no personal file. The typed report, dated 5 July 2016, advised that the DSE stress assessment was to be completed and a referral to occupational health made to obtain advice on working breaks. In fact, the claimant had compiled his part of the DSE assessment on 22 April 2016, requesting a variable height desk and regular working breaks, but this had not been progressed by the time of the handover. Ms St Clair's note referred to the claimant's request for a hydraulic desk. Although the claimant disputed the provenance of this document, because it had not been provided pursuant to his subject access request, we were satisfied it was genuine. It accurately reflected the situation as of that time, including giving a description of the claimant's fibromyalgia and putting Mr Walker on notice that it could be aggravated by stress.

7. Mr Walker had a meeting with the claimant. The claimant informed him of his concerns. Mr Walker informed the claimant that he would need to undertake SMB tech calls and promotional calls. The claimant had been undertaking C4B calls and had not been trained in SMB and promotional calls. He was led to believe that this would impact upon his target. This put him under stress. He was off sick on 8 July 2016. He complained in writing about the requirement to undertake SMB calls on 17 July 2016. On 29 July 2016 the claimant was signed off sick. He returned to work on 9 December 2016. The fit-to- work notes certified the claimant as having a stress related problem.

8. Pursuant to the absence management policy, Mr Walker kept in touch with the claimant by text and by telephone, and latterly by email. He sought to arrange a welfare meeting on 26 August 2016. The text traffic of 22 August 2016 contains courteous and appropriate communication concerning the attendance of a union representative, if the claimant wished. When it became apparent that the claimant's union representative could not attend, Mr Walker suggested the meeting go ahead anyway. There was direct correspondence with the union official who informed Mr Walker that it was practice for there to be union accompaniment at such meetings.

9. Mr Walker telephoned the claimant on 25 August 2016. This was a long and difficult conversation. Both Mr Walker and the claimant became frustrated and we are satisfied there were raised voices. The claimant questioned Mr Walker about the full details of the absence management policy and we are satisfied this irritated Mr Walker who was anxious to ensure that the welfare meeting took place within the timeframe of four weeks from the absence. The phone call

lasted half an hour. Mr Walker said, in evidence, that the call was a little heated and they were at loggerheads. The claimant's recollection is that Mr Walker was irate and aggressive and insistent that the meeting took place on 26 August 2016. Mr Walker had not had any experience of managing long-term absence. We accept the claimant's account. Mr Walker did not manage this phone call well, failing to recognise that the claimant had a stress-related condition and that a calm and dispassionate discussion was required.

10. The meeting was rearranged to 30 August 2016 when the union attended. Jo Crawshaw, who was acting up as a manager herself to Mr Walker, also attended. The claimant's concerns that he had been harassed were conveyed. Although the claimant is adamant that Mrs Crawshaw agreed to take over his management from that date, we are not satisfied his recollection is correct. It is inconsistent with the subsequent email traffic later that month, in which there is no reference to such an arrangement. We are satisfied there was an agreement to that effect from 3 October 2016, as confirmed by Mrs Crawshaw.

11. The claimant did not receive a bonus which was due at the end of August 2016.

12. During September 2016 Mr Walker made a number of attempts to contact the claimant by telephone and email. The claimant regarded this as harassment. He did not respond until 29 September 2016, when he sent an email to Mr Walker to inform him that he was booked to see his doctor the following afternoon and he would see what his GP said (this being a response to a query as to whether he would be returning to work, as his medical certification regarding fitness to work was to expire 30 September 2016). The claimant also queried why he had not been paid a bonus in August.

13. Mr Walker responded to apologise for an error of his which had led to the bonus not being paid. He asked the claimant for a landline number, commenting that he was not available on his mobile number. He asked the claimant for a convenient time to call. He then sent the claimant a letter dated 29 September 2016 headed "unauthorised absence". It recorded concern about the claimant's ongoing absence from work without notification. It notified the claimant of an employee's obligation to keep in contact with his line manager and stated that there had been no response to four calls to the claimant's mobile phone. It warned the claimant that if he failed to follow standard notification of absence procedures, he may not be eligible for sick pay from that day onwards and that he may face disciplinary action.

