EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MS E KALHOR	**V**	**THE HOSPITAL OF ST JOHN AND ST ELIZABETH**

HELD AT: LONDON CENTRAL **ON: 17-21 MAY 2021**

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MS P KEATING
MS S SAMEK

REPRESENTATION:
For the claimant: Mr I Browne (Counsel)
For the respondent: Mr C Crow (Counsel)

JUDGMENT

1. The claim of direct disability fails and is dismissed.
2. The claim of discrimination arising from disability succeeds in part.
3. The claim of a failure to make reasonable adjustments succeeds in part.
4. The claim of disability-related harassment succeeds in part.
5. The Tribunal declares that the claimant was unfairly dismissed.

REASONS

The Issues

Disability Status

1. The parties agree that the claimant was disabled (as defined at s.6 Equality Act 2010 (EqA) for the period October 2018 to the date of her resignation with the condition of cervical spondylosis, which had a substantial and long-term impact on her. The substantial impact was the pain and significant discomfort caused by sitting down for long periods, and by moving her neck to deal with members of the public while sitting at a computer.

Direct discrimination

2. Has the Claimant been subject to the following conduct?
   a. The Respondent ignored and failed to acknowledge or discuss with the Claimant all of her OH reports and medical reports
   b. The Respondent ignored reports of Health and Safety issues on 22 October 2018 and 4 April 2019
   c. [withdrawn]
   d. The Respondent ignored the Claimant's grievance of 12 April 2019
   e. The Respondent ignored the Claimant's grievance about CC
   f. The dispute about leave authorisation between 21 October and 6 November 2019 including JB sending email on 31 October asking the Claimant to pay for cover out of pocket when sick
   g. JB stating "we don't do sick here" on 4 December 2019 and ignoring the Claimant's request and joking
   h. Refusing authorisation for leave on 6 December 2019 and sending a curt email, not making adjustments to the Claimant's working time
   i. Commencing a disciplinary investigation on 12 December 2019
   j. The disciplinary investigation meeting of 19 December 2019 and the Respondent did not conclude the disciplinary investigation
   k. [withdrawn]
   l. Demotion to the role of concierge on 17 January 2020
   m. [withdrawn]
   n. The Respondent did not respond to the grievance of 2 February 2020
   o. The Claimant not being named on the April 2020 rota
   p. [withdrawn]

3. Was this conduct less favourable treatment?

4. Who is the appropriate comparator? The claimant relies on a hypothetical comparator.

5. Did the Respondent subject the Claimant to less favourable treatment than the appropriate comparator because of the Claimant's disability?

Discrimination arising from disability

6. Has the Claimant been subject to the following conduct? In particular the Claimant alleges as more fully set out in the Further and Better Particulars of Claim dated 20 October 2020:
   a. The Respondent ignored and failed to acknowledge or discuss with the Claimant all of her OH reports (bar the last which was inadequately responded to) and medical reports
   b. The Respondent ignored reports of H&S issues on 22 October 2018 and 4 April 2019
   c. [withdrawn]
   d. The Respondent ignored the Claimant's grievance of 12 April 2019
   e. The Respondent ignored the Claimant's grievance CC
   f. The dispute about leave authorisation between 21 October and 6 November 2019 including JB sending email on 31 October asking the Claimant to pay for cover out of pocket when sick
   g. JB stating "we don't do sick here" on 4 December 2019 and ignoring the Claimant's request and joking
   h. Refusing authorisation for leave on 6 December 2019 and sending a curt email, not making adjustments to the Claimant's working time
   i. Commencing a disciplinary investigation on 12 December 2019
   j. The disciplinary investigation meeting of 19 December 2019 and the Respondent did not conclude the disciplinary investigation
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   l. Demotion to the role of concierge on 17 January 2020
   m. [withdrawn]
   n. The Respondent did not respond to the grievance of 2 February 2020
   o. The Claimant not being named on the April 2020 rota
   p. [withdrawn]

7. Did that conduct amount to unfavourable treatment?

8. Did the Claimant's requirement to take time off work and have reasonable adjustments to her working life arise as a consequence of her disability?

9. If yes, was the Claimant subjected to the unfavourable treatment because she needed to have time off work and have reasonable adjustments to her working life?

10. If yes, have the Respondents shown that the treatment was a proportionate means of achieving a legitimate aim?
    a. What was the legitimate aim?
    b. Was the treatment a proportionate means of achieving that aim?

Failure to make reasonable adjustments

11. Has the Respondent applied the provision, criterion or practice of "working as her contract requires" to the Claimant?

12. If so, does this provision, criteria or practice place the Claimant at a substantial disadvantage due to her disability? What is that disadvantage?

13. If so, did the Respondent make reasonable adjustments for the Claimant?

14. If not, what adjustments should the Respondent have made? The Claimant relies upon the following adjustments:
    a. re-assigning the Claimant to other desks within the outpatient department with more appropriate structure
    b. more suitable shift hours
    c. allowing the Claimant leave when sick and needing treatment
    d. fixing the uneven floor underneath the Claimant's desk
    e. increased emotional support, including enhanced communication

15. Were those adjustments reasonable?

16. Would the adjustment have alleviated the disadvantage to which the Claimant alleges she was subject?

Harassment

17. Has the Claimant been subject to the following alleged unwanted conduct? In particular the Claimant alleges as more fully set out in the Further and Better Particulars of Claim dated 20 October 2020:
    a. The Respondent ignored and failed to acknowledge or discuss with the Claimant all of her OH reports and medical reports
    b. The Respondent ignored reports of Health and Safety issues on 22 October 2018 and 4 April 2019
    c. [withdrawn]
    d. The Respondent ignored the Claimant's grievance of 12 April 2019
    e. The Respondent ignored the Claimant's grievance about CC
    f. The dispute about leave authorisation between 21 October and 6 November 2019 including JB email on 31 October asking the Claimant to pay for cover out of pocket when sick
    g. JB stating "we don't do sick here" on 4 December 2019 and ignoring the Claimant's request and joking
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    m. [withdrawn]
    n. The Respondent did not respond to the grievance of 20 February 2020
    o. The Claimant not being named on the April 2020 rota
    p. [withdrawn]

18. If so, was this unwanted conduct on the grounds of disability?

19. Did the conduct have the purpose or effect of violating the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

20. Was it reasonable for the conduct complained of to have that effect?

Victimisation

21. The victimisation claim was withdrawn, and is dismissed on withdrawal.

Unfair dismissal

22. Was the Claimant constructively dismissed for the purposes of s.95(1)(c) of the Employment Rights Act 1996?

    a. Did the Respondent's conduct amount to a repudiatory breach of contract (whether as a cumulative breach with a last straw of otherwise) which entitled the Claimant to terminate her contract of employment? It is understood that the Claimant relies on the implied term of mutual trust and confidence – did the Respondent act in a manner calculated or likely to seriously damage or destroy the mutual relationship of trust and confidence with the Claimant?

    b. Did the Claimant delay or do anything to waive the alleged breach(es) or affirm the contract, including acting in a way that showed that she was treating the contract as ongoing?

    c. Did the Claimant resign in response to that breach or partly in response to that breach?

The Law

23. Equality Act 2010

    s.13 Direct discrimination

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

    s.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.

    s.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) ...
(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.

s.21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

s.23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

a. on a comparison for the purposes of section 13, the protected characteristic is disability;

s.26 Harassment

(1) A person (A) harasses another (B) if—

a. A engages in unwanted conduct related to a relevant protected characteristic, and

b. the conduct has the purpose or effect of—

i. violating B's dignity, or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(2) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

a. the perception of B;

b. the other circumstances of the case;

c. whether it is reasonable for the conduct to have that effect.

s.136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Schedule 8 – Duty to Make reasonable Adjustments; Part 3 Limitations on the Duty - *Lack of knowledge of disability, etc.* Reg 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. …
b. than an employee has a disability and is likely to be placed at the disadvantage…

24. The EHRC Code of Practice on Employment 2011:

Factors which may be taken into account when deciding if a step is a reasonable one to take:

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

25. Employment Rights Act 1996 – Dismissal

s.94 The right

a. An employee has the right not to be unfairly dismissed by his employer

s.95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

i. …

ii. …
iii. the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

s.98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

a. the reason (or, if more than one, the principal reason) for the dismissal, and
b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) …
(3) ….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
b. shall be determined in accordance with equity and the substantial merits of the issue

Relevant case law

26. Direct Discrimination

1. Has the claimant been treated less favourably than a hypothetical comparator would have been treated on the ground of her disability? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the age. Importantly, it is not possible to infer discrimination merely because the employer has acted unreasonably (*Glasgow City Council v Zafar [1998] IRLR 36)*

2. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

3. The tribunal has to determine the *"reason why"* the claimant was treated as she was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the

two stage procedure; if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142). "*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*" (Chondol v Liverpool CC UKEAT/0298/08)*

4. *Law Society v Bhal[2003] IRLR 640* - the fundamental question is why the discriminator acted as he did. Was the claimant (in this case) treated the way she was because of her disability? It is enough that a protected characteristic had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [the protected characteristic]? Or was it for some other reason..?"

5. *Nagarajan v London Regional Transport [1999] IRLR 572, HL.* "What, out of the whole complex of facts … is the effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

6. *London Borough of Islington v Ladele*: *[2009] EWCA Civ 1357* provides the following guidance:

    a. In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator

    b. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37

    c. As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*

    d. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite

irrespective of protected characteristic of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

e. It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39.

f. It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

g. As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

7. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

8. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT again confirmed that 'debating the correct characterisation of

the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

27. Discrimination arising from disability

Unfavourable treatment:

1. *T-System Ltd v Lewis UKEAT/0042/15:* unfavourable treatment is what is done or said (or omitted to be done or said) *"which places the disabled person at a disadvantage",* and which requires a measurement of *'an objective sense of that which is adverse as compared to that which is beneficial.'*

2. *Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65,* An award of a pension on early retirement at half of pensionable salary, when the part-time working had been caused by disability, was not unfavourable treatment: the treatment in issue was the award of a pension, and this was not a disadvantage to the claimant. Cf *Chief Constable of Gwent Police v Parsons and Roberts UKEAT/0143/18* – the capping of compensation lump sums for disabled officers leaving the force under a voluntary exit scheme: "capping" a payment is different from "awarding" a pension.

Arising in consequence of disability:

3. There are two steps, *"both of which are causal, though the causative relationship is differently expressed in respect of each of them"*:

    i. did A treat B unfavourably because of an (identified) something? and
    ii. did that something arise in consequence of B's disability?

    "The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence." (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305).

4. If the employer knows (or has constructive knowledge) of disability, it need not to be aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (*City of York Council v Grosset [2018] EWCA Civ 1105*). In this case a lack of judgment by a teacher was contributed to by stress, which was significantly contributed to by cystic fibrosis; the Court of Appeal found that it did not matter that the school was unaware that the lack of judgment had arisen in consequence of his disability when s.15(10(a) is applied. If the employer knows of the

disability, it would *"be wise to look into the matter more carefully before taking the unfavourable treatment"*.

5. There must be some connection between the "something" and the claimant's disability; the test is an objective test, and the connection could arise from a series of links (*iForce Ltd v Wood UKEAT/0167/18)* – but there must be some connection between the "something" and the claimant's disability.

6. The test was refined in *Pnaiser v NHS England [2016] IRLR 170, EAT*:

   i. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A, and there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

   ii. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant.

   iii. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. - it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

   iv. "It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

7. The fact that an employer has a mistaken belief in misconduct as a motivation for a particular act is not relevant in considering s.15 discrimination, in a case where the employer had a genuine but mistaken belief the claimant had been working elsewhere during sickness absence: it is sufficient for disability to be *'a significant influence … or a*

cause which is not the main or sole cause, but is nonetheless an effective cause of the unfavourable treatment'.' (Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT).

8. Justification: *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213*: three elements of the test: *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?".* When assessing proportionality, an ET's judgment must be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. *Hensman v Ministry of Defence UKEAT/0067/14/DM*, *[2014]).* The test of justification is an objective one to be applied by the tribunal, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning. The test under s 15(1)(b) EqA is an objective one according to which the tribunal must make its own assessment" (*City of York Council v Grosset UKEAT/0015/16)*. Under s 15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, i.e. the relevant legitimate aim. *Ali v Torrosian (t/a Bedford Hill Family Practice) [2018] UKEAT/0029/18:* this objective balancing exercise requires that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so.

28. <u>Reasonable adjustments</u>

1. A failure to make reasonable adjustment involves considering:
   i. the provision, criteria or practice applied by or on behalf of an employer;
   ii. the identity of non-disabled comparators (where appropriate); and
   iii. the nature and extent of the substantial disadvantage suffered by the claimant.

   Environment Agency v Rowan [2008] IRLR 20, *[2008] ICR 218*

   "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'. *Newham Sixth Form College v Sanders [2014] EWCA Civ 734*.

2. *Provision, criterion or practice:* It is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research UKEAT/0266/15 (7 April 2016, unreported)*, 'the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work'.

3. Pool of comparators: has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council [2004] UKHL 32*, *[2004] IRLR 651*, *[2004] ICR 954*: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

4. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (Tarbuck v Sainsburys Supermarkets Ltd), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc [2018] IRLR 1015)*

5. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage. *Leeds Teaching Hospital NHS Trust v Foster UK EAT /0552/10*, *[2011] EqLR 1075:* when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring. *Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)* - 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made *will* remove the substantial disadvantage'.

6. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. *Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar)*: it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

7. *Employer's knowledge: Gallop v Newport City Council [2013] EWCA Civ 1583*, *[2014] IRLR 211* – a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal (*Jennings v Barts and The London NHS Trust UKEAT/0056/12*, *[2013] EqLR 326*,). *Donelien v Liberata UK Ltd UKEAT/0297/14:* when considering

whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden – given the way the statute is expressed – is on the employer to show it was unreasonable to have the required knowledge.

