EMPLOYMENT TRIBUNALS

Claimant: **Ms Paula Lewis**

Respondent: **The Disablement Association of Barking and Dagenham**

Heard at: **East London Hearing Centre**

On: **25, 26, 27 and 28 April 2023**
(and in chambers on 28 April 2023)

Before: **Employment Judge Elliott**

Members: **Ms A Berry**
Ms S Dengate

Appearances
For the Claimant: Ms L Johnson (Friend of Claimant)
For the Respondent: Mr R Clement (Counsel)

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims for disability discrimination succeed.
2. The claim for constructive unfair dismissal fails and is dismissed.

REASONS

1. By a claim form presented on 11 March 2022 the Claimant Ms Paula Lewis brings claims of constructive unfair dismissal and disability discrimination. A claim for holiday pay was settled prior to this hearing.

2. The Claimant worked for the Respondent charity as a support worker.

This remote hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

5. The parties were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal. From a technical perspective, there were no difficulties of any substance that could not be easily resolved.

6. The participants were told that it was an offence to record the proceedings.

7. The Tribunal was satisfied that each of the witnesses, save for the Claimant's witness Miss Abraham, had access to the relevant written materials. We were also satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

8. Miss Abraham's evidence was brief. She was in a separate location to the Claimant and her representative. She had access to her statement but not to the bundle. We ensured that anything she needed to know from a document was read out to her by counsel for the Respondent.

9. The Claimant and her representative; her friend Ms Johnson; were in the same location. When the Claimant gave her evidence we ensured that both of them were visible on the same screen at all times. The same arrangement happened with the Claimant's witness Mrs Purcell, so that she and Ms Johnson were both on the same screen at the same time with the Claimant in another room. We were satisfied that Ms Johnson was not assisting or coaching the Claimant or Mrs Purcell with their evidence.

The issues

10. The issues were identified at a Case Management Hearing before Employment Judge Burgher on 21 July 2022 and were confirmed with the parties at the outset of the hearing. Ms Johnson for the Claimant had an opportunity to correct a couple of errors that she had noted in the list of issues. We also asked some questions of the parties to assist us with understanding the issues and the details are set out below.

<u>Constructive unfair dismissal - fundamental breach of trust and confidence/health & safety</u>

11. Did the Respondent fundamentally breach the Claimant's contract of employment. The Claimant alleges breach of the implied term of trust and confidence and breach of the requirement to provide a safe system of work. In the following respects:

    i. Isolating the Claimant from June 2021 when the Respondent ceased regular communications.
    ii. Ms Kelly Barber, the Claimant's line manager and Ms Kelsea Law,

HR Assistant, showing no concern for the Claimant's mental health and not referring her to occupational health in August 2021.

iii. In August 2021, not providing the Claimant with appropriate notice that her furlough pay would stop.

iv. On 10 August 2021 – a letter informing the Claimant that her furlough pay had stopped on 1 August 2021. Following the Claimant raising concerns, the Respondent by letter dated 24 August 2021 agreed to pay the Claimant up to 10 August 2021.

v. Stopping the Claimant's pay from 10 August 2021.

vi. Putting the Claimant on SSP without agreeing it with her.

vii. Failing to provide the Claimant with statutory training to enable her to do her job in July/August 2021.

viii. In August 2021 Kelsea Law asserting that the Claimant had not reported sick leave as required.

ix. On 21 September 2021, Ms Nasmyth in HR writing that the Claimant must be fit to return to work and no evidence of ill health prior. The Claimant asserts that this was an attack on her integrity.

x. Failing to make reasonable adjustments.

xi. Delay in progressing her return to work. It is alleged that the first time HR offered a date for a meeting was on 25 November 2021 whilst the Claimant was proceeding with her grievance.

xii. On 7 January 2022 Ms Nasmyth writing that there was a lack of clarity on the Claimant's sickness absence implying that the Claimant did not properly report it. The Claimant asserts that this is an attack on her integrity.

xiii. The delay and process of her grievance, including conflicts and failure to refer to the recommendations of Ms Price and the appeal outcome by Mr Meaden on 4 March 2022. The Claimant states that this was the final straw.

12. Did the Claimant waive any breach of contract.

13. Did the Claimant resign because of the alleged breach.

Disability Discrimination

Disability

14. Was that Claimant disabled by reason of osteoarthritis and knee condition?

15. When did Respondent know, or reasonably be expected to know that the Claimant was disabled by reason of osteoarthritis and knee condition?

16. Disability was conceded by the Respondent on 5 October 2022 in relation to osteoarthritis and a knee condition. Knowledge of disability remained in issue. In written submissions paragraph 67 knowledge of disability was conceded from 9 September 2021. It was in issue as to whether the Respondent had knowledge at any earlier point.

17. The Claimant did not pursue a claim for disability discrimination in respect of any mental health condition but wished to refer to this in the context of her constructive unfair dismissal claim, where she maintained that the Respondent had an unsympathetic and unsupportive approach to her (Case Management Order paragraph 2, bundle page 37).

Direct disability discrimination – section 13 EqA 2010

18. Was the Claimant discriminated against under section 13 Equality Act 2010. The Claimant alleges that she was less favourably treated by:

    a. Not being offered work after the end of furlough
    b. Not being offered training.

19. We asked about comparators. We were told that the Claimant relied upon her witness Ms Eden Abraham as her comparator. We were told that the Claimant did not rely upon a hypothetical comparator. She wished to rely on a named comparator.

Discrimination arising from disability – section 15 EqA 2010

20. The Claimant alleges that she was not offered work or training after the furlough scheme ended and this amounted to unfavourable treatment arising from disability.

21. We asked the Claimant what it was that arose from her disability that she says caused the Respondent to treat her unfavourably. It was put as the Claimant having difficulty walking long distances.

22. If the Respondent treated the Claimant unfavourably because of something arising from disability, do they establish a proportionate means of achieving a legitimate aim?

23. We asked the Respondent what was the legitimate aim relied upon? The Respondent said that the legitimate aim was a need for employees to be physically able to perform their duties.

Failure to make reasonable adjustments – sections 20 and 21 EqA 2010

24. The Claimant alleges that the Respondent applied the following PCPs:

    a. The requirement to walk long distances.
    b. The requirement to stand for long periods.
    c. The requirement to have training in the Respondent's office, which is a long walk from the train station.

25. The Respondent denied applying the PCPs.

26. We asked the Claimant what was the substantial disadvantage to which she says she was put as a result of the PCPs. The substantial

disadvantage was that the Claimant could not participate in training because of the need to walk to the office and could not carry out the duties of the job because she was unable to walk long distances or stand for long periods of time.

27. The following were contended for as reasonable adjustments:

    a. Adjusting the Claimant's duties to allow for less walking and standing;
    b. Allowing the Claimant to attend training at home.