14. On 30 September 2016 the claimant replied. He expressed concern about the letter he had received and requested a copy of the absence policy. He pointed out that he had notified Mr Walker of his appointment with the GP and that, in fact, he had been signed off for a further 12 weeks. He referred to his condition and that stress aggravated it. He complained that Mr Walker had not responded, following the meeting on 30 August, as promised, with answers to work-related issues, that there had been a catalogue of errors and that the

threat to withhold his pay was placing him under considerable stress. He accused Mr Walker of bullying and harassment. (He did not suggest there had been agreement that Mrs Crawshaw would be handling the absence procedure). He requested a copy of his personal folder.

15. A planned return to work was agreed on 3 November 2016 and confirmed at a meeting on 11 November 2016. The return was to be phased over four weeks. There was to be a stress risk assessment on 2 December, training on tech calls, the provision of a hydraulic desk, no sales KPIs for C4B calls and ten minute 'micro-breaks' every hour. The claimant's line manager was changed to Mr Orange. He was not provided with a personal file at the handover. It should have been created by Ms St Clair but that too had gone missing. The claimant had a meeting with Mr Orange on 6 December 2016 to discuss the return.

16. On 9 December 2016, the claimant attended on his first day back. His adapted keyboard and mouse were no longer there. He had to undertake computer-based training over the next few weeks with standard equipment. Although a hydraulic desk had been provided, on the second week this was being used by two others and he had to use a normal desk for some periods of time. The DSE assessment was not undertaken then. The claimant was informed that he could not have the adapted equipment without such an assessment. It took place on 9 January 2017. By that stage the claimant had been provided with his own hydraulic desk.

17. On 24 December 2016 the claimant submitted a grievance in respect of the failures of Ms St Clair to arrange a DSE assessment or occupational health referral, to facilitate micro-breaks, to provide appropriate training, provide compassionate leave and failing to create a new personal folder. The claimant wanted to know what had happened to the original personal folder.

18. On 9 January 2017 the claimant attended an absence review meeting with Simon Stubbs. This was to consider issuing a stage I warning because the claimant had been from work for more than seven days. The policy allows for this to be doubled in cases where the absences are disability related. The claimant believes that the paperwork seen by Mr Stubbs contained no reference to his fibromyalgia. Mr Stubbs was also provided with only one page from the sickness absence management system. That included the references to Mr Walker's attempts to contact the claimant, but it did not record the claimant's emails to Mr Walker of the 29 and 30 September 2016. On 10 January 2017 the claimant was issued with a stage I warning.

19. On 22 January 2017 the claimant was informed by his new manager, Mr Akinlaja, that he would have to take calls. The claimant challenged this instruction, setting out, by email, the history and the fact that he had been informed he did not need to take calls until he listened in to them.

20. On 23 January 2017 the claimant commenced taking online calls. He answered five calls over a period of two and a half hours. Mrs Crawshaw informed the claimant that he would not have to take such calls and he was then taken off them, but in an email from Mr Akinlaja, of 24 January 2017, he was instructed to restart them because it was his primary role.

21. On 28 January 2017 the claimant requested a reduction in hours and to work only on Sundays with an extended shift. On 6 February 2017 the claimant sent a further email renewing the request. He stated that he was concerned about the effect the job was now having upon his health and that he might have to hand in his notice. He asked for HR to confirm the minimum notice required. The request for Sunday only working was rejected by email of 7 February 2017.

22. On 6 February 2017 the claimant attended an appeal against the stage I absence warning. This was considered by Mrs Kellas.

23. On 7 February 2017 the claimant was absent through ill-health. He did not return to work again. The fitness to work note referred to work-related stress and right wrist pain.

24. On 8 February 2017 the claimant was sent the outcome to his grievance. Mrs Crawshaw concluded that the personal file had gone missing during the big move and that it was unfortunate. She said that the DSE assessment had not been completed in 2015 but, because Ms St Clair had left the business, she was unable to respond to the complaint but pointed out that a new DSE assessment had been implemented. The same response was made in respect of the complaint about not having been provided with micro-breaks. As to training, Mrs Crawshaw stated the claimant had not been available for initial training duty shifts but this would be provided shortly. She also addressed a concern about compassionate leave.