8. The EHRC Code – examples of adjustments which may be reasonable include:

    a. making adjustments to premises
    b. allocating some of the disabled person's duties to another worker
    c. transferring the worker to fill an existing vacancy
    d. altering the worker's hours of working or training
    e. assigning the worker to a different place of work or training or arranging home working
    f. allowing the worker to be absent during working or training hours for rehabilitation, assessment or treatment
    g. acquiring or modifying equipment
    h. providing supervision or other support.

29. Harassment

1. Harassment involves unwanted conduct which is related to a relevant characteristic and has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive atmosphere for the complainant or violating the complainant's dignity.

2. *Richmond Pharmacology v Dhaliwal [2009] IRLR 336:* 'harassment' is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him/her; (c) on the prohibited grounds. It would normally be a 'healthy discipline' for tribunals to address each factor separately and ensure that factual findings are made on each of them. It must be reasonable that the conduct had the proscribed effect. While there is a subjective element ('… having regard to … *the perception of that other person* …') there is no harassment if there is an unreasonable proneness to take offence. "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here

may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.'

3. 'Conduct': *'Prospects for People with Learning Difficulties v Harris UKEAT/0612/11*: suspension or other acts by an employer which would not normally constitute an act of harassment, can amount to acts of harassment; in this case the lack of forethought on the part of the employer and the peremptory nature of the suspension, with scant justification and absent prior consultation with the claimant, justified the tribunal's finding of unlawful harassment in this case.

4. Purpose or effect: Harassment will be unlawful if the conduct had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

5. Related to the prohibited grounds: The conduct must be 'related to' a relevant protected characteristic, including conduct associated with that characteristic. The tribunal has to apply an objective test in determining whether the conduct complained of was 'related to' the protected characteristic in issue. *Hartley v Foreign and Commonwealth Office UKEAT/0033/15:* Where adverse comments were made by managers amount an employee, the fact that the intent of the managers was not to "aim" at her condition was irrelevant – the tribunal must assess *"if the overall effect was unwanted conduct related to her disability.'* Also *Brumfitt v Ministry of Defence [2005] IRLR 4, EAT* (a decision under the old wording, on grounds of, in the SDA 1975) the need for comparative disadvantage defeated a claim which was made by a woman who complained of offensive language delivered to her as a member of a mixed-sex audience. There was no doubt that she had been exposed to language that she found offensive, but she had not been exposed to this because she was a woman.

6. Prohibited grounds: it may be necessary to consider the employer's mental processes to determine whether the conduct was on the prohibited grounds. *Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] EqLR 142*: when considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it is relevant to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion

that it was related to any protected characteristic and should not be left for consideration only as part of the explanation, at the second stage, once the burden of proof has passed.

7. *Driskel v Peninsula Business Services Ltd [2000] IRLR 151*: Determining whether alleged harassment constitutes discrimination involves an objective assessment by the tribunal of all the facts; the claimant's subjective perception of the conduct in question must also be considered. The tribunal is therefore required to determine both the actual effect on the particular individual complainant and the question whether that was reasonable in the circumstances of the case.

8. *Pemberton v Inwood [2018] EWCA Civ 564*: "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))." This means that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

9. *Land Registry v Grant* [2011] EWCA Civ 769: the tribunal must be careful not to cheapen the significance of the statutory wording; is must consider carefully whether the matters above can violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

10. No justification for harassment is possible and no comparator is needed; that said, conduct shall be regarded as having the required effect only if, having regard to all the circumstances, including in particular the perception of the victim, it should reasonably be considered as having that effect. In other words, the fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

11. *Pemberton v Inwood [2018] EWCA Civ 564*, *[2018] IRLR 542* ''In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

12. *Whitley v Thompson EAT/1167/97:* (i) A characteristic of harassment is that it undermines the victim's dignity at work and constitutes a detriment on the grounds of sex; lack of intent is not a defence. (ii) The words or conduct must be unwelcome to the victim and it is for her to decide what is acceptable or offensive. The question is not what (objectively) the tribunal would or would not find offensive. (iii) The tribunal should not carve up a course of conduct into individual incidents and measure the detriment from each; once unwelcome sexual interest has been displayed, the victim may be bothered by further incidents which, in a different context, would appear unobjectionable. (iv) In deciding whether something is unwelcome, there can be difficult factual questions for a tribunal; some conduct (e.g. sexual touching) may be so clearly unwanted that the woman does not have to object to it expressly in advance. At the other end of the scale is conduct which normally a person would be unduly sensitive to object to, but because it is for the individual to set the parameters, the question becomes whether that individual has made it clear that she finds that conduct unacceptable. Provided that that objection would be clear to a reasonable person, any repetition will generally constitute harassment.''

13. *Timothy James Consulting Ltd v Wilton [2015] IRLR 368, EAT* - held that a constructive dismissal could not constitute an act of harassment as a matter of law. Cf: *Urso v Department for Work and Pensions [2017] IRLR 304, EAT*, - held that a direct dismissal was distinguishable from a constructive dismissal, which could be an affront to the employee's dignity and, as a matter of statutory interpretation, could qualify as something done 'in relation to employment.

14. *UNITE the Union v Nailard [2018] EWCA Civ 1203*, *[2018] IRLR 730*. The Court of Appeal said that the ET had gone too far in arguing that a failure to address a sexual harassment complaint, made against elected officials of the union, could itself amount to harassment related to sex 'because of the background of harassment related to sex'. While the union could be vicariously liable for acts of discrimination by its employees, there would need to be a finding that the employees in question were themselves guilty of discrimination.

15. *'Hartley v Foreign and Commonwealth Office UKEAT/0033/15 (27 May 2016, unreported)*. The claimant had Asperger's syndrome which was accepted as a disability. When dismissed for underperformance, she brought proceedings for disability discrimination, complaining (amongst other things) of harassment based on comments by two managers in discussions about her work. The first manager had drawn a distinction between commenting on her tenacity (related to her condition) and rudeness/abruptness (which he attributed to her character not her disability). The second manager had drawn a distinction between commenting on her communication problem and her intelligence/ability to understand a spreadsheet. The employment tribunal held these comments did not amount to harassment because that had not been the intent of the managers, who were not, in effect, aiming them at her

condition. The EAT held that this was the wrong approach; the matter had to be reconsidered to see if the overall effect was unwanted conduct related to her disability.

16. *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT*, a case in which a woman of British Asian origin complained that a remark by a psychiatrist that a young man in his clinic 'should join ISIS, that'll sort him out' was not found to be related to race. The ET had accepted it was racial harassment because of a 'perception that ISIS in the minds of a significant proportion of the general public is that it is an international organisation connected with Asian people, in particular in such areas as Pakistan, Afghanistan and Iran'. However, setting aside this finding the EAT held that an ET needs to 'articulate distinctly, and with sufficient clarity, what feature or features of the evidence or facts found have led it to the conclusion that the conduct is related to the characteristic as alleged'. Here, there was no evidence to justify the finding that ISIS was related to Asian or South Asian people and it was not a matter of which judicial notice could properly be taken.

30. Constructive Unfair Dismissal

1. *Malik v Bank of Credit and Commerce International SA [1997] IRLR 462*: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

2. *Leeds Dental Team Ltd v Rose[2014] IRLR 8, EAT*: "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

3. *Hilton v Shiner Ltd [2001] IRLR 727, EAT:* it is important to consider whether the employer has acted as it has *without reasonable and proper cause*.

4. British Aircraft Corpn v Austin [1978] IRLR 332: a failure to investigate complaints promptly and reasonably may amount to a breach of this term, as long as the conduct is repudiatory in nature.

5. *Blackburn v Aldi Stores Ltd [2013] IRLR 846, EAT:* Serious breaches of the employer's internal disciplinary and grievance procedures may amount to a breach of this term.

6. *W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516* EAT: there is an implied term in the contract of employment 'that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.

7. *Greenhoff v Barnsley MBC [2006] IRLR 98* EAT: a persistent failure by the employer to make a reasonable adjustment as required by the disability discrimination legislation could amount to such a breach

8. *Berriman v Delabole Slate Ltd [1985] ICR 546 CA:* s.98 ERA still applies in a case of constructive unfair dismissal - "… the only way in which the statutory requirements … can be made to fit a case of constructive dismissal is to read [s 98(1)] as requiring the employer to show the reasons for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer."

Witnesses

31. We heard from the claimant. For the respondent we heard from the following witnesses:
    1. Ms Constance Merchant, the respondent's Senior Business Partner who reported into the Head of HR and Director of People
    2. Ms Tina Power, Head of Business Services
    3. Mr Paul Stanton, Head of People
    4. Ms Romena Indar, Accounts Manager, who undertook the disciplinary and grievance investigations

32. Corrections were made to some of the statements in evidence in chief. The Tribunal spent most of the first day of the hearing reading the witness statements and the documents referred to in the statements.

33. The Tribunal spent part of the first day of the hearing reading the witness statements and the documents referred to in the statements. Witnesses were cross-examined, and I asked questions.

34. The Hearing was conducted by the CVP video platform. I assessed the hearing throughout to ensure that all parties were participating and could see and hear all the proceedings. Regular breaks were taken every hour to because of the additional strain of watching, listening and speaking over a video link. No concerns were raised by the parties about the format of the Hearing.

35. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

36. The claimant was employed as an Outpatient Administration Clerk from June 2016 to her resignation in April 2020. Her role involved a variety of duties including welcoming and registering visitors, invoicing and taking payments, liaising with nursing staff. The claimant was accountable to the Patient Services Manager (122). Her contract of employment stated that she was contracted to work 37.5 hours per week over a shift pattern, which may include unsocial hours (160). In practice there were three shifts, early, mid and late.

37. The claimant's appraisals were positive. Her six-month appraisal in December 2016 states that she meets all expectations in her role and had a good working relationship with colleagues.

38. In September 2017 the claimant was off work for 2 days with *"bad back pain"* (219)

39. The claimant's PDR for 2017-18 was very positive, with 4 Exceeds and 6 Meets expectations, in summary saying she had consistently worked very hard throughout the year, multi-tasking and having good working relationships and customer service skills (228).

40. In late February 2018 the claimant experienced severe pain in her back and arm while at work and her supervisor sent to see a Doctor in the hospital. After tests she was referred to a spine specialist and for physiotherapy.

41. Because of continuing problems with back pain at work, the claimant was referred to Occupational Health and on 9 October 2018 an OH report was sent to the OPD Supervisor. This states that the claimant *"appears to have been having problems and reports symptoms associated with neck/arm and mid back pain for over a year. It is my opinion [the claimant] may have a 'pinched nerve' possibly in her neck … She has received physiotherapy for her symptoms and pain continues…".* The following was suggested: the claimant:

    (a) *"is not to lift/handle heavy objects"*

    (b) *"should rotate her tasks regularly and change her posture and undertake the exercises prescribed…"*

    (c) *"… should rotate her duties as much as possible…"* because symptoms can be exacerbated by sitting or standing for prolonged periods

    (d) Should have a Display Screen Assessment to ascertain whether she would *"benefit from further modifications/equipment to assist her in her role"*

42. The claimant reported receiving a new chair which *"she feels comfortable with"* (257).

43. Ms Power did not see this OH report at the time. Her view was that on the DSA *"we could assist"* but there were *"no direct recommendations";* she accepted the proposition that *"the onus was on the clamant to act".* On what it was the claimant should have done, Ms Power said she could have requested to swap shifts, and parts of the role she could not do – this was for the claimant *"to pick up"* in the team, that the team *"does have flexible duties…".*

44. Ms Power accepted that the supervisor who received this report should have passed it onto management. She accepted that it had not been discussed with the claimant, but that *"actions arose from it, the DSE assessment".* However,

Ms Power also accepted that the DSE assessment arose from several members of staff requesting it following workstation/chair issues (305).

45. On 19 October 2018 the claimant logged an issue on the respondent's Datix health and safety system, reporting *"dirty and unhygienic"* workstations with *"broken and sharp"* points and the surface is sticky. She reported that *"the floor is broken and damaged in some parts which has made it uneven"* (263). The claimant ticked that it was a *"Health & Safety Incident"* (266). Other staff also complained around this time about this work area.

46. Many of these issues were resolved quickly. Deep cleaning was completed by 31 October; many of the issues with the desks were completed by 12 November 2018 (283). However the issue with the floor was not resolved, save that the crack was taped over.

47. The claimant's evidence was that the positioning of the reception desks meant that the crack was always underneath the chair's rollers. This meant that it was a *"bumpy floor"* which exacerbated her back pain when the chair rolled over it, that "*they were looking into fixing this, but they didn't".*

48. A further medical report from a Consultant Spinal Surgeon at her workplace, Mr Bob Chatterjee, addressed to her GP, states that she had been *"… putting up with 6 months of pain … that it bothers her daily"* (277). The claimant had an MRI scan, which showed some degenerative change to her cervical spine, which may require osteopathic treatment (288).

49. On 5 December 2018 the claimant complained to a manager about staff *"really struggling with outdated and inadequate equipment i.e. printers chairs, cabinets etc.."* (294).

50. On 11 December 2018 the 2nd OH report states that the claimant has to *"look up"* to speak to patients and that this *"repetitive lifting of her head and tilting her neck can aggravate her pain and symptoms".* It was recommended that this *"is discussed"* with the claimant *"and possibly what alternatives may be considered to reduce/avoid this repetitive movement"* particularly while awaiting medical treatment. The report says that the claimant *"stands up regularly to reduce the head/neck tilt movement"* and it asks *" … are there any alternative duties for example?"* The report states that it is *"important [the claimant] continues to have the opportunity to regularly change her posture, as sitting and standing for long periods can aggravate her health condition".* It says that the condition is affecting her emotional wellbeing (295-6).

51. The respondent's evidence was that they discussed with the claimant a new chair, the Display Screen Assessment, provision of screen protectors and removal of under-desk drawers. The respondent's witnesses accepted that there was no discussion about the OH report's recommendation with the claimant. The claimant did not see this OH report at the time.