28. The Claimant confirmed at the Case Management Hearing (see Case Management Order paragraph 1 on page 36-37) that she no longer pursued a claim for holiday pay, this having been settled.

Time limits

29. The issue of time limits was not set out in the issues in the Case Management Order but this is a jurisdictional matter for the Tribunal. We said we would consider whether the discrimination claim was within time, including whether there was a continuing act of discrimination and if the claims were out of time, whether it was just and equitable to extend time.

The Claimant's email to the tribunal of 14 April 2023

30. On 14 April 2022 the Claimant sent an email to the Tribunal making an application that was dealt with separately and also raising some questions about two specific letters in the bundle, one dated 21 September 2021 and the other dated 7 January 2022. It was directed by Employment Judge Moor, in a letter sent to the parties on 19 April 2023, that this was to be dealt with at the start of this hearing. Although the Judge at this hearing had seen the Tribunal's letter of 19 April 2023, neither this Tribunal nor counsel for the Respondent had seen the email of 14 April 2023.

31. At the start of day 1 we asked for it to be sent to counsel and ourselves during our reading time. It was not received on day 1 so we asked again on day 2. The clerk was able to send us a copy by 11:20am on day 2 and we asked Mr Clement for the Respondent to obtain a copy from those instructing him. We checked with Ms Johnson for the Claimant who confirmed that she could deal with the matters raised in that email in cross-examination with the Respondent's witnesses.

Witnesses and documents

32. There was an electronic bundle of 413 page

33. We had a cast list and an agreed chronology.

34. For the Claimant the Tribunal heard from 3 witnesses: (i) the Claimant, (ii) Miss Eden Abraham, a former support worker at the Respondent and (iii) Mrs Sandra Purcell, former care worker at the Respondent.

35. The Claimant produced a witness statement from Ms Margaret Woodvine, the mother of a service user and Mrs Angela Jones, a former work colleague of the Claimant in a different employment. The Claimant made the decision not to call Ms Woodvine as the evidence did not go to the issues the Tribunal had to determine. Ms Jones's evidence appeared to go to remedy rather than liability. We informed the parties that in the time available we would not deal with remedy during the hearing allocation, so the Claimant decided not to call Ms Jones at this stage but she could call her if she succeeded and the case proceeded to a remedy hearing.

36. For the Respondent the Tribunal heard from 3 witnesses (i) Ms Conny Nasmyth, HR Special Projects Officer who left the Respondent's employment on 31 March 2023; (ii) Ms Melanie Price, a self-employed HR practitioner and the grievance investigation officer; (iii) Mr Marc Meaden, former Finance Director and the appeal officer, who is no longer in the Respondent's employment. We saw two different spellings of Ms Nasmyth's name in her witness statement. We hope we adopted the correct spelling and apologise if we did not.

37. We had written submissions from both parties to which they spoke. All submissions including any authorities referred to were fully considered, whether or not expressly referred to below.

Findings of fact

38. The Claimant worked for the Respondent from 31 August 2019 until her resignation on 8 March 2022 as a support worker in the children's services known as Kids Patch and at The Lodge residential unit. The Respondent is a charity supporting disabled individuals to live independent lives. The Respondent's children's service offers play and respite for families and children requiring help.

39. During the material time in 2020 and 2021 the Respondent employed 57 support workers; 12 at Kids Patch and 45 at the Lodge. They had 27 service users. The work at Kids Patch involved active play with the children which could involve physical games and interaction, personal care, administering medication and managing challenging behaviour.

40. The work at the Lodge included social activities such as attending entertainment venues; taking service users to medical appointments, on shopping trips or days out; dealing with wheelchairs when the service user was using public transport or a taxi; pushing the wheelchair, personal care and help with feeding. While some of these activities were physical and active we accept the Claimant's evidence supported by Miss Abraham and find that much of the work involved sitting with clients.

41. The Claimant generally worked for Kids Patch for 7 hours on Saturdays and at the Lodge Avenue for 4-5 hours on 2 to 3 days per week including on social excursions for them. She usually worked around 20 hours per

week from the start of her employment until the national lockdown referred to below. She was sometimes asked to work more hours.

42. The Claimant appeared to accept that she was on a zero hours contract but maintained that she received regular work. The Respondent did not dispute this. The contract of employment (bundle page 66) gave no specific hours of work. It said "..*your hours of work will vary according to the specific needs of the Charity. It will not always be possible to provide you with work and you will be notified on a weekly basis of any hours required*". For the avoidance of doubt, we find that the Claimant was on a zero hours contract.

43. The Claimant needed to be rostered to work and those rotas were drawn up a month in advance.

44. The Claimant started work for the Respondent on 31 August 2019. She completed a medical questionnaire on recruitment stating that she had no disabilities. The Claimant said in her witness statement that she spoke at the interview about experiencing depression, but she did not declare it because she did not know it could be a disability. This is not the condition relied upon in these proceedings. The Claimant mentioned in the questionnaire that she experienced anxiety, but she also did not rely on this as a disability.

Lockdown and furlough

45. Like countless other organisations, the Respondent was severely impacted by Covid and the national lockdown that began on 23 March 2020.

46. On 17 April 2020 the Respondent held discussions with staff, including the Claimant, about the furlough scheme. On 21 April 2020 the Respondent wrote to the Claimant to confirm that her position had been furloughed (pages 146-147). By a letter dated 26 November 2020 the furlough arrangement was extended (page 156). No member of staff was given a formal furlough agreement. All that was required under the furlough scheme, under an amendment to the initial Direction that set it up, was for the agreement to furlough to be made in writing or confirmed in writing by the employer. In any event the Claimant confirmed by email on 10 December 2020 her consent to remain on furlough (pages 157-158) saying: "*letting you know I'm fine to stay on furlough".*

47. Kids Patch was closed during the pandemic. Some care workers continued to work at the Lodge because clients needed personal care and medication.

The Claimant's knee injury

48. On 23 April 2021 the Claimant informed the manager of Kids Patch, Ms Kerry Cannadine, by telephone, that she had injured her knee and could

not walk long distances or stand on her feet for long periods. She said she was waiting for an MRI scan. The Claimant followed this up with an email on the same day (page 161) saying:

> "*As per our conversation this afternoon regarding me coming back to work at Kids Patch at this moment in time I am unable to come back but would hopefully be able to in the future as it's a role that I have loved to work in but with me having knee injury at present I know I would not be up to running around 7hrs on shift. I will concentrate on my social work at the Lodge and will be ready to go back there as soon as I hear from [the Respondent] with a start date. Thank you for all your support and help and understanding. I wish it was not this way as it's all I've wanted is to be back doing what I love but hopefully not for too long".*

49. Ms Cannadine replied within minutes saying: "*I wish you the best of luck and please do not hesitate to contact me again if and when you feel you can return to our kpc and children's services. Best of luck with your injury, I hope you are able to resolve the issue soon and I'm sure the lodge clients are looking forward to seeing you on the socials as and when the service returns"* (page 162). The service dealing with social events was still closed in April 2021 due to the pandemic. It did not reopen until 10 August 2021.