25. On 8 February 2017 the order for a replacement mouse and keyboard was cancelled, but that was intercepted by Mr Akinlaja, who varied the instruction to the supplier, to put the order on hold until the claimant was back in the business.

26. On 15 February 2017 the claimant resigned giving notice to terminate on the 28 February 2017. On 16 February 2017 a meeting was arranged with the claimant for the 28 February 2017 with a view to him reconsidering his resignation. The claimant did not attend that meeting.

27. On 27 February 2017 Mrs Kellas sent to the claimant a letter and allowed his appeal against the administering of the stage I absence warning, on the ground that Mr Stubbs not been provided with the statements the claimant had referred to. She also made recommendations as to training and adjustments to be put in place.

28. On 28 February 2017 the claimant submitted a grievance concerning the actions of Mr Walker, in respect of the period he managed him, and against Mrs Crawshaw for her management of him and her handling of the grievance.

29. On 1 March 2017 the claimant commenced new employment, working Monday to Friday. He applied for this job online in early February 2017. He had a telephone interview and was offered this employment on 10 February 2017.

30. Mr Taylor responded to the grievance against Mr Walker and Mrs Crawshaw on 20 March 2017.

31. The claimant contacted ACAS for early conciliation on 24 May 2017. A certificate was issued on 29 June 2017. The proceedings were issued on 31 July 2017. The claimant had attempted to present them on 27 July 2017, but the online system for submitting claims had been suspended as a consequence of the abolition of fees for bringing employment claims. The claimant drove to Leicester to submit a written copy of his claim on 28 July 2017 and posted it at the designated office. That was on Friday 28 July. The claim was marked as received on the following Monday 31 July.

The issues

32. At a preliminary hearing, on 6 November 2017, Employment Judge Rogerson identified the claims. The parties agreed that the Order made at that hearing properly summarised the issues in the case.

The law

33. An employee with the qualifying period has a right not to be unfairly dismissed[1]. A resignation will amount to a dismissal if the employee was entitled to terminate the contract, and did so, by reason of the employer's conduct[2]. That is known as a constructive dismissal.

34. That will arise if the employee resigns in consequence of a fundamental breach of contract of the employer and the employee does not otherwise affirm the contract[3].

35. There is an implied term in an employment contract that neither party shall conduct themselves, without reasonable and proper cause, in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between them[4]. A course of conduct may cumulatively amount to a fundamental breach of contract of such a nature and, provided the employee resigns without otherwise affirming the contract, he will have been

[1] Section 94 ERA
[2] Section 95(1)(c) ERA
[3] Western Excavating (ECC) Ltd v Sharp [1978] ICR 221
[4] Malik v BCCI [1997] ICR 606

constructively dismissed[5]. Affirmation amounts to the evincing of an intention by the employee to continue to be bound by the contract terms. This means that an employee loses the right to terminate the contract in reliance on the breach, but he would retain the right to pursue a claim in damages. A last straw of a series of events which individually or cumulatively amounted to a breach of the implied term need not constitute a repudiatory breach of contract of itself, but it must not be entirely innocuous. It must contribute to the breach. It may be a sufficient trigger to revive earlier events which had been repudiatory breaches but in respect of which the contract had been affirmed.

36. If an employee has been dismissed, it is for the employer to establish the reason for that dismissal and that it falls within one defined in sections 98(1) and (2) of the ERA. If the employer establishes such a reason, the Tribunal must determine whether dismissal for that reason was reasonable in all the circumstances of the case[6].

37. Provisions concerning the time limits within which claims must be presented are contained in section 111 of the ERA and section 207B of the ERA.

38. The relevant statutory provisions concerning discrimination are contained in sections 6, 15, 20, 21, 26, 39, 40, 123, and 136 of the EQA, and schedule 8 paragraph 20.