52. *The claimant said in her evidence that "my workstation was my job. I could not leave and do something else unless management would agree … I had very little*

control over this and management would not change this. I had to do my job for 8 hours." She accepted that she went on breaks *"… but if I went for a break it was frowned on, not liked by manager."* She said that she did communicate when she took a break *"I told normally 2/3 people".* The claimant described that she *"did not feel comfortable [with this arrangement] as I had not a lot of support from management."*

53. The Tribunal accepted the claimant's perception of how her breaks were regarded. This is evidenced by the claimant's manager. At a subsequent disciplinary interview, her manager, "JB" said that the claimant was noted to be *"wandering off … often without permission. I find out for her colleagues where she was gone … her colleagues are resentful because of her general behaviour in absenting herself from her desk on numerous occasions throughout the day…"* (473-6).

54. The Departmental risk register published after the claimant's H&S report shows the *"crack in floor"* on a risk matrix: it states that there is a *"possible"* likelihood of injury (3), with a *"minor"* consequence (2). The guidance states that the risk should be *"mitigated/treat",* which should be *"proportionate to the identified risk"* (300).

55. In response to the concerns raised about the chairs, on 23 January 2019 the respondent's H&S Manager emailed Mr Vickery saying that the chairs were all working properly, but that they were not being adjusted to the needs of the staff members. The chairs should be adjusted, the foot rest and keyboard supports should be used. It said that *"each reception desk*" has a badly angled pc which would need to be relocated *"to ensure that the staff member does not experience discomfort"* (304).

56. The claimant filled in a Display Screen Assessment self-risk assessment form on 21 February 2019; in it she ticked *"no"* to several boxes, including the screen was not at the right height, there was no adequate space for wrist/hand support. She said that her chair was not adjustable or stable. Under managers actions it states that a drawer has been removed, and screen protectors and a new chair ordered (314-5).

57. On 15 April 2019 the claimant submitted a grievance: it stated that staffing had been a *"challenge"* and that staff turnover and sickness was *"alarmingly high"* putting pressure on the permanent staff, *"our work stations have become overcrowded and unsafe, our equipment and chairs are broken…".* She made a complaint about her new supervisor raising her voice and throwing her hands around when the claimant asked her for some documents required for an audit; that this supervisor had also asked to see the claimant's contract. She says she is *"very distressed … and put an immediate stop to this kind of abusive and harassing behaviour…"* (345-6).

58. Mr Vickery emailed back saying that he would *"investigate this further"* also cc'ing Tina Power (344).

59. Ms Merchant's evidence was that she did not get to hear about this grievance and that to her knowledge HR was not told about it. She said that while a manager could investigate a grievance independently, there appeared to be no evidence that an investigation occurred, she accepted that no investigation was undertaken, she accepted that there was no follow up on any actions arising from the claimant's grievance.

60. A 3rd OH report was received on 13 June 2019, stating that the claimant had a *"chronic underlying musculo-skeletal condition"* for which she was receiving 12 treatments, following each of which she would need to take time off work. It referenced an uneven floor not allowing chairs to move freely, which she *"feels had aggravated her health condition"* (351-2).

61. In her evidence Ms Power accepted that from the date of the uneven floor being brought to her attention in October 2018, by March 2019 there were no firm plans to get the floor fixed, apart from to tape over the visible crack, and by November 2019 it had still not been fixed. She said that this *"stays in the risk register … we did make allowances to avoid this area and we ensured the tape was there".*

62. As confirmed by her at a subsequent disciplinary interview, page 472), JB told the claimant to change her workstation to avoid the crack. It was suggested to the claimant that this was *"appropriate advice".* The claimant's evidence, which we accepted, was that there were four desks at the station – *"… if I am on the late shift I have to sit there, there is nowhere else to sit. Everyone tried to avoid this [workstation]…".* Her evidence, which we accepted, was that that there were *"two issues"* for her causing pain: the first being looking up at patients; the second that the *"bump*" leads to an impact, *"you have to contract your muscles to go over the bump and this created more pain for me."*

63. A significant issue arose on w/c 28 October 2019; on this date the claimant asked JB for ½ day leave on 30 October (she was working the midday to 8.00pm shift) as she wanted to go to the Doctor at 4.00. JB queried this, saying it was too late to arrange cover.

64. There is disputed evidence on what occurred next. JB's account was that the claimant said she would change her appointment. The claimant said that this was a drop-in clinic rather than a Dr's appointment, so there was no appointment to change. The claimants position was that she would come to work on 30 October on the understanding that JB would *"try"* to arrange some cover in the meantime. Cover was not arranged by JB.

65. The claimant also asked a supervisor about cover, as confirmed by the supervisor at the subsequent disciplinary interview, who told the claimant *"I said I will sort [cover] out later… The next day … I asked her to find cover or swap with someone else… the next day the claimant told me [M – a bank nurse] would be covering her shift… If there was a misunderstanding potentially [the claimant] could have found cover because I told her to do so".* This witness also said that the reason the claimant gave for the appointment was that her back was *"killing"* her, the cause of this she said to the supervisor was, *"it's the job".*

66. In fact, the claimant missed the drop-in clinic she had wanted to attend, and by the time she left work she did so because she was in pain and in tears *"I left because I was sick".* The claimant went to see her GP the next day and was signed off work for two weeks.

67. It was put to the claimant that she had complained on 28 October of sinus pain, which was unconnected to her disability. The claimant's evidence, which we accepted, was that the issue started with a cold which affected her badly*, "that my neck was in such a state …it was apparent that I was ill."* The claimant was asked why she did not tell anyone before she left work that she was leaving. She said that apart from the supervisor there was *"no one there… I was told I could cover the shift, I was told if you find someone you can go…"*

68. On 31 October 2019 JB emailed the claimant saying, *"I believe you left early yesterday and asked [M] to cover you. Are you swapping the 4 hours with [M] or are you paying her directly?".* The claimant's response stated that she had left on grounds of sick leave, which was allowed under the policy (450-51).

69. JB asked for clarity from HR, saying that the claimant had said she had a Dr's appointment, JB had queried why she could not have attended before her shift started, and the claimant had said she would change the appointment; but the next day she had asked the Bank cover 'M' to cover part of her shift *"without asking or telling me and left"* (449-50).

70. On 11 November 2019, JB wrote a file note of the events on 28-30 October 2019; the note wrongly states that the appointment was on 29 October, and it says that she was *"advised by [the supervisor] that [the claimant] arranged bank staff to cover the remainder of your shift without notifying the supervisor or myself".* (467). The Tribunal noted that this account was contradicted by the account given by the supervisor at disciplinary stage – who says she told the claimant to arrange cover and was then was told by the claimant that M would be covering.

71. In the meantime, while the cracked floor had been taped up it remained uneven, and the claimant was concerned enough to take photos of this on 4 November 2019 (452-3).

72. On 6 November the claimant saw Mr Chatterjee who said she required two weeks off work that the issue was a *"combination"* of her prolapsed disk and her workplace which *"frankly has begun to get on top of her…".* She was referred for osteopathy (464). On the same day her GP signed the claimant off work with cervical spondylosis for two weeks, stating that her work *"is exacerbating her symptoms"* (461).

73. Following JB's referral to HR, two allegations of potential misconduct were investigated: the claimant had taken *"an unauthorised leave of absence"*; and she had *"acted outside her remit and leveraged Bank resources to cover her absence".*

74. JB was interviewed, giving her account as above, stating the claimant had said she would cancel the appointment but she had changed her mind. The issue

was that *"she misled me and her supervisor and .. acted outside of her remit…"*. JB that she was not aware of an underlying condition apart from the claimant taking *"…time off regularly because she said her back hurt".* There was reference to the uneven floor, and (quoted more fully above) to the claimant *"wandering off… often without permission… her colleagues are resentful…"* (473-6).

75. The 4th OH report dated 28 November 2019 states that the claimant is not fit for work; it recommends she meets with managers to discuss her concerns about workplace demands including staff resourcing, also recommending a Workplace Stress Risk Assessment which will provide an opportunity to put into place further adjustments "*as appropriate and required".* A phased return was recommended over a 5 week period, working 5 hour alternate days in week one. The following adjustments were suggested for consideration:

    (a) "allocating" the claimant to "midday shift";
    (b) allocating some of her duties to others;
    (c) allowing her "frequent" rest breaks;
    (d) time off for rehab, assessment or treatment;
    (e) acquiring or modifying equipment;
    (f) making adjustments following a work station assessment;
    (g) to rotate tasks away from desks "*frequently"* (478-80).

76. The claimant returned to work on 4 December 2019. Her evidence was that none of the adjustments were discussed at her return to work meeting. Instead, she says that JB told her *"we don't do sick here"*. We accepted that this remark was made. We also accepted that at a subsequent meeting that day SB was asked about the OH recommendations by the claimant who wanted to discuss the adjustments and phased return, and this was ignored. We accepted the claimant's evidence that when she told JB about her worsening condition JB asked her, *"are you disabled … are you getting a blue badge"*.

77. We noted that JB is no longer an employee and did not give evidence. The respondent's case was that JB was consistently supportive to the claimant that she "sympathised" with the claimant.

78. In reaching the conclusion that these remarks were made to the claimant at the return to work interview, we noted JB's generally negative remarks about the claimant that she made at the subsequent formal interviews. We noted also that the account of how the claimant came to ask 'M' to work the rest of her shift was contradicted by the account of a Supervisor, who was junior to JB. JB admitted at the subsequent disciplinary investigation interview she had referenced a blue badge, albeit in a different context; she was not asked at this interview about the claimant's "we don't do sick here" allegation made by the claimant.

79. We also noted the tenor of JB's 31 October 2019 email (paying for cover) – a sarcastic, unreasonable remark, one which JB would have known should not have been made to an employee, whatever her belief about the absence. We concluded that JB was rude and blunt to the claimant at the 4 December 2019 return to work interview, that while there was reference to adjustments, no actual

adjustments were discussed. We concluded that the remarks were made, as the claimant says.

80. The claimant's evidence was that she was back on duty for 8-hour shifts on 4 and 5 December – *"I was required to go back to my workstation and work 8 hours".* She said that there was a discussion about adjustments *"in general terms"* and there was a reference to her health being a priority, but a phased return was not discussed; *"nothing was put in place…".* Ms Power accepted that a phased return had not been put in place, because there had been *"no opportunity to do so, there were discussions taking place…".* The effect of this was that the claimant was rostered to work full shifts on her return to work.

81. An issue them arose for a medical appointment the claimant had on 6 December 2019. On her return on 4 December the claimant filled in a holiday request for 6 December; JB replied saying she could not authorise holiday, saying *"please can you confirm if you have a doctor's appointment if so can I see the confirmation?"*

82. The claimant's evidence was that JB *"… did not believe me when I said I wanted to go to the GP, she wanted evidence of this. I have told her and I said want to take 6th off to go to Dr, and she does not believe me - she wanted to see the appt. She has the OH report, and this says that they should allow me to see Dr. I find this harsh. … I would have expected to be believed…".* In the subsequent grievance interview JB said that when the claimant asked for leave on 6 December, *"I approved this"* (533).

83. The claimant attended this GP's appointment on 6 December and she was signed off work for 6 weeks (490).

84. On 12 December 2018, while off sick, the claimant was informed she was required to attend a disciplinary investigation meeting on 19 December to address allegations of misconduct. The allegations were that the claimant (1) had agreed to cancel her appointment but had left work without authorisation; she and failed to carry out a reasonable agreement made with her manager; (2) had acted outside of her remit by commissioning a bank worker to cover her absence, leading to additional costs, this had undermined her managers; this amounted to a breach of the Code of Conduct (497-8).

85. Ms Merchant's evidence was that this was a case of misconduct, she accepted that this was not a disciplinary process which could conceivably have ended in the claimant's dismissal.

86. In her investigation interview the claimant said that she had not left work to attend her Doctor, which was shut by the time she left. She said that she was in pain and had tried to speak to a manager, no one was around; that she had worked as long as she could on her shift. She had not gone to the appointment and had *"tried to cooperate".* The claimant mentioned the need for adjustments and this had not happened. She had asked a bank staff to cover because this member of staff was experienced.

87. On 9 January 2020 the claimant submitted a complaint about JB's conduct, who she alleged had put *"undue pressure on me to come to work when sick. It was neglectful and unsafe to refuse authorising my leave".* She alleges that no adjustments were made on her return to work on 4 December 209, *"her lack of care has led me to be signed off again…" (*506). In response, the claimant was told that a grievance investigation would be undertaken at the same time as the disciplinary *"as both matters are related"* (514). On 14 January she asked to be assigned to another line manager.

88. The claimant returned to work on 17 January 2020. She was assigned to a new role as Concierge on the Reception desk, and was allocated a new manager to report to (516). On 16 January the claimant was told SL would be her line manager on a temporary basis and SL would *"identify your needs and assign you some duties"* (513). On asking whether she would be working in outpatients again, she was told that *"it wouldn't be a good idea"* to return to her role, and she told she should work on Concierge (525). The claimant was also told that her move to Concierge was temporary, her temporary supervisor telling her she was in this role *"until further notice"*.

89. For the claimant this did not meet the reasonable adjustments suggested, which included allocation of some duties to others. She was still in pain – as she still had to lift her head up and down when seeing visitors and patients whilst sitting down. Ms Power's evidence was that this was a suitable as she could stand up and leave her desk, *"…there is much more flexibility, so this is best for her."* In her evidence Ms Power said that the Concierge desk took away most of the admin functions, *"… it was just meet and greet … OH said reduce tasks and we did this… her role was just directing - smile and greet and lead patients to where they need to go, and option to stand, sit, there was flexibility in this role…".*

90. It was suggested that the claimant could have been put in the back office, the evidence was that *"we did consider it but that this may involve lifting files."* Ms Power accepted that a role in Admin/billing *"…with arrangements it could be done, but it takes time, would take weeks to train".*

91. Ms Power accepted that there was no plan put in place for frequent rest breaks. Her evidence was that this was for the claimant to organise, that she should contact the supervisor if it was busy, or she could have asked staff on other stations, for example the imaging desk, to *"cover for a couple of minutes".*

92. On 14 January 2020, Mr Chatterjee wrote a further report, stating that a new scan showed little change; that she *"needs a combination of lightning her duties … some additional therapies such as yoga and Pilates, and … some pain management…"* (518).