50. The Claimant's case was that she was told by Ms Cannadine to resign from Kids Patch. There was no documentary evidence to support this. Ms Cannadine left the Respondent's employment on 9 July 2022. The matter was investigated internally during the Claimant's grievance and we say more on this below.

51. The investigating officer Ms Price was not able to speak to Ms Cannadine about this allegation. Ms Price spoke to Ms Law on the matter who said she believed that Ms Cannadine had said this. Ms Price concluded in her grievance investigation report that Ms Cannadine had suggested to the Claimant that she resign from Kids Patch (page 214). This was changed in the grievance outcome letter without any explanation as to why and then restored in the appeal outcome. Based on the Claimant's evidence and the finding in the internal investigation, we find that Ms Cannadine did suggest to the Claimant in April 2021 that she should resign because of her injury.

<u>Was the Claimant isolated from June 2021 when the Respondent ceased regular communications?</u>

52. From the start of lockdown the Claimant received what she described as "*courtesy calls*" from management asking how she was. These calls were made fortnightly by a number of different people including her manager Ms Kelly Barber, and others including those named Michelle, Lisa and Susan.

53. The calls continued from the manager of Kids Patch, Ms Cannadine, whom the Claimant described as "*fantastic"* at this. The Claimant's

complaint was that the calls from the Lodge ceased in June 2021.

54. These calls ended in June 2021, not just for the Claimant but also for her colleague Miss Abraham, who was not disabled (as set out in her witness statement at paragraph 6).

55. The Claimant did not know why the calls ceased from the Lodge, she said she heard that people had left, there was a huge turnover of staff. We find on a balance of probabilities, that due to high staff turnover, the Respondent did not have the resources to continue to make the calls to all staff, not just to the Claimant. They were also gearing up towards reopening services as pandemic restrictions began to lift.

56. We find that when the "*courtesy calls*" stopped, the Claimant felt somewhat isolated. Being in lockdown and on furlough was an isolating experience for vast numbers of people in the UK. We find that there was no obligation on the Respondent to make those calls and as resources became more stretched, they stopped making the calls to the Claimant and others including Miss Abraham.

57. The Claimant and Miss Abraham were also members of a work WhatsApp Group which included managers. We find that there was no action on the part of the Respondent to seek to isolate the Claimant and this allegation fails on its facts.

<u>The ending of furlough</u>

58. It is a matter of public record that the furlough scheme came to an end on 30 September 2021. Covid restrictions began to ease in the summer of 2021. On 10 August 2021 HR Administrator Ms Kelsea Law wrote to the Claimant to tell her that furlough would end on 1 August 2021 and she would be required to work as usual. She was asked to liaise with her manager to resume attendance and familiarise herself with any changes they needed to implement (page 163).

59. It is acknowledged by the Respondent (including statement Ms Nasmyth paragraph 28) that these letters, sent to 12 members of staff including the Claimant, were sent with the wrong notice period for the ending of furlough. This was altered as soon as members of staff brough this to the Respondent's attention.

60. An amended letter was sent on 24 August 2021 acknowledging that the letter of 10 August did not provide reasonable notice for employees for their own financial planning and they were told that furlough would end on 10 August 2021 rather than retrospectively on 1 August 2021. The Claimant was paid for the period 1 to 10 August 2021. We find that the letter of 24 August remedied any financial loss which was the Claimant's concern. We were not taken to any document, provision or requirement for a specific period of notice to bring furlough to an end. We find that the Respondent remedied any potential breach of contract when they sent the

24 August letter.

61. The Claimant's pay ceased from 10 August 2021 until she went on to SSP, about which we say more below. We find that because the Claimant was on a zero hours contract, there was no breach of contract in August 2021 by not offering her work.

62. On 13 August 2021 the Claimant spoke to her line manager Ms Kelly Barber to say she could only do light duties due to her knee injury in April and that she could not walk long distances. She was informed by Ms Barber that the only jobs available involved extensive walking. Ms Barber made no assessment of the Claimant's capabilities and whether she could perform her duties with any adjustments.

63. On 13 August 2021 the Claimant sent an email to Ms Law (page 164) to say that although they had brought furlough to an end she had not been put on a rota. She also said that she had purchased a laptop so she could do the necessary training online, but she had not been sent anything. Ms Law replied the same day, asking the Claimant to advise her when she could complete her training and her availability. On 16 August her representative Ms Johnson told Ms Law that the Claimant was available to complete the training at home if she was given access to the material. The Claimant needed to do the training before she could resume work because her training was out of date. At no point was the Claimant sent the training material or a link to access the training.

64. Ms Nasmyth's evidence was that in August 2021 Ms Barber told the Claimant there was no work available that did not involve "*lots of walking".* Ms Nasmyth accepted in evidence that she did not actually know what duties the Claimant performed because they did not work together.

65. In terms of the requirement for "*lots of walking*" Ms Nasmyth explained that from 10 August they received authorisation from the Council to resume activities with their clients outdoors. As it was summer and with an awareness of ongoing Covid rates, most if not all of the activities were done outside with service users. This was the point from which rotas for the support workers could be prepared in order to resume those activities.

<u>The medical certificate of 26 August 2021</u>

66. On 26 August 2021 the Claimant obtained a Fit Note from her GP stating the condition of osteoarthritis of the knee and stating that she may be fit with amended duties. In the comments section the GP said: *"cannot walk long distances and needs to be considered for light duties.".* The duration of the fit note was until 31 October 2021.

67. Ms Nasmyth said that this certificate was not received by the Respondent until 9 September 2021 (statement paragraph 40). This was the date that the Claimant chased the Respondent as to whether it had been received. The Claimant sent an email to Ms Law saying: "*Did u receive my sick*

certificate?" (page 178.1) and Ms Law replied at 10:15am saying that she had received it that morning (page 178.2). The Claimant's case was that Ms Law asserted that she had not reported her sickness correctly. In the absence of hearing from Ms Law, we accept that she said this to the Claimant. We find that she did so because the certificate was received late. We also find that this was not the Claimant's fault, she had sent it and then chased it up on 9 September.

68. Ms Nasmyth's evidence was and we find that the normal procedure for the Respondent upon receipt of a Fit Note saying that the employee may be fit for light duties, was to invite the employee to a meeting and to send them to Occupational Health (OH). There was a shortage of funds for this and OH referrals were made on a case by case basis. In July 2022 an OH referral was made for the Claimant's former colleague and witness Ms Sandra Purcell. As soon as Ms Nasmyth understood that Mrs Purcell had a limitation on her duties, she asked the Finance Director Mr Meaden to find the money to make the OH referral. On Ms Nasmyth's evidence we find that this was done for more than one person, but it was not done for the Claimant. Adjustments were made for Mrs Purcell, whose doctor had advised she could do amended duties and she was able to return to work.