39. The Tribunal shall have regard to the Equality and Human Rights Commission's Code of Practice on Employment as it relates to discrimination in the workplace and the rights of disabled persons.

Discussion and conclusions

Breach of the duty to make adjustments

August 2015: failure to undertake a DSE assessment/obtain occupational health advice/maintain the previous adjustments

40. A failure to assess an employee for adjustments regarding his disability cannot, of itself, constitute a breach of the duty[7]. It is necessary to identify those specific adjustments which would obviate the disadvantage created by the provision, criterion or practice. The assessment may be a means to achieving that but is not the adjustment required in itself.

41. At times, the claimant had to work without a raised desk. But for the provision of this auxiliary aid, the claimant was placed at a substantial disadvantage compared with people who are not disabled. His fibromyalgia created physical

[5] Lewis v Motorworld Garages Ltd [1986] ICR 157 and Omilaju v Waltham Forest London Borough Council [2005] ICR 481.
[6] Section 98 (4) ERA
[7] Tarbuck v Sainsbury's supermarkets [2006] IRLR 664

discomfort which was significantly greater when working at a normal desk in contrast to a raised desk. It was not reasonable to fail to provide this auxiliary aid. The respondent was on notice of this. It had provided the claimant with such a desk previously. In failing to do so following the move, it acted unreasonably and therefore was in breach of section 20(5) of the EqA in respect of the duty to provide auxiliary aids.

42. In addition there was a provision, criterion or practice of requiring employees to work for up to 3 hours with only a 15 minute break. That placed the claimant at a substantial disadvantage. The respondent's managers were aware of that. We are satisfied that this was raised in earlier occupational health reports which have been lost, but that had been pointed out by the claimant. Micro-breaks of five minutes or so each hour removed the substantial disadvantage.

43. Insofar as Ms St Clair failed to maintain those adjustments there was, in our judgement, a breach of the duty. It may have been that arose because she had lost the file. That did not absolve the respondent from the responsibility to reimpose the adjustment without undue delay. Had it obtained an earlier DSE assessment or occupational health report doubtless those adjustments would have been put in place. That is clear from the later report obtained in September 2016. It had been tardy in obtaining those and there was a breach of section 20(3) of the EqA.

44. We regard this complaint as out of time. The claimant made a number of requests to Ms St Clair for the adjustments. The time is regarded as commencing at such time as an act inconsistent with providing the adjustments is taken or, if no such act is taken, when a reasonable employer might be expected to make the adjustment. We find this would have been within a month or so of the request. It was nearly 2 years before the claim was presented after that time. We do not regard this as a continuing act as there were separate requests made which are compartmentalised into different periods of time. We do not regard it as just and equitable to allow this complaint out of time because the delay has adversely affected the quality of the evidence. Ms St Clair is no longer employed by the respondent and there is a lack of detail in the claimant's own account as to precisely when he made requests. We nevertheless consider this complaint significant to the constructive dismissal claim.

<u>June 2016: failing to implement the earlier adjustments</u>

45. When Mr Walker took over the claimant's management and he again raised the requests for micro-breaks and an auxiliary desk. There was a breach of the duty in not restoring the adjustment and auxiliary aid. There was no satisfactory explanation as to why immediate referral to an occupational health advisor had not been made. The DSE assessment which the claimant completed in April was not progressed by Ms St Clair or Mr Walker. It would have been reasonable of them to do so, and it would have supported the

recommendations which had been made in the earlier, lost occupational health reports.

46. We find this complaint was presented out of time. It was more than a year before the claimant issued his claim. For the same reasons set out above we do not consider it just and equitable to consider it.

December 2016: failure to implement and maintain adjustments

47. For a period of three or four weeks after his return to work, the claimant did not have sole use of a hydraulic test, as from time to time it was being occupied by others with the approval of Mrs Crawshaw. In addition, from 9 December 2016 until 28 February 2017 there was no provision at all of the adapted mouse and keyboard. The claimant had to work with standard equipment which caused him significant discomfort. Although these items had been lost there was no reason to require a further assessment. Even if there were, it should have been undertaken as soon as the claimant returned to work and the modified computer accessories provided.