93. The claimant continued to experience issues in her new role relating to her back. Her temporary manager advised the Head of Business Services that the claimant was saying she was *"always"* in pain at work, that she was standing at times to greet patients. On 4 February 2020 a further email stated that the claimant was talking about *"how the Hospital were aware of her health problems for 17 months and didn't do anything…"* (520).

94. JB was interviewed on the claimant's grievance on 7 February 2020. She referenced meeting the claimant for a chat on 4 December 2019 and a more formal return to work meeting on 5 December. She says both that the claimant *"proceeded to go into the details of her back pain;* also that the claimant *"did not mention anything about being in any pain or discomfort".* She said that the claimant had worked her full shift and not the limited hours *"as she mentioned she was ok … [she] at no time mentioned or indicated that she was feeling unwell or uncomfortable…"* (531-3). For the reasons stated above, the Tribunal did not consider that this was an accurate account of the interactions with the claimant on 4/5 December 2019.

95. A referral to a spinal and pain medicine consultant confirmed a diagnosis of neuropathic pain in C6/7 related to cervical spondylosis, and recommended pain medication, continued physio and yoga, a referral to a specialist in emotional trauma to assist with the issue of continued pain.

96. On 20 February 2020 the claimant with the assistance of a Legal Advice Centre submitted a further grievance. She summarised the four OH reports and their recommendations from 9 October 2018 to 28 November 2019, stating that the recommendations *"have continually been ignored"*; that on her return to work on 4 December 2019 she received *"hostile treatment"* from my manager; she had been notified of a disciplinary on 12 December; she referred to the duty for reasonable adjustments, and for all the recommendations in the OH reports to be carried out. She accepted some changes had been made, but stated *"I am highly concerned that you are not putting into place a realistic and feasible long-term adjustment to the role…"* (540-42). There is no evidence that this email was responded to.

97. An internal email on 21 February refers to the claimant being away from the concierge for over 10 minutes without informing anyone, and that it is *"adding unfair pressure"* on the imaging staff who have to cover; and asking that the claimant must *"inform a staff member when they need to leave desk for an approved reason"* (543). This was discussed with the claimant, who followed up by email to say that she would *"need to be away from the desk occasionally on the recommendation of the OH…"* (545).

98. The claimant was rostered on the concierge rota for the whole of March 2020 (548). On 23 March 2020 she went into Covid-19 isolation for 2 weeks. A series of emails between the claimant emails between the claimant and Ms Power from 29 - 31 March 2020 show the claimant enquiring about working from home on her return (6 April 2020). She was told that this was not a possibility, that she could work (including possibly being redeployed) in a front-line role, or she could consider taking annual or unpaid leave.

99. On 31 March the claimant required about furlough, and was told the respondent was not considering taking part *"at this stage"*. She asked about PPE and distancing. Later that day she emailed Ms Power saying that her colleagues had said there was no PPE or social distancing; as a consequence she said that she would take annual leave until 20 April 2020 for safety reasons. She said *"I will*

contact [JB] before the 20th". Ms Power responded asking her and family to *"stay safe"* and saying that she would liaise with JB (563-557).

100. In her evidence the claimant said that she had enquired what to do at the end of isolation, and Ms Power said that they would get back to her, but they did not do so, this is referenced in her 29 March 2019 email saying she *"didn't get an update"* from her supervisors, and asking if there was a role working from home. For the claimant this was *"…another indication that I was not wanted"*. She said in her evidence that the April rota was out before she went into isolation *"… and I was not on it"*.

101. The claimant resigned her role on 8 April 2020, stating that she considered her employer to be in *"continued breach of terms of my employment contract"*:

    1. Failure of the respondent to consider making any reasonable adjustments following OH and specialist reports
    2. Harassing behaviour regarding the status of her injury, including mocking her in email, in person, and calling her into a disciplinary meeting while signed off work
    3. Wrongful and dishonest accusations of misconduct related to injury
    4. Failure to investigate or respond to repeated verbal and written grievances
    5. Demoting her to concierge without consultation
    6. Reducing her pay in January without due explanation or justification
    7. Consistently ignoring emails

    The claimant included a 'description of event/discriminating behaviour spreadsheet' (585-91).

102. It was suggested to the claimant that when she resigned on 8 April 2020 this was not to do with not being put on the rota, but because of the decision at that stage not to take part on furlough, and because of what she perceived to be a lack of PPE and social distancing. We accepted that this may have been a factor in the claimant's mind. However, we accepted that the predominant factors for her decision to resign were those set out in her resignation letter, that these were the genuine reasons for the claimant's resignation.

103. The claimant contends that she was underpaid on her return to work in January 2020, that there was an agreement in place with the respondent that she would, on her return to work, take time off as annual leave instead of being paid less when she was building up her hours. The issue for her was that she gave back annual leave for hours she was not at work during the phased return, but was not paid for all of her days at work. This is expressed in the claim as a repudiatory breach of contract and is a factor in her resignation letter.

104. The claimant accepted that she had been absent from work for 73 days by her return to work in January 2019, 8 days more than her contractual entitlement to paid sickness absence. Her point was that if she had returned to work on 4 December with adjustments, she would not have had the consequent absence, and would not have had to take annual leave to cover her shortened shifts; *"they*

did not implement a phased return, I could not risk any more damage to my health and I had to stay away." While the claimant was paid according to her contractual entitlements, her argument is that *"I was off because I was disabled; if the OH report had been implemented I would not have incurred this absence".*

105. By the date of resignation, the claimant's evidence was that *"I had agreed a temporary change, this role was a waste of my skills … in April it had become forever. I came back in January, still there in April. There was no discussion, no feedback, I was just waiting for investigation and grievances".* The claimant described receiving one email saying there as a delay, *"I then waited, and at one point I just gave up".*

106. The respondent had, by the date of her resignation, produced a disciplinary investigation report stating that on the evidence available the first allegation was substantiated; the second partially substantiated. The recommendation was to hold a formal disciplinary hearing (565-582). This was not communicated to the claimant by the date of her resignation. No report was produced on the claimant's grievances.

107. Ms Indar gave evidence on her report. She accepted that the claimant had given evidence that she was sick at the time she left work, also that authorisation is not required to take sickness absence. She accepted that the claimant needed to arrange cover if possible if she was leaving; her evidence was that the claimant *"did her best in this situation"*. She accepted that the claimant had been instructed by her supervisor to get cover, and the claimant had then told her supervisor she had done. *"… it was miscommunication between 3 parties."*

108. The Tribunal noted that this evidence appears to be contrary to some of the conclusions within the investigation report. Ms Indar's evidence was that it was *"difficult to come to a conclusion – the claimant said she left because she was unwell; before this she had said an appointment. I felt that if she was so unwell that she could not stay at work, she could have communicated this to duty manager. I accept that it was reasonable that if she was not well she should go home."* The issue of asking the bank staff to work was "substantiated" because of resource implications; it was concluded that her absence was "unauthorised" as she failed to communicate to mangers she was leaving.

109. On the 'blue badge' allegation: Ms Indar said that JB accepted making a comment about a blue badge - because *"she was not aware of the claimant's disability, so she did ask to clarify if she was using a blue badge, and is registered as disabled."* Ms Indar accepted that she had not asked JB about the "we don't do sick" allegation.

110. Ms Indar accepted that there was a criticism of both processes and implicitly of JB in the report's recommendations, that there was a lack of clarity in communication between supervisors, managers and their teams, that there was a need to promptly carry out RTW interviews and follow-up. 12 recommendations were made for the respondent to improve processes.

111. On the delay to the disciplinary report and the lack of a grievance report, the respondent's position was that this was down to sickness, people being away, and then the onset of the covid pandemic.

Closing Submissions

112. Mr Crow provided a written submission and made oral submissions, Mr Browne made oral submissions.

113. Mr Crow for the respondent made the following general points:
    - Key decision makers for the respondent are unavailable as they have left the organisation
    - While the claimant's evidence was not deliberately misleading, it was *"not reliable or accurate".*
    - The OH reports and medical reports of Mr Chatterjee were not ignored – and this is the allegation; in fact they were discussed.
    - And adjustments were made from the reports, contrary to the claim made.
    - The claimant was not restricted or prevented from taking breaks or from moving around, there was no negative perception of her when she did so (and an allegation of negative perception does not form part of the claim).
    - The claims are out of time, for example there was no event between June 2019 and contact with ACAS on 25 November 2019. She was not too ill to work in this time.
    - The floor was not ignored, tape was put down, and it is not for the tribunal to determine whether or not this was insufficient – on the allegation, it was not ignored. "It is not for the Tribunal to decide if this is sufficient."

114. Mr Crow also argued that some allegations were not put to witnesses; that if a positive case is to be maintained against a witness, that has to be put. For example, it was not put to Ms Power that the failure to deal with the floor was an act of harassment.

115. The claimant asked for the first grievance to be dealt with informally, and so it was not passed to HR. The allegation is that this grievance was completely ignored, and there is no evidence that was the case.

116. On the s.15 claim – the failure to deal with the grievance: the something arising from disability is the need for time off, and the allegation is that because the claimant took time off work she was treated unfavourably by not dealing with the grievance; but *"…it is not a plausible inference that this is the reason why the grievance was not dealt with".*

117. Time off for medical appointment: there is a link between time off and disability. But the Tribunal still has to ask whether the way in which JB sought to commence a disciplinary investigation was because of time off. *"Ask what are the circumstances known to JB"* – she say she does not know that the claimant has an underlying condition. Mr Crow accepted that there may be constructive

knowledge, but if the claimant did not raise a link between her time of an underlying disability, JB is not to be criticised.

118. The disciplinary issue: the claimant gives contradictory explanations, saying she would cancel the appointment and then leaving work without reverting to managers. The investigation is because she took time off without explanation having agreed not to go to the appointment. The investigation is therefore because of this contradiction, which is not disability related.

119. The issue of cost – this is not disability related; while the claimant may have been told to arrange cover, it was not suggested that this meant the claimant could incur the cost of bank staff. The investigation is not caused by the claimant taking sick leave; it was taken because of the contradiction in her responses, and because of the cost that had been occurred.

120. On the 'refusal' of annual leave to take the appointment – in fact it was granted and was then converted to sick leave.

121. In addition the decision to commence the investigation is a one-off act with continuing consequences and is therefore out of time.

122. On the failure to put the claimant on the rota after her isolation the issue was fluid and dynamic with the claimant, also the pandemic would have had an effect; and so there is no good reason to draw a causative link between the disability and the rota.

123. Reasonable adjustments: the burden is neutral; the tribunal can consider what adjustments could have been made. But the respondent has to know what adjustments are being suggested, and the respondent has addressed the suggestions that had been made, for example it did adjust shifts.

124. On unfair dismissal, the breach must be repudiatory; it cannot be because the claimant disagreed with decisions the respondent had taken. For example the delay in dealing with the grievance and disciplinary matters can be attributed to the pandemic.

125. Mr Browne for the claimant argued the following:

126. The use of the word "ignore" this does not necessarily doing nothing, *"it can mean there is a failure to do enough"*.

127. The evidence: on the one hand there is good record keeping by the respondent – meeting notes kept on file (195, 197, 466-7); the notes demonstrates a practice of recording key decisions. And less formally, emails between Ms Power - 520 - again attempt to record decisions taken. He argued that there is *"a paper-trail"* for some decisions, which are helpful for the respondent; but no paper trail of key decisions which R says did happen, but *C "says did not happen."* For example the action R says was taken on OH reports, of which there is no record and no evidence.

128. On knowledge of disability: reports and meeting notes – 258 and 266 were sent to managers; this says that the claimant has a long term condition.

129. The 3rd OH report at 295 is *"particularly important"* as it refers to elements of the claimant's role which were exacerbating her symptoms. *"This should have been stark warning to the respondent"*. They should have discussed alternative roles to avoid this exacerbation – it was *"an issue for the respondent to address"*. There was no attempt made to move the claimant into a different role. It cannot be said that that no adjustment would have been reasonable.

130. The 4th report at 479 – recommends a phased return - 5 hours alternate days. This was not implemented on her return in December - she was rostered onto two full shifts and this was a week after this report. Adjustments should have been put in place.

131. While Ms Power says that she gave personal consideration to moving the claimant to the Concierge desk, there is no disability or workplace assessment undertaken and the claimant remained in pain undertaking her role.

132. The time of for rehabilitation and assessment as an adjustment: first C was refused the time off for an appointment and then she was disciplined for taking sickness absence.

133. Frequent rest breaks: The evidence shows that employees were not aware of the claimant's need for breaks and got annoyed; and adjustment could have been to make staff aware of the need to cover for breaks. This was raised a lot in disciplinary investigation – colleagues are resentful, this is causing a breakdown in her relationships with colleagues and supervisors are aware of this. This forms part of the conclusions in the disciplinary report.

134. The move to concierge: if this was an attempted reasonable adjustment, it was made without the claimant's involvement, it was imposed on her and it was made without clinical involvement; OH had not said move her role, and there should have been a workplace assessment. By April there was no consideration to any other role. While finance may have required training, this may have been a reasonable adjustment which should have been considered for the past year.

135. The disciplinary process: this is a disability-related absence when C leaves work – and she has told her Supervisor that this is because of her back, and her supervisor had said this at the disciplinary interview (474). JB knew about a chronic back condition (472) and had discussions about it, *"there was no lack of knowledge"* during this process.

136. It's not proportionate to put the claimant through a disciplinary *"just because you have some doubts"*. There should have been an "informal discussion" – see the Disciplinary Policy page 240 in which any issues of concern could have been raised.