69. Having received he Fit Note the Respondent placed the Claimant on SSP. The Claimant complains that she was placed on SSP without this being agreed with her in advance. We find that there is no obligation on employers to agree with employees that they be placed on SSP. It is a matter of the employee meeting the statutory requirements for SSP. In any event the contractual provisions for SSP were set out in the contract of employment that was agreed between the parties (page 125). There was no breach of contract in any respect by the Respondent placing the Claimant on SSP. To the extent that any agreement was necessary, it was covered by the contract of employment.

70. The Claimant thought she should be put back on furlough if there was no work for her. We find there was no obligation on employers to place employees on furlough and the scheme was coming to an end at the end of September in any event. The Respondent wished to bring their staff off furlough.

71. In an email dated 27 August 2021 the Claimant said to Ms Law in HR (page 174) "*I recently had a fall and have had problems with my knee and have had MRI which says I have severe osteoarthritis in both knees and cartaliage (sic) and ligament damage. I am seeing a consultant on …. who is reviewing my MRI images. I have been having accupunture (sic) which has taken paid away but cannot walk long distances. I use a crutch but I would be able to do my lodge work sitting down with clients doing activities. I could manage going certain outings cinema, bowling and Meals out etc as we go in a cab but nothing requiring long distance walking. I could not walk from station to DABD office that's too far. I can do training on line and still have a lot to give with my time to clients".*

Mental health issues

72. The Claimant's case was that Ms Barber and Ms Law showed no concern for her mental health and did not refer her to occupational health in August 2021. The Claimant had disclosed in the medical questionnaire she completed on recruitment in 2019 (page 75) that she had anxiety linked to family issues and a bereavement. We find that there was no need for the Respondent to refer the Claimant to occupational health because of her mental health. There was no medical certificate in respect of this condition.

73. In August 2021 Claimant and her representative raised in emails, some concerns about stress and anxiety. She was not contacted by anyone at the Respondent to discuss these matters. We find that the Respondent showed no concern for her mental health.

74. On 16 September 2021 the Claimant's friend and representative Ms Johnson emailed Ms Law to say that they should no longer communicate with the Claimant direct, but with herself with a copy to the Claimant (page 190).

75. On 21 September 2021 the Claimant's friend and representative Ms Johnson was sent a letter from HR which dealt with a number of issues raised. Under the heading "*Work availability*" the letter said: "*Whilst, we look forward to Paula's return, I must reiterate that she must be fit to do so. We will continue to work with her. She must contact her line manager or HR for further discussion"* (page 185). The Claimant complains that this statement was "*an attack on her integrity*" because she had no prior ill health. In evidence the Claimant said she did not see her leg injury as "*ill health*", because in her view she could have returned to work.

76. On 29 September 2021 the Claimant's representative Ms Johnson emailed Ms Law to say that the Claimant was experiencing both physical injury and stress and anxiety. She also asked for the period from 27 September to7 October 2021 to be treated as annual leave and paid as such which was agreed. Ms Johnson said she would be submitting a grievance on behalf of the Claimant (page 188).

77. On 11 November 2021 a further Fit Note was given by the GP covering the period from 30 September 2021 to 15 January 2022 (page 204). It was retrospective because the Claimant's GP had been on holiday. This Fit Note said that the Claimant may be fit for work on light duties. It was sent to Ms Law and Ms Elvin in payroll on 12 November 2021.

78. In terms of allegation (xii) above, we find that when the letter of 7 January 2022 said: "*you did not report any sickness absence as required to HR"* (page 225) this was not, as the Claimant alleged, an attack on her integrity. It was factually correct that she did not report correctly, although this was not her fault because her GP was on holiday.

The Claimant's grievance

79. On 18 October 2021 Ms Johnson submitted a grievance on behalf of the Claimant (pages 190-195). It covered a number of issues including pay related matters, the ending of the furlough arrangement, breaches of various policies and the Claimant's complaints that she had not been given the training she needed to return to work and had not been allowed to return to work on amended duties.

80. The grievance investigation officer was Ms Melanie Price who is a self-employed HR consultant. She was instructed by at least 28 October 2021 as she sent an email to the Claimant on that date introducing herself as the investigating officer (page 196.1). The grievance investigation meeting took place on 1 November 2021 and concluded on 8 November 2021. The Claimant was accompanied by Ms Johnson. The notes of the hearing were in the bundle at pages 197-199 and 202-203.

81. In the 1 November meeting the Claimant told Ms Price that "*everything had changed*" and she "*cannot see how she can go back, position untenable*", page 199. In the 8 November 2021 meeting Ms Johnson on behalf of the Claimant said: "*Clear PL cannot return"* and *"Looking for some financial compensation".* We find that in both meetings Ms Price was told that the Claimant was not looking to return to work and she was seeking financial compensation.

82. Ms Price held a fact finding meeting with Ms Law on 16 November 2021. These were only 2 people interviewed within the investigation.

83. On 24 November 2021 Ms Law emailed the Claimant saying: "*Having read through the detail of your certificate, I would like to meet with you to discuss any concerns you may have about returning, your duties and how we undertake to support your needs"* (page 206). This raised in our minds question as to why this did not happen when the Fit Note of 26 August 2021 was submitted. A meeting was offered for 30 November 2021, more than 3 months after the Claimant was signed as potentially fit with amended duties.

<u>The grievance investigation report</u>

84. Ms Price produced an Investigation Report, dated "*November 2021* at the top (page 212) and dated 1 December 2021 at the end (page 218) and sent to Ms Nasmyth on that date (agreed chronology). Even though she was not the decision maker on the grievance, Ms Price concluded that the grievance was partly upheld. The matters upheld by Ms Price were as to the complaint that Ms Cannadine suggested that the Claimant resign and on certain payroll issues.

85. At the conclusion of her report Ms Price made a number of recommendations. Point 6.1 below was a statement and not a recommendation and the final two points were both numbered 6.6.

6.1 Unfortunately given all that has taken place, Paula does not feel that she is able to return to the workplace.
6.2 It is recommended that DABD explore the areas upheld and consider what remedies might be appropriate. The two areas upheld relate to the payroll issues and the request to resign.
6.3 It is recommended that DABD learns lessons from the past year and considers implementing checklists in relation to payroll to ensure that appropriate audits are in place so that it can be confident that employees are being enrolled into pension schemes correctly, payslips are available and payments such as annual leave are paid in a timely manner.
6.4 It is recommended that DABD ensures that policies are made available to all employees from their first day of employment and that there is appropriate signposting to these policies.
6.5 It is recommended that DABD considers methods of communications with staff especially if the country should go into any further lockdowns, to ensure clarity of processes and procedures.
6.6 It is recommended that DABD ensures that there is appropriate training for managers to ensure that they are clear on company policies and procedures and clarity on contracts and contractual arrangements.
6.,6 It is recommended that DABD explore ways of supporting individuals who are off sick and considers the methods of communicating with them during their absence.