48. This claim is out of time subject to the just and equitable discretion to allow a claim to proceed. We consider that, in respect of the hydraulic desk, the inconsistent act was allowing others to use it. That was in late December and early January. The claimant was provided with sole use of the desk on 9 January 2017, at which point the breach of duty ceased. The claim would be nearly 3 months out of time. It is, nevertheless, just and equitable to allow that complaint to proceed. The facts were not in significant dispute. The evidence has not been affected in any material way by the delay. The respondent is not significantly disadvantaged in responding to this claim. The same applies to the failure to provide the adapted mouse and keyboard, a breach which continued up until the claimant left. This breach of duty to provide auxiliary aids is established.

Unfavourable treatment because of something arising in consequence of the disability

49. The issuance of the stage I absence warning was unfavourable treatment. It exposed the claimant to the risk of future absence management processes which could culminate in the termination of his employment. It also could potentially affect his entitlement to a bonus. It was in existence for six weeks before being overturned on appeal. That mitigated against its significance.

50. We are satisfied that was because of something, the claimant's absence, which arose in consequence of his disability, fibromyalgia. Mr Gidney submitted that it did not arise in consequence of the disability but in consequence of stress related absence. We reject that submission. The fit to work note referred to a stress-related problem. Fibromyalgia was the condition which was exacerbated by stress. It is the 'problem' alluded to in the fit to work note which was stress-

related. That was put beyond doubt in the occupational health report, dated 12 September 2016, and was therefore known to the respondent's managers.

51. We are satisfied that the implementation of the absence management policy is a legitimate aim; to manage sickness absence fairly in the workplace and ensure that employees are available to discharge their duties. We also satisfied that imposition of the warning was appropriate to the aim. It incentivised employees to attend work.

52. We must evaluate proportionality by the test of whether the action was reasonably necessary. That includes consideration of alternative measures which will not disadvantage people in the claimant's position and sharing his protected characteristic. We do not consider that the balance struck by this his employer was inappropriate. To have removed the policy from application to all disabled related absences would weaken achievement of the legitimate aim. No obvious alternative measure could have furthered the aim. The warning itself had a comparatively small impact on the claimant, and lasted only six weeks. The variation of the time frame which generated the trigger, an absence of 14 days rather than 7 days or 6 or absences rather than 3 within a year within the policy, in addition to consideration of other relevant factors, and the flexibility of reconsideration of the decision on appeal was proportionate. The respondent has justified this treatment.

Harassment

53. We do not accept the allegation that Mr Walker harassed the claimant by constantly attempting to contact him whilst he was on sick leave. Mr Walker was applying the policy to keep in touch and trying to arrange a meeting within the timeframe stipulated. That was not unwanted conduct related to the claimant's disability.

54. Nor do we accept the claimant's case that Mr Walker continued to attempt to contact him in September, contrary to an agreement to transfer the management of his sickness absence to Mrs Crawshaw. There was no such agreement in August and September. It is not referred to in the correspondence sent by the claimant on 30 September 2016, when he set out had a number of his concerns, including his belief he had been subjected to harassment. We would have expected this agreement to have been referred to in this letter. There was such an agreement at the beginning of October. It is likely the claimant has mistaken the timing of events.

55. That is not to say all of Mr Walker's communications with the claimant were satisfactory. Mr Walker mishandled the telephone call of 25 August when he argued with the claimant, raising his voice, and insisting that the meeting should proceed the following day without a union representative. The claimant's health demanded the manager spoke in a calm tone.

56. Mr Walker also sent to the claimant an inappropriate letter, which was threatening and incorrectly accused him of failing to comply with the procedure to keep in touch.

57. Those two incidents constituted unwanted conduct. They created an in intimidating, hostile, degrading, humiliating and offensive environment for the claimant. We are not satisfied that the unwanted conduct related to the protected characteristic of disability. Those communications were examples of a heavy-handed approach to managing one of the respondent's policies. Nothing in the content of what was said referred to fibromyalgia, or was directly or indirectly an allusion to it. The unacceptable tone and argumentative approach was related to the attendance of the claimant at a meeting, not to his particular condition and his disability. The same analysis applies to the letter of 29 September 2017. Whilst unwanted conduct, it did not relate to the claimant's disability.