137. C's use of bank staff: this is an issue of confusion, including the fact that her supervisor tells C to get cover, the issue of an appointment, whether the claimant

left because of sickness: C may not have formally asked a manager to leave *"… and could be criticised, but this was not a disciplinary allegation"*. Also, the claimant did inform her supervisor – see 475.

138. Mr Browne argued that the disability-related absence was the driver for the disciplinary process. It could have been "ironed out very informally", instead C is subject to disciplinary a process, and this is the discriminatory treatment.

139. Also, the investigation "sweeps up" into the process issues arising from the claimant's disability, her absence from station. Also, C's key allegations were not put to the relevant staff members.

140. Rota: Ms Power accepted that there was no reason why the claimant should be left off the rota; the hospital was running low on staff, and there is no positive case being put s to why she was not on the rota. It is "odd" not to ask C to work – why was she not put on the rota?

141. Resignation: at this stage it had been years of failures to make any adjustments, she had raised issues which had not been dealt with; she had waited for months since the outset of the disciplinary process; she has been moved to a role she thinks is inappropriate which is still causing health issues; there is no check-ups with her, no suggestion by April that things are going to change, so she resigned as it was clear she was "no longer wanted by the respondent".

142. On time: the claimant's argument is that there were continuing repudiatory breaches by the respondent to her resignation. If a just and equitable extension of time is needed, the claimant is making efforts, she has raised grievances, she has been trying to resolve issues at work with no success.

The Tribunal's conclusion on the law and the evidence

Direct discrimination

143. We considered whether the claimant was subject to the following conduct and whether this conduct was on grounds of the claimant's disability. The claimant relies on a hypothetical comparator, this would be an employee who was not disabled and with no material differences in the circumstances of the claimant and this comparator; to compare 'like with like'. The relevant circumstances include the comparator taking time off work, needing to change or stop doing part of their role, who needs regular breaks, and who needs reduced or changed hours of work. Their manager would be JB and the two would have a poor interpersonal relationship.

a. The Respondent ignored and failed to acknowledge or discuss with the Claimant all of her OH reports (bar the 28 November 2019 report, which was inadequately considered) and the medical reports?

144. The Tribunal accepted that there had been a failure to discuss with the claimant all bar the last of her OH reports and all of Mr Chatterjee's reports. We concluded that there was no proper or appropriate discussion with the claimant at any time

about her medical issues and the adjustments which were suggested to her role in the OH and medical reports. In particular, we noted that there was no discussion about her being able to move away from her workstation as needed, about the issues with repetitive neck movement, the need for frequent changes to her working position.

145. We heard no evidence of how a comparator would have been treated in such a circumstance; this was not explored at all with the respondent's witnesses. We concluded that a hypothetical comparator who needed changes to their role and changed or reduced hours would have been treated in the same way as the claimant. We concluded that the claimant's medical condition and need for adjustments was ignored, whether consciously or unconsciously.

146. We concluded that a comparator who was presenting evidence (whether medical or not) evidencing a need for a change of duties or hours would equally have been ignored. We concluded that the claimant's disability was not in any way a reason for the fact that the medical reports were ignored; they were ignored, we concluded, because there was no sense within the claimant's management structure that there was an issue which required addressing.

147. A comparator would have been treated in the same way, there would have been no discussion with the comparator about the need for changes, and they would not have been put in place.

b. The Respondent ignored reports of Health and Safety issues on 22 October 2018 and 4 April 2019:

148. The issue remaining under this claim is the failure to fix the cracked floor. This was not 'ignored' in that an attempt was made to address the issue by taping over the crack. However, it was clear to the respondent that this did not fix the problem. It remained on the 'risk register; as an issue to be resolved. We accepted that the word 'ignored' is, from the claimant's perspective, what then happened, as nothing afterwards was done to fix the issue, it was effectively parked following the initial attempt to fix in late 2018. This meant that chairs could not move properly over the crack without jolting the user.

149. We noted that this issue was of concern to other staff, not just the claimant, and that other staff raised health and safety concerns including over the crack in the floor. We concluded that this issue was, in fact, dealt with in exactly the same way when raised by non-disabled members of staff.

150. Therefore the claimant was not treated differently on grounds of her disability over this issue, as other non-disabled staff were treated in the same way. We concluded that a comparator who raised health and safety issues would have been similarly ignored.

c [withdrawn]

d. The Respondent ignored the Claimant's grievance of 12 April 2019:

151. There is no evidence that this was ever addressed, and the claimant says that it was never addressed. The respondent's witnesses accepted that it may not have been addressed. We accepted that it was effectively ignored.

152. We concluded that this was no different to how a grievance presented by the hypothetical comparator in the same or similar circumstances. This comparator would have presented a grievance and would have received a similar response and no action would have been taken on it.

e. *The Respondent ignored the Claimant's grievance about CC:*

153. Again, there is no evidence that this was ever addressed, and the claimant says that it was never addressed. The respondent's witnesses accepted that it may not have been addressed. Again we accepted that it was effectively ignored.

154. For the same reasons as the 12 April 2019 grievance, we concluded that a comparator who submitted a similar grievance would also have been ignored. The treatment was not on the ground of the claimant's disability, it was instead, we found, indicative of how the respondent's then direct management team of the claimant acted and would have acted with any member of staff in the same or similar circumstances.

f. The dispute about leave authorisation between 21 October and 6 November 2019 including JB sending email on 31 October asking the Claimant to pay for cover out of pocket when sick:

155. There were two issues: firstly about what occurred with the leave request. This was confusing factually. We accepted that JB was initially of the opinion that the claimant leaving work had not been agreed by her. We also accepted that the conclusion of the conversation was not a definitive 'no' to the leave, that it was dependent on whether cover could be arranged. But it had not been granted despite it being for a visit to her GP.

156. We accepted that JB found out the day after the leave that the claimant had arranged cover via the supervisor and had taken this leave. But the claimant did not inform JB at any time of the arrangement she had made with the supervisor, meaning JB had to enquire as to what had occurred.

157. We concluded that in a similar situation a non-disabled comparator, who has a similarly poor relationship with JB, would have been treated in exactly the same way. The leave would not have been granted by JB to the comparator and JB would have reacted similarly to a non-disabled comparator when finding out a bank staff member had been used. There was no less favourable treatment.

158. The second issue was the email: we concluded that a similar email would have been sent to the comparator; this was not sent because the claimant was disabled, it was sent because JB and the claimant at this stage did not get on, and because JB was angry that the claimant had effectively gone behind her back to get cover. The comparator would have received the same email.

g. JB stating "we don't do sick here" on 4 December 2019 and ignoring the Claimant's request and joking:

159. We accepted that this remark was made, albeit it was never investigated. We accepted that this was a remark which was closely related to the claimant's ill-health and her disability, and it was in the context of a return to work interview related to her disability.

160. However, we also concluded that this remark would have been made to a non-disabled employee returning from sickness absence with the same or similar work history to the claimant and with a similar relationship with JB. This was not a remark made because of the claimant's disability, it was not less favourable treatment.

161. There is a second part of this allegation – 'ignoring the claimant's request'. This is clarified within the Rider to the ET1, page 21, that the claimant asked SB to implement the OH recommendations, but "[JB] ignored my request". We accepted that this request was made and was ignored. We again concluded that the hypothetical comparator making a request for changes to be made to their working arrangements at short notice would have been similarly ignored.

h. Refusing authorisation for leave on 6 December 2019 and sending a curt email, not making adjustments to the Claimant's working time:

162. As found above, initially the leave request was refused; on the claimant's return to work on 4 December 2019 no adjustments were made to her shifts.

163. We again concluded that a non-disabled employee returning to work with a similar work history and relationship with JB, who required shorter-working hours and who required to take time off at short-notice for an appointment, would have been treated the same way.

164. We concluded that on the claimant's team there was no process for staff who needed changes to their shifts including shorter-shifts apart from internal shift swaps. We concluded that such a request would have been similarly treated had it been made by the hypothetical comparator needing to reduce their working shift at short-notice.

165. We also concluded that a request at short-notice for leave for a medical appointment would have been treated the same way – JB would have said to the comparator that it was too short notice, and would have requested proof of the appointment. The claimant was not subjected to less favourable treatment.

i. Commencing a disciplinary investigation on 12 December 2019:

166. Was this treatment on grounds of the claimant's disability? We concluded not – that JB would have submitted a complaint and the same decision would have been made to commence a disciplinary investigation with the hypothetical comparator. This was not because of the claimant's disability, it was because of the poor relationship between the claimant and JB, and a comparator who acted

in the same way would have been treated similarly by JB, who would have complained about this conduct, leading to an investigation. There was no less favourable treatment.

j. The disciplinary investigation meeting of 19 December 2019 and the Respondent did not conclude the disciplinary investigation:

167. Again, we concluded that the same treatment would have occurred with a non-disabled comparator; once the complaint had been made, an investigation meeting would have taken place. The process adopted at the investigation meeting on 19 December 2019 with the evidence available would have been the same with a non-disabled comparator.

168. We found that the reason why the respondent did not conclude the process was in part because of staff absences, leave, and then the onset of the covid-19 pandemic with the consequent huge stressors on the respondent's operation from late February/ early March 2020 onwards. This had nothing to do with the claimant's disability.

k. [withdrawn]

l. Demotion to the role of concierge on 17 January 2020

169. We accepted that the claimant characterised this in her mind as a demotion. We concluded that this is how it was seen in the hospital, as a meet and greet role, without any of the administrative responsibilities in the claimant's role.

170. This decision was taken without the claimant's input by Ms Power. What caused this treatment, what was the reason for it? We concluded that there were two reasons for this treatment. One was because there had been a significant deterioration in the relationship between the claimant and JB. The other reason was because the claimant needed an adjustment to her duties, and Ms Power's view was that the Concierge role was a suitable adjustment. We concluded therefore that a significant reason for this treatment was because this was, Ms Power believed, a reasonable adjustment to make. There was therefore a disability-related element to this decision.

171. However, we concluded that this did not amount to direct disability discrimination. We again considered how a hypothetical comparator would have been treated. We concluded that a non-disabled comparator who had complained about their supervisor and who had an equally poor relationship with JB, who had difficulties undertaking their role at their usual work station would also have been transferred to the Concierge desk without prior consultation, as the claimant was.

m. [withdrawn]

n. The Respondent did not respond to the grievance of 20 February 2020:

172. It is accepted that this was not responded to. We noted the reasons given for the delay in providing the disciplinary report – sickness, holiday and then the

Covid-19 pandemic. We noted that while Ms Indar says in her statement that she investigated the grievance issues, not all of the claimant's allegations were put to witnesses, no report was produced (draft or otherwise) and the grievance issues are not referred to in Ms Indar's statement.

173. The Tribunal concluded that the reason why the grievance was not dealt with was because the claimant had made difficult allegations against JB and others, that there was a reluctance to address them and a desire to progress the disciplinary allegations first. This was not because the claimant was disabled and we saw no connection between the claimant's disability and the failure to address the grievance. The reason why the grievance report was not completed at the date of the claimant's resignation would have been the same for a non-disabled comparator who submitted a grievance on the same date when facing a disciplinary allegation.

o. The Claimant not being named on the April 2020 rota:

174. It was accepted the claimant was not on the April 2020 rota. The respondent is unsure of the reason, pointing to the Covid-19 pandemic as a potential reason. The claimant points to the fact that an employee on sick leave (which she argues is analogous to mandatory self-isolation) would have been named on the rota.

175. We again concluded that a non-disabled comparator who had expressed concern about returning to work and who was in self-isolation and then took annual leave would also have remained off the rota.

p. [withdrawn]

176. Did the Respondent subject the Claimant to less favourable treatment than the appropriate comparator because of the Claimant's disability?

177. For the reasons set out above, we concluded above that the claimant was not subjected to less favourable treatment than a non-disabled comparator. The treatment was not because of the claimant's disability, accordingly the claim of direct disability discrimination fails and is dismissed.

Discrimination arising from disability

178. Did the Claimant's requirement to take time off work and have reasonable adjustment to her working life, arise as a consequence of her disability? We concluded yes, to both parts of this requirement.

179. Time off work: The respondent disputes that at least one absence – the 30 October 2019 absence - was disability related, citing the claimant's account at the time that the cause of her health was a cold/sinus pain. The Tribunal accepted the claimant's evidence, that this was a cold/sinus issue which impacted on her back and neck pain, that the primary reason why the claimant left work on 30 October was because she was in a lot of back pain which was related to her disability. We concluded that all of the claimant's sickness

absences and medical appointments referenced in this claim were caused or contributed to by her disability.

180. Adjustments to working life: We considered the adjustments the claimant was seeking, as set out in the OH and medical reports. We concluded that they clearly arose in consequence of her disability. They all sought to reduce the impact of parts of the role – in particular sitting for lengthy periods and constantly looking upwards – by suggesting rotation and a change of duties. The adjustments were inextricably linked to alleviating the symptoms of her disability.

181. We next considered in relation to each of the claims (i) whether the conduct as found amounted to unfavourable treatment – i.e. was this treatment which placed her, objectively, at a disadvantage, was adverse to her (ii) whether she was subjected to this treatment because of the something arising – i.e. the requirement to take time off work and/or the need to have reasonable adjustments to her working life.

a. The Respondent ignored and failed to acknowledge or discuss with the Claimant her OH (bar the 28 November 2019 report, which was inadequately considered) and medical reports

182. We accepted that all bar the 28 November 2019 OH and medical reports were ignored and not discussed with the claimant at all. When the claimant attempted to bring up the 28 November report with JB, her request was ignored and instead sarcastic remarks were made to her.