86. Having not seen the grievance investigation report, Ms Johnson emailed on 13 December 2021 asking if the matter could be resolved before Christmas so that the Claimant did not have it hanging over her head (page 196.6).

87. On 4 January 2022 the HR team informed the Claimant and Ms Johnson that they were in receipt of Ms Price's report and they were considering it (email page 219). By 4 January they had been in receipt of it for over a month. We find on Ms Nasmyth's evidence that the HR team was under resourced as it was limited to 1 full time person supported by herself in Special Projects working 3 days per week.

The grievance outcome

88. The outcome letter was dated 7 January 2022 (page 222). It was drafted by Ms Nasmyth with input from others. Unusually it gave no name at the end as to who had made the decision. It was marked at the end *"PP Conny Nasmyth ACIPD"* and *"Human Resources On behalf of DABD*". The Judge asked Ms Nasmyth who had made the decision on the grievance. We were told and we find that the decision maker was the Chief Executive Ms Elaine James. The Claimant had no way of knowing that the Chief Executive was the decision maker. The Claimant was given a right of appeal to the Finance Director Mr Marc Meaden who reports to the Chief Executive.

89. The only matter upheld in the grievance outcome letter related to the payroll issues. All other complaints were not upheld. Unlike the investigation report, Ms James did not uphold the Claimant's complaint that she had been asked by Ms Cannadine to resign. Ms James interpreted the Claimant's email to Ms Cannadine of 23 April 2021 (set out above) as saying that she no longer wanted to work at Kids Patch (page 224). What the Claimant said was: *"at this moment in time I am unable to come back but would hopefully be able to in the future".*

The appeal against the grievance outcome

90. On 4 February 2022 the Claimant appealed against the grievance outcome (page 236-239).

91. The appeal officer was Mr Meaden. He did not know that the grievance decision maker was his line manager Ms James. He thought the decision maker was Ms Nasmyth. This leads us to find that Mr Meaden did not know that he was being asked to consider the decision of his line manager. He thought he was considering the decision of a member of HR. We find that he was not conflicted in any way in making that decision.

92. The appeal hearing took place on 17 February 2022.

93. The appeal outcome was sent on Friday 4 March 2022. Mr Meaden could see no reason to reverse the grievance outcome and he did not uphold the appeal (page 258) save that he reinstated Ms Price's conclusion that Ms Cannandine suggested that the Claimant resign (page 258).

94. The Claimant relied in her list of acts amounting to a fundamental breach of contract on a "*failure to refer to the recommendations of Ms Price"* (set out above). The Tribunal asked the Claimant who should have referred to those recommendations and for what purpose? We did not receive a clear answer to that question. It is correct that Mr Meaden did not refer to Ms Price's recommendations. We find that it was not necessary for him to do so. We could find nothing adverse in his failure to do so and we were not told who else should have referred to them and in what context.

95. The Claimant resigned on 8 March 2022 by email to the Chief Executive (page 259). She said in her resignation letter that she would be bringing a tribunal claim. She said she had been issued with an Early Conciliation Certificate on 14 February 2022. Her ET1 was issued on 11 March 2022, 3 days after her resignation.

Delays in the grievance process

96. We find that the grievance process took longer than was ideal but that it was not unusually protracted. Ms Price as the investigating officer first interviewed the Claimant within a couple of days of her appointment on 1 and again 8 November 2021. She interviewed Ms Law on 16 November 2021 and produced her report on 1 December 2021. The grievance

outcome was delayed by the Christmas and New Year period. The outcome was sent on 7 January 2022.

97. The appeal was presented on 4 February 2022 and the hearing was just under two weeks later on 17 February 2022. The outcome was sent on 4 March 2022.

98. Although we consider that this is longer than the Claimant would have liked, it was not exceptional in the circumstances. We were not taken to the grievance procedure on this issue and no submissions were made on the point.

What was the reason for the Claimant's resignation

99. The Claimant relied upon Mr Meaden's appeal outcome as the final straw in a series of events amounting to a fundamental breach of contract and that this was what led her to resign.

100. We have made findings above on the 13 allegations upon which the Claimant relied as amounting to a fundamental breach, culminating in the appeal outcome on 4 March 2022.

101. Allegations (i), (ix) and (xii) fail on their facts, as set out above. Allegations (iii) and (iv) regarding the correspondence bringing about the end of furlough, were rectified by the letter of 24 August 2021. On allegation (v) there was no contractual obligation to offer work on a zero hours contract and on allegation (vi) there was no requirement to agree placing the Claimant on SSP. On allegation (ii) whilst we found that no concern as shown for the Claimant's mental health, we find that his played no part in her decision to resign in March 2022. It was not in dispute that at no point was the Claimant referred to OH.

102. We find that anything that happened on or after 1 November 2021 was not causative of the Claimant's resignation because she had formed the decision and told the Respondent that she did not plan to return to work. This deals with the allegation concerning the 7 January 2022 letter as well as the appeal outcome – allegations (xii) and (xiii). The Claimant's focus from 1 November 2021 was on securing a settlement involving the termination of her employment. We were supported in that finding by an extract from an email of about 24 November 2021 from Ms Johnson (page 196.3) saying: "*As you know Paula is looking to reach an agreement on her grievance which involves her not returning to DABD".*

103. The Claimant began Early Conciliation for these proceedings on 4 January 2022. Early Conciliation concluded on 14 February 2022. She received her appeal outcome on 4 March, resigned on 8 March and presented her ET1 on 11 March 2022.

104. Our finding is that the Claimant had made the decision by 1 November 2021 at the latest, being no more than 2 weeks after she lodged her

grievance, that she was not going to return work for the Respondent. We find that she pursued the grievance and appeal process with a view to seeking to negotiate terms of settlement for her departure. We find that she did not resign in response to any alleged breaches of contract. She resigned when the end of the grievance and appeal process did not bring the outcome she was seeking, namely a negotiated settlement. Our finding is that the handling and outcome of the grievance process was not causative of her resignation. She had made the decision not to return to work by at least 1 November 2021.

105. We find that from 1 November, the reason the Respondent did not pursue steps to bring her back to work, was because she had told them she did not intend to return. In the grievance outcome letter of 7 January 2022, the Claimant was told that they would be happy to discuss her return "*just as soon as you wish to do so"* (page 225).