Constructive unfair dismissal

Breach

58. We are satisfied a series of the above actions of the claimant's managers, cumulatively, were likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The were:

[i] The failure of Ms St Clair to undertake an earlier DSE assessment and make an occupational health referral in 2015 to ensure that the earlier adjustments could be reinstated;

[ii] The failure of Ms St Clair to allow the claimant to take micro-breaks and to provide a suitable desk to assist him discharging his duties;

[iii] The failure of Ms St Clair to reconstitute a personal file with the appropriate medical records and occupational health advice and the loss of another personal file;

[iv] The failure of Mr Walker to complete the DSE assessment the claimant had commenced in April 2016 or make an occupational health referral as soon as he took over the claimant's management in early July 2016;

[v] The failure to pay the claimant his bonus when it was due in August 2016;

[vi] The failure of Mr Walker to allow the claimant to take micro-breaks;

[vii] The conduct of Mr Walker, on 25 August 2016, in a telephone call with the claimant in which he became irate, raised his voice and insisted that the proposed meeting the following day should take place without a union representative;

[viii] Sending to the claimant an unauthorised absence letter of 29 September 2016, criticising him for not keeping in touch (when he had responded that day to inform Mr Walker he was to see his GP), and warning the claimant that pay may be suspended or he may face disciplinary action in the circumstances;

[ix] Failing to arrange for the adapted mouse and keyboard to be available upon the claimant's returned to work on 9 December 2016, and not providing a replacement prior to the claimant's departure;

[x] Failing to arrange for a hydraulic desk for the claimant's sole use between 9 December 2016 and 9 January 2017;
[xi] Failing to arrange a DSE assessment with the claimant immediately upon his return to work on 9 December 2016 and taking a further month to facilitate such an assessment;
[xi] Instructing the claimant to undertake online calls when he was not ready to do so;
[xii] Failing to provide the claimant with training in respect of the telephone calls before instructing him to undertake such calls;
[xiii] Failing properly to investigate and address the claimant's grievance by making suitable enquiries, including of Ms St Clair who worked in the same premises. Albeit Ms St Clair had left the employment of the respondent she was easily contactable, because Mr Stubbs spoke to her when he was considering the stage I absence management procedure. There was no good reason Mrs Crawshaw could not have made similar enquiries in handling this grievance.
[xiv] Failing to respond to all of the complaints raised by the claimant in his grievance. The last point in the claimant's grievance concerned Ms St Clair's manager. He said that, in respect of his request for occupational health referrals, Ms St Clair had said she had repeatedly asked her manager about them. Ms St Clair had also said her manager had declined the request for micro-breaks and leave. Mrs Crawshaw made no enquiries of the manager. She was still employed by the respondent. She did not address this complaint at all in the grievance outcome letter. Her response to the complaint that no DSE assessment of occupational health referral had been made was unsatisfactory. There was sufficient information available for it to be apparent that there had been a wholly unsatisfactory delay without even speaking to Ms St Clair. The claimant was entitled to an apology for this delay. Similarly, the evidence clearly demonstrated that there had been a loss of not only the first personal folder, but a second one when Mr Walker took over. The claimant was entitled to a recognition that the respondent's managers were responsible for safely retaining his confidential documentation. An apology for the repeated loss of his personal files was the least he could have expected from the grievance. The response that things unfortunately go missing failed to acknowledge the repeated errors of management to retain safely the claimant's medical records and personal information.
[xiv] On 9 January 2017 failing to ensure that the proper documentation was available to Mr Stubbs to determine whether the claimant should be issued with a stage I absence warning.

59. We are satisfied these events were without reasonable or proper cause. No responsible employer would have acted in this manner. We would have found that the mishandling of the grievance was so deficient in itself as to constituted a breach of implied term. Together with all the other events we have listed, there was, a event a breach of the implied term of trust and confidence over 18 months to 2 years.