183. The claimant returned to work on two full-day shifts, contrary to the 28 November 2019 OH report which recommended a phased return commencing on reduced hours on alternate days; as adjustments it suggested consideration of the following: allocating duties to others, working midday shift; rotate tasks away from desks; incorporate frequent rest breaks. None of these were discussed with the claimant; none of these were implemented at the time. This was not for a lack of understanding of the issues at this time - on 4 December 2019 JB emailed staff including Ms Merchant and Ms Power saying that *"as requested by the OH [the claimant] will be returning to work slowly and work a few hours a week…"*

184. The Tribunal accepted that the 28 November 2018 report was considered by Ms Power prior to the claimant's return to work in February 2020. However, this was not discussed with the claimant; its suggested adjustments were not properly considered by Ms Power, instead she moved the claimant to the Concierge role without discussing the report with her. We concluded therefore that this report was inadequately considered.

185. We concluded that the failure to consider or properly consider the OH reports clearly placed the claimant at a disadvantage, as adjustments which may have been possible to her role and/or a change or hours, or other possible roles, were not considered by the respondent.

186. What was the cause, or the reason, for this treatment? We noted that several recommendations were made in the disciplinary outcome report for better

communication and training for mangers, operational issues to be addressed promptly, to ensure staff are aware of guidelines and procedures that govern changes/adjustments to shifts.

187. We also noted the pejorative remarks and comments about the claimant - from being away from her workstation too often, to the remarks made by JB to the claimant which were we found related to her disability, below.

188. In relation to the first three OH reports and the medical reports of Mr Chatterjee and the GP, the respondent's position was that essentially they had at least in part been actioned, also that as they pre-dated substantial absence, such absence could not have been the cause of any inaction on them.

189. We noted the evidence in this hearing and in the documents – Ms Power's evidence on the first report was that it was for the claimant to raise the issues and request adjustments from her managers; JB's evidence at disciplinary was that she had asked the claimant to avoid the crack in the floor.

190. We also noted that some of the OH recommendations were actioned – for example the 9 October and 11 December 2018 reports – a DSE assessment was undertaken, the floor was taped, some equipment was modified. However, we concluded that these had been actioned because of H&S Datix reports by the claimant and other members of staff – i.e. not because of the recommendations within the reports. Other recommendations were not considered – for example the need to rotate tasks regularly and change posture (9/11/18) , avoid repetitive tilting of her head , alternative duties, change posture and avoid sitting for long periods (11/12/18).

191. We concluded based on the remarks made to the claimant and the complete failure to discuss or action the OH reports, that there was a grudging and negative attitude towards the claimant's disability amongst her management team.

192. We concluded that the reason why the respondent, on the claimant's return to work on 4 December 2019 ignored, or did not consider implementing, the suggested adjustments was because the claimant's line management was avoiding and had a grudging attitude towards (rather than being actively resistant to) making adjustments. Therefore, it was because the claimant needed adjustments which the respondent did not want to consider, that the recommendations within this report were ignored.

193. We therefore concluded that the predominant reason why the reports were ignored or inadequately addressed was because of something arising in consequence of B's disability, i.e. the claimant's requirement for reasonable adjustments to her role.

b. The Respondent ignored reports of H&S issues on 22 October 2018 and 4 April 2019 (the failure to fix the floor)

194. We accepted that not fixing the floor had the effect of exacerbating the claimant's pain while at work when sitting at certain workstations – a clear disadvantage.

195. However we concluded that there was no link between not dealing with the floor and the requirement to take time off and the need for reasonable adjustments to her working life. The cause for this treatment – not dealing with the floor – was because it was logged on the system as a repair which required doing but which was classed as a minor risk to health and safety. We noted that other health and safety complaints raised by the claimant and others were largely dealt with. There was no link whatsoever between the logging of the floor as a minor risk and not being repaired and claimant's requirement to time off work and/or requirement for reasonable adjustments.

c. [withdrawn]

d. The Respondent ignored the Claimant's grievance of 12 April 2019

196. We accepted that the claimant's grievance of 12 April 2019 was ignored – a clear disadvantage in this situation for the claimant, whose aim was to resolve workplace issues.

197. However we concluded that there was no link between the failure to deal with this grievance and the requirement to take time off and/or the need for reasonable adjustments to her working life. The 12 April grievance does not refer to the claimant's disability or to her OH reports. While it refers to overcrowded and unsafe workstations and broken equipment and chairs, saying that this is "frustrating" it does not suggest that this is a reasonable adjustment. The grievance also references staff turnover, morale, and pay. It raises concerns significant concerns about a supervisor, CC.

198. We concluded that this grievance did not refer to her disability at all. The reference to the broken equipment is about the Datix health and safety report and was not linked to her disability. We concluded that the reason why the grievance was ignored had nothing to do with the claimant's need for time off and/or adjustments – that there was no link whatsoever in the mind of those who received the grievance (including Ms Power who was cc'd in) and the something arising from disability - it was just ignored.

e. The Respondent ignored the Claimant's grievance about CC

199. For the same reasons as in (d) above, we concluded that ignoring this grievance was a disadvantage; but that there was no link whatsoever between this and the claimant's need for time off and/or adjustments. The grievance made no reference to disability-related issues or the need for adjustments.

f. The dispute about leave authorisation between 21 October and 6 November 2019 including JB sending email on 31 October asking the Claimant to pay for cover out of pocket when sick

200. The claimant sought permission to take leave at short-notice to see her GP (the only dispute being whether this was an appointment or a drop-in clinic). This request was initially refused by JB, with the possibility that cover may in fact be available, but no cover was sought by JB. This refusal and failure to seek cover was, we concluded, a disadvantage as it required the claimant to change her plans to see her GP.

201. The next disadvantage was the fact that the arrangements the claimant made with her supervisor to arrange cover, her leaving work, and the reason why she left work, became the subject of a dispute at work.

202. A third disadvantage was the sarcastic and threatening remark about the claimant paying for the cover – this was, we concluded, designed to be such. It was a clearly negative and disadvantageous for the claimant.

203. What caused this treatment, what was the reason for it? We concluded that the disadvantages arose because of the claimant's need to take time off work – to attend her GP and then because she could not complete her shift because she was in pain. There is a clear link between the need for time off and the three disadvantages that followed – being denied the time off was clearly linked to the requirement that she took for time off; the dispute about the time off was again linked to the fact she took the time off; the remark was because she took the time off.

204. We noted that the reason given by the respondent is that the leave was unauthorised, and not simply because she took the time off. However, as stated above, we concluded that JB was aware that the claimant had in fact arranged cover via her supervisor when she made the complaint and that the time off was related to her disability. We concluded that JB was angry because the claimant had taken the time off and had arranged cover in doing so via the supervisor, rather than the time off being unauthorised as she alleged.

205. We accepted that part of JB's anger was because the claimant had not informed her she was leading early. But, we concluded that the absence was then used against the claimant despite it being an appropriate absence on ill-health grounds.

206. Accordingly, we concluded that significant reason why the dispute arose and the email was sent because the claimant took time off work to attend a medical appointment, and this amounted to unfavourable treatment arising in consequence of disability.

g. JB stating "we don't do sick here" on 4 December 2019 and ignoring the Claimant's request and joking:

207. We concluded that the remark was made; also that the requests for adjustments was ignored (see direct discrimination, above). These were clearly disadvantages.

208. We concluded that the remark was clearly directed to the claimant's time off work on sickness absence, that the fact the claimant had taken this time off work was the reason why this remark was made. As (a) above, we concluded that the reason why the request to consider adjustments was ignored was because the claimant's line management was avoiding consideration of the adjustments, because the claimant needed adjustments.

209. Accordingly, this conduct amounted to unfavourable treatment arising in consequence of the claimant's sick leave and her need for adjustments at work.

h. Refusing authorisation for leave on 6 December 2019 and sending a curt email, not making adjustments to the Claimant's working time

210. This relates to two issues: initially refusing the claimant's holiday request and asking for confirmation and proof that this was for a medical appointment, and not reducing the claimant's hours of work on her return to work on 4 December.

211. Both were clearly disadvantages: the refusal of the request meant the claimant would have to rearrange a GP's visit, and her account appeared to be in question as proof was requested.

212. What caused this treatment? The respondent says it was because there was no cover and this was the reason the leave request was refused.

213. We concluded that initial refusal of the time off to attend the medical appointment was because the claimant needed time off work and JB was resistant to allowing this and so did not seek cover as she had said she would. We also concluded that the adjustments to her working time, the phased return and shift pattern, was met with the same resistance and were not put in place. We concluded that the claimant asking for the time off and raising the issues of adjustments was not actioned, and was in fact resisted, was because these adjustments and time off was required by the claimant. They were instead ignored.

214. There was no other reason why the claimant was not put on a phased return to work and adjustments discussed with her on her return to work on 4 December 2019 when this was so clearly flagged and understood from the 28 November 2019 OH report. Accordingly this disadvantage arose because of the something arising – i.e. the requirement to take time off work and/or the need to have reasonable adjustments to her working life.

i. Commencing a disciplinary investigation on 12 December 2019

215. This was clearly a disadvantage. The respondent contends that the reason for this treatment was because the claimant committed acts of potential misconduct, and not because of her time off work and need for adjustments. We concluded that the reason for this unfavourable treatment was the claimant's need for time off work for what we found to be disability-related reasons: to attend her GP, and then because she was in too much pain to continue to work. The claimant did not inform JB she was leaving work or had booked cover, but she had received authorisation to do so from her supervisor.

216. We noted that the defence to the claim (page 28 paragraph 29) characterises this absence as an unauthorised absence. This was not the case as the respondent's witnesses conceded that the claimant was entitled to leave work if too ill to continue having informed her supervisor.

217. We concluded that the reason why the claimant was subjected to the disciplinary was because she had taken this time off, that JB was angry she had taken this time off; that the predominant reason why she was subject to this process was because she had taken time off work for a disability-related reason.

j. The disciplinary investigation meeting of 19 December 2019 and the Respondent did not conclude the disciplinary investigation

218. The continuation of this process to a disciplinary investigation meeting was clearly a disadvantage to the claimant. We concluded for the reasons at (i) above that this amounted to a disability-related detriment.

219. The process was then left hanging over the claimant for several months until her resignation. We noted that there can be a range of causal links between the treatment and the reason or cause of it; that the something which causes the treatment need not be the sole or main reason for the treatment – but it must have a significant influence on the unfavourable treatment.

220. We noted that 'but for' the disciplinary process starting, it would not have been delayed. However we concluded that this was the wrong test – that the reason for the delay must itself be linked either to the fact of the claimant's absence or her need for adjustments. We concluded for the reasons above that the reason for the delay had no connection with her disability – the delay was because of staff absence, holidays and then the covid-pandemic.

221. We therefore concluded that this allegation succeeded in part – the decision to interview the claimant was unfavourable treatment for a disability-related reason, the need for time off work.

k. [withdrawn]

l. Demotion to the role of concierge on 17 January 2020

222. On the claimant's return to work she was given a different role without consultation. The claimant perceived this to be a demotion – she was no longer taking payment, imputing data, she was now directing visitors to their destination. This was also Ms Power's description of the role – *"…smile and greet…".* We accepted that for many employees this would be regarded as a demotion, that it was reasonable for the claimant to consider this to be effectively a demotion, particularly as it was done without consultation with her.

223. What caused this treatment, what was the reason for it? We concluded that there were two reasons for this treatment. One was because there had been a significant deterioration in the relationship between the claimant and JB. The

other substantial reason was because the claimant needed an adjustment to her duties, and Ms Power's view was that changing role was a suitable adjustment. We concluded therefore that a significant reason for this treatment was because the claimant required reasonable adjustments and this was, for the respondent, a reasonable adjustment to make.

224. Accordingly, the decision to give the claimant the concierge role was unfavourable treatment for a disability-related reason – the need for adjustments to the claimant's role.

m. [withdrawn]

n. The Respondent did not respond to the grievance of 20 February 2020

225. There was no response to this grievance, no report was produced, not all allegations were put to interviewees during the investigation process. We concluded that this was unfavourable treatment, a disadvantage to the claimant who was left with no idea what was happening with this grievance, and it was not progressed.

226. As above for direct discrimination, we concluded that the claimant had made difficult allegations against JB and others, that there was a reluctance to address them and a desire to progress the disciplinary allegations first. This was not because the claimant took sick leave, or because she required adjustments at work, and there is no connection between the claimant's disability and the failure to address the grievance. This allegation does not succeed.

o. The Claimant not being named on the April 2020 rota

227. We noted that the claimant was rostered to 18 March, and was marked on the rota as sick from 23 March (459) and on annual leave from 6 April; this is as she discussed with the respondent in late March 2020.

228. The claimant believed that she was never on the April rota. However we also noted that the rota is amended regularly, often during the week being worked. We concluded that the reason why the claimant was not marked on the April rota was because she was taking annual leave and had told her manager she would consider what to do next. In other words it was not certain she would be returning that month.

229. We concluded that this did not amount to unfavourable treatment, as the claimant had asked not to be on the rota; the reason why she was not rostered for April was not because she needed adjustments or because she had taken time off sick, but because it was unclear whether she would be returning to work in April until she had spoken to JB.

p. [withdrawn]

If so, have the Respondents shown that the treatment was a proportionate means of achieving a legitimate aim?

230. The Amended Defence pleads a legitimate aim in relation to the disciplinary investigation – ensuring patient safety by ensuring appropriate staffing levels, managing cost, and managing unauthorised absence in accordance with the respondent's disciplinary proceedings. We accepted that this was a legitimate aim.

231. Was undertaking a disciplinary investigation a proportionate means of achieving this legitimate aim?

232. We noted the test: was the means chosen no more than necessary to accomplish the objective? We considered the 'workplace practices and business considerations', noting that this is an objective test - was the unfavourable treatment is a proportionate means of achieving the objective?

233. We concluded that the means adopted – to proceed down a disciplinary route – was not proportionate, because JB was aware that the claimant had gained authorisation to use the bank staff and to leave early before she made her complaint. Accordingly, the disciplinary process was premised on a misleading statement and it started because JB was upset that the claimant had taken this time off. With the knowledge that the claimant had been ill, and her supervisor had told her to find cover, we did not consider that it was proportionate to go down the disciplinary route.