The reasonable adjustments claim

106. There were three PCP's relied upon by the Claimant:

a. A requirement to walk long distances.
b. A requirement to stand for long periods.
c. A requirement to have training in Respondent's office, which is a long walk from the train station.

107. PCP 1: The Claimant was asked whether she was required in her job to walk long distances. She said that in the conversation on 13 August 2021, Ms Barber told her that one of the requirements placed on them by the Council, was to ensure that residents were taken out each day so they were not kept in a confined space. The Claimant's evidence was that one of her duties was to take clients for a walk around the park and this for her was a long distance. She said she could take clients to the cinema or bowling and go out in a taxi, but that she could not walk more than a couple of hundred yards.

108. We did not hear from Ms Barber; we had the first hand evidence of the Claimant of that conversation. We find that Ms Barber told the Claimant of the requirement imposed on them by the Council that residents be taken out each day so they were not kept in confined spaces. We find that walking what for the Claimant was a long distance - anything above a couple of hundred yards - was a PCP applied by the Respondent in August 2021. This was when Covid rules were lifting, but the risks of infection still remained.

109. We were taken to Miss Abraham's evidence that "*very little walking was involved in the Lodge itself*" (paragraph 4 of her statement) and that "*occasionally we would take the clients on outings that would involve more walking*". We find that Miss Abraham's evidence on the point related to the usual duties of the job, but in the conversation of 13 August 2021 Ms Barber explained the requirement that applied at that time due to the

pandemic. We were supported in this finding by Ms Nasmyth's evidence (statement paragraph 31) when she said: "*Being outdoors as often and as frequent as possible was something that we encouraged to reduce the risk of getting Covid*".

110. We find that the PCP1 was applied and the Claimant was put at a substantial disadvantage in that she was unable to walk more than a couple of hundred yards.

111. It was submitted by the Respondent that there could be no failure to make reasonable adjustments because the Claimant had not attended a return to work meeting to have a discussion about adjustments. It is not in dispute that the first time the Respondent offered a return to work meeting was on 24 November 2021 with a meeting date of 30 November 2021 (page 206).

112. We find there was a failure to make a reasonable adjustment from 27 August 2021 onwards. It was not conditional upon the Respondent arranging a meeting. They had the key information they needed; the Claimant's ability to walk was compromised by her knee condition. If they had difficulty in setting up a meeting, a conversation on the phone or by video would have given them any more detail they wanted. We find that it would have been reasonable to adjust the Claimant's duties to allow her to take clients out in a taxi or to do seated activities outdoors. The Claimant told the Tribunal that she had been preparing activities for her clients while she had been in lockdown.

113. PCP 2: The Claimant was asked whether in her job there was a requirement to stand for long periods. She said that all her activities were done seated with the clients and some of her clients were wheelchair bound. She said: "*I didn't have to stand up for anything really, only if I was preparing food".* The Claimant was asked directly in cross-examination: *"There was no requirement for you to stand for long periods?"* and she answered "*Not long periods, no".*

114. We find on the Claimant's evidence that the Respondent did not apply PCP 2.

115. PCP 3: The Claimant's evidence was that training could be done online from home and she purchased a laptop for this very purpose. We find that the Respondent did not apply PCP3.

Knowledge of disability

116. As we have set out above, the Claimant saw her GP and obtained the Fit Note dated 26 August 2021 saying that she had osteoarthritis of the knee and *"cannot walk long distances and needs to be considered for light duties."* The Respondent saw this on 9 September 2021 and accepted that they had knowledge of disability from that date. The Claimant sent an email to Ms Law on 27 August 2021 (quoted more fully above) saying the same and more about her condition - specifically that she "*had MRI*

which says I have severe osteoarthritis in both knees and cartaliage (sic) and ligament damage".

117. She said she was using crutches and went on to say what she could and could not do. We find that given the admission of knowledge of disability from the concise information given in the Fit Note which they received on 9 September 2021, they had knowledge of disability from the more detailed information given by the Claimant in the email of 27 August 2021.

Comparator Miss Abraham

118. It was not in dispute that Miss Abraham was employed in the same role as the Claimant. She is and was not at the material time a disabled person. At the end of furlough she was told by their line manager Ms Barber that there was work available (statement paragraph 8) and that she should update her mandatory training before returning to work. Ms Barber had no such conversation with the Claimant. The Claimant tried hard to contact Ms Barber but did not have her calls or messages returned. The Claimant also told Ms Law in HR of the problems she was having in trying to reach Ms Barber, but this did not result in any contact.

119. On 6 September 2021 Miss Abraham received an email from Ms Law giving her the details of how to do her mandatory training in order to return to work (page 274.59). It was on-line training and extensive. Miss Abraham said it contained 30 modules and took her about 2 weeks to complete. Miss Abraham asked the Claimant if she had received the same email; she had not. Miss Abraham returned to work once she had completed the training.

120. As we have found above the Claimant, via her representative, told Ms Laws on 16 August 2021 (page 169) that she was available to complete the training. No steps were ever taken to send her the access link to the training. The Claimant required this training in order to return to work.

Time limits

121. The Respondent submitted that, in the light of the dates of Early Conciliation being from 4 January 2022 to 14 February 2022 and the ET1 being presented on 11 March 2022, any act or acts taking place before 5 October 2021 were on the face of it out of time.

122. The Claimant gave no evidence and made no submission as to why it would be just and equitable to extend time. The Claimant relied on their being a continuing act of discrimination through to the date of her resignation on 8 March 2022.

123. We have considered whether the failure to provide the Claimant with training to enable her to come back to work and the failure to provide her with work following the end of furlough was a continuing act or a one-off act with continuing consequences.

124. We find that there was an ongoing failure to give proper consideration to the Fit Notes and the Claimant's representations that she was willing and able to come back to work with some adjustments. The Fit Notes were sent to the HR Administrator, Ms Law. Ms Nasmyth's evidence was that Ms Law required help and supervision including with the drafting of correspondence. In evidence Ms Nasmyth told the Tribunal that she did not personally have sight of the Fit Note of 26 August 2021 and if she had looked at it herself and seen it said "*Osteoarthritis of knee*" and that the Claimant "*needs to be considered for light duties*", the Claimant should have been invited to a meeting and referred to OH. This was exactly what the Claimant wanted to happen.

125. We have found above that the Respondent had knowledge of disability from 27 August 2021 the condition of osteoarthritis of the knee. They knew that this placed limitations on what the Claimant could do. We have also found above that when the Claimant sustained a knee injury in April 2021, Ms Cannadine suggested that she resign. We did not hear from Ms Cannadine or Ms Law. Based on Ms Price's investigation report, point 4.3(i) (page 214), we also find that Ms Cannadine indicated to Ms Law that she had asked the Claimant to resign.