The reason for the resignation and affirmation

60. We do not accept the submission of Mr Gidney that the claimant had resigned because his request to work on Sundays had been rejected or because he had obtained alternative employment. Whilst these two factors were influential in his timing to leave, we are not satisfied they were the effective cause of the resignation. The emails confirmed the evidence of the claimant, that he was becoming distressed and traumatised by the handling of his request for adjustments to assist his work and the dismissive attitude to his complaints. There was a gradual accumulation of pressure upon him which drove him to the extreme of giving up desirable employment with the respondent; work for four days per week with favourable remuneration on Sundays and Bank holidays.

61. The request to change his hours to work only on Sundays was not an affirmation of the contract, but an attempt to alleviate the stress which had arisen from the actions we have listed above. At that time the claimant had responsibilities to his family and was considering the options available. Maintaining an income was necessary, but it was only short term, whilst he sought alternatives. The suggestion the claimant was seeking to set up an arrangement to work on Sundays for the respondent and work week days for another employer was implausible. Such a workload was not compatible with the difficulties the claimant was struggling with, by reason of his fibromyalgia and the stress of working for the respondent. In any event, this request was made before the later breach relating to the grievance outcome.

62. The expiration of time between the last events and the resignation, and the continuation of the contract for such a period, was not sufficient to amount to an affirmation. The claimant received the grievance outcome letter 7 days before he resigned. That revived the earlier acts which might otherwise have been affirmed by the claimant choosing to continue in employment rather than resign. The claimant was absent on sick throughout these 7 days. None of these matters were sufficient to evince an intention to be bound in the future by the contract.

Reason for the dismissal

63. The respondent did not contend that, if the tribunal found that the claimant had been constructively dismissed, that the dismissal would be for a potentially fair reason under section 98(1) of the ERA. In the circumstances the dismissal was unfair.

Unlawful dismissal by reason of the discriminatory conduct of the respondent

64. As is apparent from the list of events which cumulatively led to a breach of the implied term of trust and confidence, the failure to make adjustments was significant. We have found that, as regards the most recent failures to provide auxiliary aids, that was a breach which we should entertain. Even earlier breaches, albeit out of time, were influential in the claimant's decision to resign. They do not have to be the only reason for the resignation to lead to it being

unlawful[8]. It follows therefore that not only do we find that the dismissal was unfair but it was also tainted by discrimination. It follows that we find that the discriminatory treatment of the claimant led to his constructive dismissal was unlawful under section 39(2)(c) and section 39(7)(b)of the EqA.

Time limits

65. The unfair dismissal and unlawful discriminatory dismissal are, in principle, out of time. The effective date of termination was 28th of February 2017 and that would require the claim to be presented by the 27 May 2017. Disregarding the period the claim was in early conciliation, the period of 36 days, the time period will be extended to 2 July 2017 under section 207B(3) of the ERA and section 140B(3) of the EqA. Applying section 207B(4) of ERA and section 140B(4) of the EqA, the time limit would have expired within the period of early conciliation and so is deemed to expire one month after date B, which will be 29 July 2017. The claim form is marked as having been received on 31 July 2017.

66. The claimant attempted to present the claim on 27 July 2017. That would have been in time. He was only unable to do so because of the shutting down of the online system for accepting fees, an event which was unforeseeable and beyond the control of the claimant. The claimant took immediate steps to submit in writing the following day, 28 July 2017, after he had discovered he could not submit his claim online. That would have been in time too, but because it fell on a Friday the claim form was not processed at the office where he posted it until the following Monday, 31 July 2017. We are satisfied it was not reasonably practicable in the circumstances to submit the claim in time, that is within the last days of the time limit and the claimant presented the claim within a reasonable period thereafter. In the circumstances the claim is entertained. We consider it just and equitable to hear the complaint of discrimination relating to the constructive dismissal for the same reasons.

Employment Judge D N Jones

Dated: 23 May 2018

[8] Wright v North Ayrshire Council [2014] ICR 77