234. We noted that no other defence was raised or argument made in written or oral submissions by the respondent about any legitimate aims or the proportionality of its actions in respect of the other s.15 allegations.

235. Accordingly the following s.15 Equality Act 2010 claims succeed: (a); (f); (g); (h); (i); (j - in part); (l).

Failure to make reasonable adjustments

Has the Respondent applied the provision, criterion or practice of "working as her contract requires" to the Claimant?

236. Mr Browne clarified that this PCP is the claimant's working arrangements, working 8 hours on a shift-rota undertaking her contractual duties at her workstation.

237. It was clear to the Tribunal that the respondent was not prepared to consider adjustments to the claimant's duties, as suggested in OH reports and by the claimant at meetings with JB in December 2019. No adjustments were discussed with the claimant and non (bar the requests which were also made via the Datix H&S system) were put into place.

238. We concluded that until 17 January 2020 when the claimant returned to work on the Concierge desk, the respondent applied a practice of requiring the claimant to work her contractual duties on her full hours on a shift rota, with no adjustments to her role.

239. We considered whether 'working to contract' can amount to a PCP under the provisions of the Equality Act. We saw no reason why not: the claimant's disability meant she was unable to carry out her role without suffering significant pain: the respondent failed to consider the suggested adjustments set out in the OH reports and as we found pejorative remarks were made to her when she tried to raise them.

240. We found there was a negative attitude from the claimant's immediate management to her requests to adjust her role and hours and to leave work to attend appointments. Accordingly we concluded that the requirement to work to contract was a policy or practice which was actively pursued by the respondent.

Physical features

241. Part of the claim relates to the cracked floor: we concluded that the crack in the floor was a feature arising from the construction of a building s.20(10) EqA.

If so, does the practice and the physical feature place the Claimant at a substantial disadvantage due to her disability? What is that disadvantage?

242. The claimant's case is that working to her contract aggravated her injury and led to her working in pain, requiring her to take sick leave, as did having to sit at a workstation which had a bumpy floor.

243. We concluded that working to contract placed the claimant at a substantial disadvantage, as it also, aggravated her injury, and that this would not have occurred with non-disabled comparators who would not be caused significant pain by sitting for long-periods at a workstation while looking up at customers.

244. In concluding that the disadvantage was substantial, we noted that the medical reports state highlighted the need to make adjustments in order to alleviate pain, that repetitive movements of her neck when sitting down can aggravate her pain and symptoms; another report states the claimant has no other health issues which would prevent her from performing "regular and efficient duties" (479).

245. We concluded that the purpose of the suggested adjustments was to minimise as much as possible the effect of some parts of the claimant's role on her medical condition of cervical spondylosis, to minimise the effect of her work duties on her chronic pain.

246. We concluded that requiring the claimant to work her contract did have the effect of exacerbating her medical condition, as the nature of her role was sedentary and involved repetitive neck movements. We also concluded that the issue of the floor also exacerbated her medical condition as it caused her back to jolt when her chair moved over this area.

247. We noted that the test requires a comparison exercise with non-disabled people; while a like for like comparison is not needed, we noted that colleagues had complained about the bumpy floor, but did not appear to be complaining it caused

or exacerbated an injury. We concluded that the bumpy floor caused a substantial disadvantage to the claimant in comparison to those who were not disabled.

248. We concluded that colleagues of the claimant who undertook their role to contract were not similarly disadvantaged; while they engaged in repetitive activities from a sitting position, it appears that they were not in pain doing so. Also, while there were complaints about the floor, this did not have a similar effect on the claimant's colleagues of adding to the pain they were experiencing.

<u>If so, did the Respondent make reasonable adjustments for the Claimant?</u>

249. We accepted that the respondent made the following adjustments: taping over the floor, and changing the claimant's role to Concierge desk in January 2020. However, no consideration was given to any of the proposed adjustments within the OH reports.

250. We concluded that taping over the floor did not fix the issue of the bump and that this was not a reasonable adjustment.

251. We also concluded that the move to the concierge desk was not a reasonable adjustment. It did not significantly resolve the claimant's pain when undertaking duties as it was a client facing role meaning she could not move away from the desk without causing disruption. It was always meant to be a temporary solution rather than an adjustment to her role. Also, one of the reason for this move was for convenience, to separate the claimant from JB. While it was also felt to be an adjustment, no consideration was given to whether this was, in fact, a suitable adjustment, and we concluded that it was not.

<u>If not, what adjustments should the Respondent have made? Were these adjustments reasonable?</u>

252. The Claimant relies upon the following adjustments:

    1. Re-assigning the Claimant to other desks within the outpatient department with more appropriate structure.

        a. We accept that reassignment was a potential reasonable adjustment which could have been successful. Ms Power accepted that there may be a role in finance, her concern was the weeks of training that this may entail, also that it may involve lifting files.

        b. However, we also noted that it is not necessary for the claimant to show that this was an adjustment which would succeed. We accepted that there was at least a prospect that this could work as an adjustment, as it involved moving the claimant to a role where would have some ability to sit or stand while undertaking her role and not undertake excessive neck movements while interacting with patients.

c. We also noted that the respondent was able to reassign the claimant when it decided to do so. We saw no reason why this is not an adjustment which could not have been considered at an earlier stage. It was a recommendation in the December 2018 OH report – to consider alternative duties. We concluded that it was a practical adjustment to make and the respondent raised no resource of financial issues with making this adjustment.

2. More suitable shift hours

a. We saw no reason why this could not have been done following the OH report of 28 November 2019 which suggested that the claimant work the midday shift. This adjustment was not suggested or put in place on the claimant's return to work; the claimant was on late shift on her return, which meant she had difficulty attending a medical appointment which was during her shift.

b. The respondent's witnesses did not dispute that this could be an adjustment which could have been undertaken, at this or an earlier stage.

c. We noted the EHRC Code, that its guidance suggests altering hours may be a suitable adjustment.

d. We concluded that this is an adjustment which was reasonable, one which may well have had a positive effect on the claimant's health and ability to undertake her role.

3. Allowing the Claimant leave when sick and needing treatment

a. We noted that the claimant faced resistance on two occasions when trying to take time off to attend a medical appointment, and on the 2nd occasion when she left work because she was too ill to continue to work. We accepted that the claimant was eventually allowed to take time off for the 6 December 2019 medical appointment. However, the failure to agree the time off on 30 October 2019 caused a significant issue.

b. We accepted that allowing an employee time off at short notice causes logistical issues for employers, including as on 30 October 2019 additional expense. However we also noted that the respondent's employees accepted that the claimant was allowed to leave work when ill (having told her supervisor she was leaving) and was entitled to take time off for medical appointments. This is also a suggested adjustment in the EHRC Code.

c. We concluded that this was a reasonable adjustment to make, it was a practical step to take. It may cause some disruption and logistical issues, but it is inevitable that medical appointments will occasionally occur during working time, that is the nature of medical

treatment, and it was an adjustment which the respondent should have made. Such a step would have been effective in allowing the claimant to obtain medical treatment.

4. Fixing the uneven floor underneath the Claimant's desk

    a. the respondent agreed that this was a repair which needed making; it was classed as a low priority. The respondent was aware that this was an issue, it had been raised as an issue, and medical reports had highlighted the floor as a specific issue for the claimant's pain management.

    b. This was a repair which would be made at some point – the respondent recognised this. We concluded that while there may have been an expense in bringing this repair forward, it would have been an expense at some point. In the interim it was contributing to the pain the claimant was experiencing, as well as causing other employees to complain.

    c. We concluded that a repair would have been effective in not contributing to the claimant's pain, that the costs of doing this work now were outweighed by the benefits to the claimant as well as employees at this workstation generally.

5. Increased emotional support, including enhanced communication

    a. We did not understand what was meant by increased emotional support, and no example were given of what this may entail. We accepted that there was no employee assistance programme, but we noted that the claimant was seeking medical help, and we failed to see what emotional support should be offered as an adjustment.

    b. We did accept that there was a failure to communicate with the claimant about the OH reports – i.e. consult with her on potential reasonable adjustments. The fourth report was considered, but a change in role was put in place without consultation.

    c. However, we noted the *Tarbuck* EAT judgment, that it is not a reasonable adjustment to consult with an employee on adjustments. We considered that enhanced communication about adjustments was not an adjustment which can be made.

253. We therefore concluded that adjustments (a) to (d) above were reasonable adjustments to make, and that there was a significant prospect that these adjustments would have alleviated the disadvantage.

Harassment

254. Has the Claimant:

1. been subject to the following alleged unwanted conduct?
2. If so was this unwanted conduct on the grounds of disability?
3. If so, did it have the purpose or effect of violating the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
4. If 'effect' was it reasonable for the conduct complained of to have that effect?

a. The Respondent ignored and failed to acknowledge or discuss with the Claimant her OH (bar the 28 November 2019 report, which was inadequately considered) and medical reports

255. The 1st 3 OH reports were ignored, and on the claimant's return to work in January 2020 she was assigned to a role without consultation, a role which she considered was a demotion. The claimant had asked to discuss the 28 November 2019 report on her return on 4 December 2019, and had been rebuffed in her attempts to do so. We noted the negative comments to her when she attempted to do so.

256. We concluded that this failure to discuss the suggested adjustments in the OH reports with the claimant when she had made it clear she wanted to discuss this issue, amounted to unwanted conduct by her managers.

257. Was this conduct related to the claimant's disability? We were clear that there is a close relationship between the fact of the OH reports seeking adjustments and the apparent unwillingness of her managers to discuss them with her. As we conclude above, we were of the view that the respondent was ignoring the reports because they asked the employer to make adjustments. This was, we found, conduct directly related to the claimant's disability.

258. We concluded that this treatment had the effect of upsetting the claimant, who felt that her medical condition and reasonable adjustments were being ignored by the respondent and she was treated on 4 December 2019 in a sarcastic manner. We concluded that this had the effect of creating a hostile environment at work, which violated the claimant's dignity. She was ignored on an important issue relating to her health, and she was required to work in an unsuitable environment.

259. Was it reasonable for the conduct complained of to have that effect? We accepted that it was reasonable for this conduct to create a hostile environment which violated her dignity: the claimant was in pain and was trying to raise issues of adjustments at work; she was ignored. This would be the response of many employees put in a similar position. We also noted the context of the 4 December 2019 meeting and the remarks made, dealt with in more detail below. We concluded that this conduct had the effect of violating her dignity.

b. The Respondent ignored reports of H&S issues on 22 October 2018 and 4 April 2019 (the failure to fix the floor)

260. We accepted that not fixing the floor had the effect of exacerbating the claimant's pain while at work when sitting at certain workstations – and ignoring the reports in this context clearly amounted to unwanted conduct.

261. However, we concluded that the failure to deal with the H&S reports was in no way related to the claimant's disability. The cause for this treatment – not dealing with the floor – was because it was logged on the system as a repair which required doing but which was classed as a minor risk to health and safety. We noted that other health and safety complaints raised by the claimant and others were largely dealt with. There was no link whatsoever between the logging of the floor as a minor risk and it not being repaired, and the claimant's disability.

c. [withdrawn]

d. The Respondent ignored the Claimant's grievance of 12 April 2019

262. We accepted that the claimant's grievance of 12 April 2019 was ignored – and that this was unwanted conduct – we accepted that the claimant genuinely wanted to resolve the issues she complained of.

263. However we concluded that there was no link between the failure to deal with this grievance and the claimant's disability – it was not conduct related to the claimant's disability. As above, there was no reference to the claimant's disability in this grievance, raising concerns about pay, morale and a complaint against a supervisor.

e. The Respondent ignored the Claimant's grievance about CC

264. For the same reasons as in (d) above, we concluded that ignoring this grievance was unwanted conduct, but that there was no link whatsoever between this and the claimant's disability.

f. The dispute about leave authorisation between 21 October and 6 November 2019 including JB sending email on 31 October asking the Claimant to pay for cover out of pocket when sick

265. This was clearly unwanted conduct. The claimant's leave request to attend her GP was initially not accepted, this was dependent on cover being found but JB did not take steps to gain cover. The claimant found cover having spoken to the supervisor, and was criticised for doing so by email which included a sarcastic remark.

266. We accepted also that this conduct was related to the claimant's disability – there is a clear link between the need for time off work for disability-related reasons (firstly to see her GP, which became a need to leave work on ground of ill-health), and the dispute about this with JB which included the 31 October email.

267. We concluded the following: that the initial refusal of leave and the initial dispute which arose, with JB challenging the claimant for taking the time off, had the effect of creating a hostile environment at work, and which violated the claimant's

dignity. The fact she had taken the time off was questioned and challenged, despite the supervisor having provided JB with an accurate account of what had happened.

268. Was it reasonable for this conduct to have that effect? We accepted that it was reasonable for this conduct to create a hostile environment which violated her dignity: the claimant was in pain and needed to attend her GP; and JB did not take steps to arrange cover and then challenged the claimant when she did so. We found that any employee in this situation would consider that this was hostile behaviour, and we accept that it was reasonable for the claimant's dignity to be violated by this conduct.

269. We consider that the email sent suggesting the claimant pay for cover was purposely designed to humiliate and to be hostile towards the claimant. We found at this stage that JB had discussed the situation with the supervisor and knew what had happened, but was deliberately sarcastic and unpleasant in her email.

g. JB stating "we don't do sick here" on 4 December 2019 and ignoring the Claimant's request and joking:

270. We concluded that the remark was made; also that the requests for adjustments was ignored (see direct discrimination, above). We consider that the remark and the decision to not to put in place any adjustments on the claimant's return to work on 4 December 2019 was clearly unwanted conduct; the claimant was seeking adjustments and her request was ignored. Instead sarcastic remarks, related to her time off and therefore her disability, was made.

271. We accepted also that this conduct was related to the claimant's disability – there is a clear link between the need for time of for disability-related reasons and the remark being made; also, ignoring the claimant's request for adjustments was directly linked to the fact of the claimant's disability.