126. We find based on the above that there was a discriminatory view that the Claimant could not perform her duties and an overarching and continuing view, despite what the Claimant and her GP had said, that she could not do her job because of her knee condition. Despite continuing representations from the Claimant, there was an ongoing failure to engage with the detail of the medical situation, to make an OH referral or obtain a report from her GP and to meet with her. We find that this was a continuing act that ran to 1 November 2021 when the Claimant made the decision that she was not going to return to work at the Respondent.

<u>The failure to provide training or offer work after furlough</u>

127. We have found that the Claimant was not offered work after the end of furlough and she was not offered training. We find that she was treated less favourably than her non-disabled comparator Miss Abraham who was given access to the training on 6 September 2021 and was allowed to return to work.

128. The Respondent submitted that the Claimant was told that work was available and she subsequently made a decision not to return to work. This was not until 1 November 2021.

129. On 6 September 2021 when the Respondent sent the training link to Ms Abraham, they had knowledge of the Claimant's disability. We took account of the conversation with Ms Cannadine in April 2021 when she suggested that the Claimant resign because of her injury and the conversation with Ms Barber on 13 August 2021 when they discussed the need to take the clients for walks, without any consideration of what the

Claimant might be able to do. The position was not reviewed once they had knowledge of disability and there as a failure to engage properly with the medical information.

130. We find that the Respondent formed the view that the Claimant was unfit to do her job because of her knee condition and this was the reason that they did not offer her the opportunity to do the training and to return to work. We find that the reason for this was the Claimant's disability.

131. We have also considered whether the unfavourable treatment of not being offered work or training after furlough was because of something arising from the Claimant's disability. She relied upon her difficulty in walking long distances.

132. The Claimant was not offered work or training after furlough and this was unfavourable treatment. The Respondent had knowledge of disability from 27 August 2021. The Claimant had an inability to walk long distances as a result of osteoarthritis in her knee. This gave rise to the Respondent's view that she was unfit to do her job, particularly when outdoor activities were more important in the summer of 2021 to reduce the risk of Covid infection. The reason for the unfavourable treatment was that the Claimant could not walk long distances and this was something arising from her disability.

133. We have also considered whether the Respondent has shown that not providing the Claimant with training and work was a proportionate means of achieving a legitimate aim. The aim was put as the need for employees to be physically fit to perform their duties. This is a legitimate aim, but preventing the Claimant from doing online training and failing to consider what work she could actually do, was not a proportionate means of achieving that aim.

The relevant law

Constructive unfair dismissal – sections 95 and 98 Employment Rights Act

134. The applicable law is found in section 95(1)(c) of the Employment Rights Act 1996 which provides that "*for the purpose of this Part an employee is dismissed by his employer if …….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".*

135. The leading case on constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA.*** The employer's conduct must give rise to a repudiatory breach of contract. In that case Lord Denning said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract, then the employee is entitled to treat himself as discharged from further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

136. In ***Malik v Bank of Credit and Commerce International SA 1997 IRLR 462*** the House of Lords affirmed the implied term of trust and confidence as follows:

> *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

137. In ***Baldwin v Brighton and Hove City Council 2007 IRLR 232*** the EAT had to consider whether for there to be a breach, the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view of the EAT was that the use of the word *"and"* by Lord Steyn in the passage quoted above, was an error of transcription and that the relevant test is satisfied if either of the requirements is met, so that it should be "*calculated or likely".*

138. If there was a dismissal, the tribunal must consider whether the dismissal was for one of the potentially fair reasons set out in sections 98(1)(b) or 98(2) of the Employment Rights Act and whether the dismissal was fair or unfair under section 98(4),

139. In ***Kaur v Leeds Teaching Hospitals NHS Trust 2018 IRLR 833*** the Court of Appeal listed five questions that should be sufficient for the tribunal to ask itself to determine whether an employee was constructively dismissed (judgment paragraph 55):

    a. What was the most recent act (or omission) on the part of the employer the employee says caused, or triggered, their resignation?
    b. Has the employee affirmed the contract since that act?
    c. If not, was that act (or omission) by itself a repudiatory breach of contract?
    d. If not, was it nevertheless a part (applying the approach explained in *Waltham Forest v Omilaju [2004] EWCA Civ 1493*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign).
    e. Did the employee resign in response (or partly in response) to that breach?

Direct disability discrimination – section 13 Equality Act

140. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that 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.

141. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

Discrimination arising from disability – section 15 Equality Act

142. Discrimination arising from disability is found in section 15 Equality Act 2010:

> *(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,*
>
> *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

143. The approach to be taken in section 15 claims is set out in ***Pnaiser v NHS England 2016 IRLR 170 (EAT)*** by Simler P at paragraph 31. This case also addresses the burden of proof in section 15 cases. Under section 136, once a claimant has proved facts from which a tribunal could conclude that an unlawful act of discrimination has taken place, the burden shifts to the respondent to provide a non-discriminatory explanation. In order to prove a prima facie case of discrimination and shift the burden to the employer, the claimant needs to show:

a. that he or she has been subjected to unfavourable treatment;

b. that he or she is disabled and that the employer had actual or constructive knowledge of this;

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it can be inferred that the 'something' was the reason for the treatment.

144. If the prima facie case is established and the burden shifts, the employer can defeat the claim by proving either:

a. that the reason or reasons for the unfavourable treatment was not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or

b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

145. 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 (judgment paragraph 31b).

The duty to make reasonable adjustments – sections 20 and 21 Equality Act

146. The duty to make reasonable adjustments is found under section 20 EqA. They duty comprises three requirements. Subsection (3) is as follows:

> *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*

147. The EAT in ***Royal Bank of Scotland v Ashton 2011 ICR 632*** held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment.

148. This case was considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ*** on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of his disability.

149. Under section 21 of the Equality Act a failure to comply with section 20 is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

150. In deciding whether an employer has failed to make reasonable adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

> *(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
>
> *(b) the physical feature of premises occupied by the employer;*

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

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

151. On the burden of proof, the EAT in ***Project Management Institute v Latif 2007 IRLR 579*** (Elias P as he then was) held that the claimant must not only establish that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It is necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

152. In relation to knowledge of disability, knowledge of the disadvantage and reasonable adjustments Schedule 8 paragraph 20(1)(b) of the Equality Act provides:

> *(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 - …..that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

153. In ***Newham Sixth Form College v Saunders 2014 EWCA Civ 734*** the Court of Appeal *(*Law LJ) said in relation to knowledge of the substantial disadvantage: *"[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*" (judgment paragraph 14).

154. In ***Knightley v Chelsea & Westminster Hospital NHS Foundation Trust 2022 IRLR 576*** the EAT said that the different legal tests for unfair dismissal, discrimination arising from disability and reasonable adjustments raise different legal issues and have different legislative aims. The EAT said it follows that there is no reason why breach of one of these provisions will necessarily or automatically mean that any of the others will also have been breached.