272. We concluded that the ignoring of the request for adjustments had the effect of creating a hostile environment at work, and it was conduct which violated the claimant's dignity. She needed adjustments and she was saying so. Ignoring this was an act which clearly impacted on the claimant and was we considered objectively a troubling issue. It was reasonable for the conduct to have this effect – we considered that any employee whose manager is ignoring a request for adjustments set out in a medical report would feel that their manager was acting in a hostile way, and this would reasonably violate employees' dignity.

273. We considered that the we don't do sick here remark was purposely made in order to make the claimant feel humiliated, it was a deliberately hostile remark made as the claimant was returning from a period of sickness absence.

h. Refusing authorisation for leave on 6 December 2019 and sending a curt email, not making adjustments to the Claimant's working time

274. Was this unwanted conduct? Yes, refusing authorisation for leave that had been requested is clearly unwanted by the claimant, as was requesting proof that this was a medical appointment which questions the claimant's credibility. Not adjusting her hours on her return to work was unwanted, as this was an adjustment she wanted to discuss and have implemented on her return.

275. We accepted also that this was conduct related to the claimant's disability; one centred around the need for a medical appointment, the other relating to her need for adjustments in her hours of work.

276. We concluded that this conduct had the effect of creating a hostile working environment for her – she was being asked for proof of an appointment in a curt email when proof had not been requested previously, and we concluded that the claimant believed that she was being treated with a degree of suspicion.

277. Not adjusting her working time – the claimant knew she needed adjustments, as did the respondent; the claimant was asking for these, but specific adjustments were not discussed or implemented, and instead pejorative remarks were made to her. In this context, we considered that this amounted to hostile and degrading conduct which had the effect of humiliating the claimant and of making the workplace appear to be a hostile environment for her.

278. We concluded that it was reasonable for this conduct to have this effect: being ignored in circumstances when adjustments are needed, and having remarks made and being treated with suspicion was, we considered, conduct which would likely have this effect on any employee.

i. Commencing a disciplinary investigation on 12 December 2019

279. This was clearly unwanted conduct. We also concluded that it was conduct related to the claimant's disability. The allegations against the claimant were made by JB, that the claimant had agreed to cancel her appointment (which, we found, she had not); that she had left work without authorisation (which we found, she had not) and had acted outside of her remit in getting a bank worker (which, we found, she had not). This was directly linked to the fact that the claimant had taken this time off, that JB was angry about this as shown in her email the next day about paying for the Bank staff. The claimant was, as the respondent's witnesses accepted, entitled to take the time off if she was too ill to work.

280. We found that the claimant was subject to allegations which did not accord with what had actually occurred. This treatment we found, had the effect of violating her dignity and being subject to such allegations had the effect of making the workplace a hostile environment via the actions of her manager referring her to disciplinary over this issue.

281. We felt it was reasonable for this conduct to have this effect: the claimant took time off when she was entitled to do so and she was then disciplined for doing so. We concluded that any employee would feel humiliated and that the workplace was hostile in such circumstances.

j. The disciplinary investigation meeting of 19 December 2019 and the Respondent did not conclude the disciplinary investigation

282. We concluded that the disciplinary investigation was for the same reasons as (i) above, unwanted conduct related to the claimant's disability which had the effect of violating her dignity and cleating a hostile workplace for her.

283. We did not consider that the delay in concluding the disciplinary investigation was conduct related to the claimant's disability. The reasons were staff absences and then the onset of the Covid-19 pandemic.

k. [withdrawn]

l. Demotion to the role of concierge on 17 January 2020

284. The claimant required adjustments to her role or potentially a move to an alternative role. The Concierge desk was an alternative role, albeit one that was imposed on her.

285. We concluded however that this was seen by the claimant, reasonably, as a demotion, as even on Ms Power's account it was a 'meet and greet' role. It did not however provide required adjustments, including breaks and the ability to stand and move when required. This was we concluded, unwanted conduct.

286. There was also a connection with her disability, which can include conduct associated with her disability. We concluded that one of the reasons for giving the claimant this role was because a change of role was suggested by OH, it therefore related to the need for adjustments, which is clearly connected to her disability. There was also another reason – the administrative convenience of removing the claimant from JB's direct line management. We concluded that however there was sufficient connection with the claimant's disability in Ms Power's reasons for moving the claimant to the Concierge desk role.

287. We concluded that this had the effect of violating the claimant's dignity – being moved to a role she perceived as a demotion without consultation. We considered that it was reasonable to do so, that many employees in this situation, would feel upset and unwanted. We also noted the cumulative effect of the treatment to date. We concluded that this change of role in this manner, in context with all else that had happened - in particular end-October, 4-6 December and the disciplinary - amounted to a hostile workplace for the claimant.

m. [withdrawn]

n. The Respondent did not respond to the grievance of 20 February 2020

288. This was again unwanted conduct. We concluded that this in no way related to the claimant's disability. The reasons for not progressing were because of staffing issues and then the onset of the pandemic.

289. We noted from a spreadsheet within the bundle marked without prejudice but included by consent, showed that there was progress being made on some of the issues. We concluded that this meant that the issues were being considered as a potential litigation risk.

290. In any event however, we concluded that this spreadsheet did not relate to the claimant's disability, but to the fact that there was a litigation risk. The grievance was not responded to for different reasons, related to staffing issues and the pandemic, rather than for reasons related to her disability.

o. The Claimant not being named on the April 2020 rota

291. We noted the chronology, the claimant was rostered to 18 March, and was marked on the rota as sick from 23 March (459) and on annual leave from 6 April; this is as she discussed with the respondent in late March 2020. The reason why she was not named on the rota is that she said she would speak to her manager, but did not do so, instead she resigned. Accordingly, the reason why she was not named on the rota was not related to her disability, it related to her decision not to attend work and take leave after her self-isolation, and in circumstances when she had not made it clear whether she wanted or was able to attend work, given the pandemic.

p. [withdrawn]

292. Accordingly the following s.26 Equality Act 2010 claims succeed: (a); (f); (g); (h); (i); (j - in part); (l).

Unfair dismissal

293. We first considered whether the respondent's conduct amounted to a repudiatory breach of conduct; in doing so we considered the claimant's reasons for resigning, and the cumulative effect of the conduct found to be acts of discrimination, while disregarding conduct which was not unlawful, nor a breach of contract.

294. The claimant relies on the implied term of mutual trust and confidence – did the respondent act in a manner calculated or likely to seriously damage or destroy the relationship of trust and confidence?

295. The Tribunal considered the resignation letter – the grounds are failure to consider making reasonable adjustments; harassing behaviour; wrongful and dishonest accusations of misconduct related to injury; failure to investigate or respond to repeated verbal and written grievances; demoting to concierge without consultation; reducing her pay in January without explanation or justification.

296. There was a further ground for resignation - constantly ignoring emails. It is unclear what this relates to beyond general allegations within the chronology (some of which relate to the ignoring of the grievances), and no findings were made by the tribunal.

297. The reduction in pay allegation relates to an reduction in January 2020, when she received reduced pay, and it was explained to her by HR that this was because she had used her full entitlement to contractual sick pay.

298. The Tribunal concluded that the following acts by the respondent amounted to repudiatory acts i.e. acts which were likely to seriously damage or destroy the relationship of trust and confidence:

    1. the failure to consider making reasonable adjustments;
    2. calling the claimant to attend a disciplinary process while off sick
    3. moving the claimant to the Concierge post without consultation.

299. We concluded that there had been a persistent failure to consider making reasonable adjustments from the first OH report in December 2018; on the last occasion when the claimant specifically mentioned the issue her request was ignored and instead negative comments were made. When adjustments were considered in January 2020, only one adjustment was considered, the move to concierge; none of the suggestions in the 28 November 2019 report were considered,

300. We noted *Greenhoff*; that the persistent failure to make reasonable adjustments could amount to a repudiatory breach. We concluded that in this case it did amount to a repudiatory breach, as there was no reasonable or proper explanation given by the respondent for this failure. At the hearing the respondent's position was that many of the adjustments had been made, when they had not, or that the onus was on the claimant to arrange them, when this had never been explained to her.

301. In concluding that calling the claimant to attend a disciplinary meeting also amounted to a repudiatory breach of conduct, we accepted that there was no intent in the respondent's mind to breach the claimant's contract. However, we concluded that the disciplinary allegations were built on an inaccurate account of what was reasonably known to the claimant's immediate managers, and hence the disciplinary process was itself an unreasonable process.

302. We noted that there is no need to find that the disciplinary manager who called this interview intended to breach the claimant's contract – that subjective intention is irrelevant. We concluded however that undergoing a process which is premised on an inaccurate account and calling an employee to an investigation interview amounted to conduct which was likely to seriously damage the relationship of trust and confidence.

303. We also concluded that moving the claimant to the Concierge desk also amounted to conduct which was likely to seriously damage the relationship of trust and confidence: it was in effect a demotion and was accepted as such by the respondent's witnesses; it was done without consultation. It was not done just as an adjustment, but for convenience, to separate the claimant and JB. While the initial intention may have been for it to be a temporary arrangement it very soon became open ended. It was in any event not a suitable adjustment for

the claimant. While not deliberate, we found that it was an act which was likely to seriously damage the relationship of trust and confidence.

304. The Tribunal concluded that the following acts were calculated to seriously damage the relationship of trust and confidence:

    1. Mocking comments in emails and in person ('blue-badge' we don't do sick, paying for cover)
    2. The accusations of misconduct

305. The comments were made, were mocking, and were designed to be so. They were therefore made deliberately; this was either with the aim of damaging the relationship of trust and confidence, or at the least having utter disregard for the effect that these remarks would have on this relationship. We concluded that these remarks by their very nature were likely to damage this relationship.

306. The allegation of misconduct was made by JB. We concluded that the allegation as made was inaccurate, as JB knew that the claimant had received authorisation to find cover, had found cover and then had left work having informed her supervisor she was leaving. We concluded that this allegation was made with the aim of damaging the relationship of trust and confidence. We also concluded that making such an allegation in this circumstance was likely to damage this relationship.

307. Some of the claimant's allegations of breach of contract made by the claimant were not, we found, repudiatory breaches of contract. We accepted that it may be a breach of contract not to address grievances promptly, we noted the following: the earlier grievances in April 2019 and about CC, were not addressed but were not pursued by the claimant – she never chased these up. While it was a significant failure by the respondent, we considered that the claimant effectively gave up on them, she decided not to pursue them and her managers did not bother doing so. This breach, if there was one, was therefore accepted or affirmed by the claimant.

308. The February 2020 grievance was also not addressed: however we concluded that this did not amount to a repudiatory breach. The respondent did not respond at a time of significant stress on the hospital's operations at the start of the Covid-19 pandemic; the respondent's failure to respond was not without reasonable and proper cause.

309. The failure to pay the claimant in January: we concluded that the respondent did not breach the claimant's contract – this was not a contractual breach because the claimant had used her entitlement to sick pay. We accept the claimant believes she should have been paid full pay because her absence was caused by the respondent's actions. However, we considered the act itself – non-payment of full wages – did not amount to an act which was likely to destroy the employment relationship – it was not a repudiatory breach of contract.

310. We considered therefore that a substantial reason for the claimant's resignation was because of the respondent's repudiatory breach of contract as set out

above. The respondent raised no argument hat the claimant had affirmed any of the repudiatory breaches, and we found that she had not, save as found above.

Time

311. The respondent argues that many acts are out of time – in particular the alleged failures of to respond to the OH reports prior to November 2019.

312. The receipt of the early conciliation form was 25 February 2020, the ACAS Conciliation Certificate was issued on 17 March, and the claim was issued on 14 April 2020, shortly after the claimant's resignation. We calculated that any act of discrimination prior to 26 November 2019 was potentially out of time.

313. The claimant's argument is that the acts alleged are continuing acts to her resignation, not a series of isolated acts.

314. We concluded that the main factor underpinning the failure to consider the OH recommendations in the first two OH reports was because they were simply ignored; that there was no sense that adjustments were required to be put in place by the respondent. As was suggested in evidence, it was for the claimant to arrange adjustments on the ground with her managers, but they were not able or prepared to put them into place on their own initiative.

315. What followed was increasing tension with the claimant when she took time off, when she left her workstation (as evidenced in the disciplinary interviews) and then, when the claimant directly raised the issue, pejorative remarks and the failure to implement adjustments.

316. We concluded that this amounted to a continuing act from October 2018 the first OH report to the claimant's resignation. The respondent's conduct and failures to act were linked by a failure to address at any stage the adjustments proposed by OH which would ameliorate the disadvantage, instead meeting the claimant with hostility when she did raise adjustments, or took time off, or required disability related absences. These were not isolated acts; we concluded that underpinning this treatment was a reaction against or wilful ignorance about the claimant's disability and need for adjustments.

317. If we are wrong, we concluded that it would be just and equitable to extend time. The claimant attempted to deal with issues via the grievance process, and this was not dealt with by the respondent; she was attempting to raise issues of adjustments, again without success. She, and her advisor who assisted with her grievance, believed that this was a continuing act; the claimant received similar assistance with her dismissal letter (as evidenced by the tracked change version n the bundle) which paints the picture of a continuing chronology of events. The claimant raised her concerns with ACAS prior to her resignation, and she brought her claim within a short period thereafter.

318. We also concluded that there was no prejudice to the respondent in extending time. The claim was brought within 2 weeks of her resignation. The issues were

all known to the respondent as they are the same as the grievance allegations, which were being assessed by lawyers prior to the claimant's resignation.

Remedy

319. A separate notice will be sent for a one hour Preliminary Hearing to determine the issues on remedy, and to set a date for a remedy hearing and a timetable of steps to be taken.

320. Finally, I apologise to the parties for the length of time which it has taken to produce this judgment.

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EMPLOYMENT JUDGE EMERY

Dated: 28 December 2021

Judgment sent to the parties
On
6 January 2022
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For the staff of the Tribunal office