<u>Time limits – section 123 Equality Act</u>

155. Section 123 of the Equality Act 2010 provides that:

> *(1) …… proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*

156. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the tribunal should exercise that discretion in favour of the claimant.

157. The leading case on whether an act of discrimination is to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96.*** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: "The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed" (paragraph 52).

158. In ***Owusu v London Fire & Civil Defence Authority 1995 IRLR 574*** the EAT held that a practice of denying Mr Owusu upgrading or the opportunity to act up, could constitute an act extending over a period which is a continuing act. This was in contrast to a failure to promote him in respect of roles for which he had applied during his employment. These were held to be specific one-off instances which were out of time.

<u>The burden of proof</u>

159. Section 136 of the Equality Act deals with the burden of proof and provides that 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. This does not apply if A goes on to show that it did not it did not contravene the provision, namely where it gives a non discriminatory explanation for the treatment.

160. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

161. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

162. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

163. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

164. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

165. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

Conclusions

<u>Constructive unfair dismissal</u>

166. Our findings on the 13 allegations relied upon by the Claimant were as follows:

i. Isolating the Claimant from June 2021 when the Respondent ceased regular communications. This allegation failed on its facts.
ii. Ms Barber and Ms Law showing no concern for the Claimant's mental health and not referring her to OH in August 2021. We have found that Ms Barber and Ms Law did not show concern for the Claimant's mental health. We have also found that there was no OH referral at any point whether for her mental health or her disability.
iii. In August 2021, not providing the Claimant with appropriate notice that her furlough pay would stop. We have found that this was rectified by 24 August letter.
iv. On 10 August 2021 – a letter informing the Claimant that her furlough pay had stopped on 1 August 2021. Following the Claimant raising concerns the Respondent agreed to pay the Claimant up to 10 August 2021. This is the same as point (iii) above.
v. Stopping the Claimant's pay from 10 August 2021. We have found that as the Claimant was on a zero hours contract, the Respondent was not contractually obliged to offer the work.
vi. Putting the Claimant on SSP without agreeing it with her. Our finding is that it is not necessary to agree this and in any event it was covered in the contract of employment.
vii. Failing to provide the Claimant with statutory training to enable her to do her job in July/August 2021. We have found that there was a failure to provide the Claimant with that training.
viii. In August 2021 Ms Law asserting that the Claimant had not reported sick leave as required. We find that Ms Laws did assert this because she had not received the Fit Note on time, but the Claimant had sent it.
ix. On 21 September 2021, Ms Nasmyth writing that the Claimant must be fit to return to work and no evidence of ill health prior. The Claimant asserted that this was an attack on her integrity. We found that it was not an attack on the Claimant's integrity so this allegation failed on its facts.
x. Failing to make reasonable adjustments. We have found that there was a failure to make reasonable adjustments on PCP1.
xi. Delay in progressing her return to work. The first time HR offered a date for a meeting was on 25 November 2021 whilst the Claimant was proceeding with her grievance. We have found that there was a delay in progressing the Claimant's return to work.
xii. On 7 January 2022 Ms Nasmyth writing that there was a lack of clarity on the Claimant's sickness absence implying that the Claimant did not properly report it. The Claimant asserted that this was an attack on her integrity. We found that it was not an attack on her integrity so this allegation failed on its facts.
xiii. The delay and process of her grievance, including conflicts and failure to refer to the recommendations of Ms Price and the appeal outcome by Mr Meaden on 4 March 2022. The Claimant said that this was the final straw. We have found that Mr Meaden

was not conflicted in hearing the appeal. There was need for him to refer to Ms Price's recommendations. We have found that the grievance procedure was not unduly delayed.

167. The Claimant succeeded on allegations (ii), (vii), (viii), (x) and (xi). These were the lack of concern for her mental health and lack of an OH referral; the failure to provide training; the assertion in August 2021 that she did not report her sickness correctly; the failure to make reasonable adjustments and the failure to progress her return to work.

168. The matters which on our finding amounted to a fundamental breach of the contract of employment were encompassed under the heading of not progressing the Claimant's return to work, which includes the failure to make an OH referral or to seek a medical report; the failure to allow her to do the mandatory training to enable her to return to work and the failure to make reasonable adjustments which would have allowed her to return to work. Taken together those matters amounted to a fundamental breach of the implied term of trust and confidence.

169. Once the Claimant told the Respondent on 1 November 2021 that she did not intend to return to work, we find that there was a good reason why they did not take steps to bring her back to work. They told her in the grievance outcome letter that they would be happy to discuss it, just as soon as she wished to do so. She did not wish to do so.

170. Whilst there was a fundamental breach of contract, this persisted until 1 November 2021 we find that the claim for constructive unfair dismissal fails because the Claimant did not resign in response to the breach. She resigned when it became clear that there would be no negotiated settlement. The claim for constructive unfair dismissal fails and is dismissed.

171. We have taken account of the decision in ***Knightley*** **(**above) that there can be different outcomes on a constructive dismissal and a discrimination claim in the same case.

Direct disability discrimination

172. The fact that the Claimant's non-disabled comparator was given access to the training and allowed to return to work in the same job and in the same material circumstances, was sufficient to reverse the burden of proof.

173. We find that the Claimant was treated less favourably than her non-disabled comparator Miss Abraham and the reason for the treatment was her disability. The claim for direct disability discrimination succeeds.

Discrimination arising from disability

174. The Claimant was treated unfavourably by not being offered work or training after the furlough scheme ended. The reason she was not offered

work or training was because she could not walk long distances and the Respondent formed the view that she was unable to do her job. This was because of something arising from her disability. The claim for discrimination arising from disability succeeds.

The failure to make reasonable adjustments

175. This claim succeeds in relation to PCP 1 being a requirement to walk long distances, which meant anything more than a couple of hundred yards. We find that the PCP was applied, it put the Claimant at a substantial disadvantage because she could not walk long distances because of her knee condition. There was a failure to make reasonable adjustments to allow her to do work with her clients that did not involve walking long distances, such as going out with them in a taxi or doing seated activities outdoors.

176. The claim for failure to make reasonable adjustments succeeds in relation to PCP1. The claim fails in respect of PCPs 2 and 3 because we have found that the Respondent did not apply those PCPs.

Time limits on the discrimination claims

177. We have found above that the failure to provide the Claimant with training to enable her to come back to work, the failure to provide her with work following the end of furlough and the failure to progress her return to work was a continuing act of discrimination following ***Owusu*** (above). The continuing act ended on 1 November 2021 when the Claimant told Ms Price that she did not intend to return to work. This brings within time the discrimination claims, other than the reasonable adjustments claim on PCPs 2 and 3.

Employment Judge Elliott
Date: 2 May 2023