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EMPLOYMENT TRIBUNALS

Claimant: Mrs J Little

Respondent: Marsh Services Ltd

Heard at: East London Hearing Centre **On:** 28 February, 1, 2 & 3
March; and in chambers on
6 April 2017

Before: Employment Judge C Hyde **Members:** Mrs G A Everett
Ms T A Jansen

Representation

Claimant: In person

Respondent: Mr C Milsom (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

- (1) The constructive unfair dismissal complaint brought under sections 94, 95(1)(c) and 98(4) of the Employment Rights Act 1996 was not well founded and was dismissed.
- (2) The disability discrimination complaints brought under section 15 (disability related discrimination) and section 20 (failure to make reasonable adjustments) of the Equality Act 2010 were not well founded and were dismissed.

REASONS

1 Reasons are set out in writing for the above judgment as the judgment was

reserved. These reasons are set out only to the extent that the Tribunal considers it is necessary to do so in order for the parties to understand why they have won or lost. Further the reasons are set out only to the extent that it is proportionate to do so.

2 All findings of facts were reached on the balance of probabilities.

Preliminaries

3 This hearing was concerned with the determination of claims which were set out in two claims forms presented on 6 September 2016 and 10 November 2016. Grounds of resistance were submitted in relation to the claims dated 6 October 2016 and 10 January 2017 respectively. Further, two preliminary hearings took place in respect of the claims: the first on 7 November 2016 before Employment Judge Prichard in respect of the first claim; and then a further preliminary hearing took place on 3 February 2017 before Employment Judge Russell.

4 At the hearing before Employment Judge Russell an agreed list of issues was arrived at as set out in that order. The issues are set out below with some further amendments which were made by the end of the full merits hearing.

5 This hearing was concerned with the determination of liability only including, if appropriate in relation to the unfair dismissal complaint, determination of *Polkey* and contributory fault issues, and whether there had been any unreasonable failure to follow the ACAS Code in respect of grievances. Remedy was to be determined later if appropriate. In relation to the disability discrimination complaints the Tribunal also had to determine the question of whether the claims were presented in time.

The issues

6 The issues which had been agreed before Employment Judge Russell were amended slightly by the end of the hearing. Thus in relation to paragraphs 4.1(d) and (e) in respect of the constructive dismissal complaint, the references to 13 August 2015 were amended to references to 30 July 2015 as the Claimant had intended to refer to the date on which she commenced her period of sickness absence. Further, paragraphs 4.1(i) and (k) were withdrawn by the Claimant, the Claimant having accepted during her evidence that the delays in receiving the outcomes of the grievance and the appeal were not unreasonable.

7 The final list of issues which the Tribunal needed to determine was as follows, adopting the numbering from Judge Russell's Order which was used in the full merits hearing also:

Unfair dismissal claim

- 4.1 Did the Respondent conduct itself without reasonable or proper cause in a manner which did or was likely to destroy or seriously damage the implied term of trust and confidence? The Claimant relies upon the following conduct:

- (a) Comments about the Claimant on Facebook on 31 March 2015 made by her colleagues (Mr Donkor, Ms Goff, Ms Rowell and Ms Mandalay);
 - (b) Failure by Ms Rowell to deal with the Claimant's complaint when raised informally on 13 April 2015;
 - (c) Inappropriate conduct by Ms Goff and Ms Rowell at a meeting on 14 April 2015;
 - (d) Isolation and ostracism from team from 14 April 2015 until 30 July 2015 when she commenced a period of sickness absence;
 - (e) Increased working hours between March 2015 and 30 July 2015;
 - (f) Inadequate support and/or unwarranted blame by Ms Goff and Ms Rowell during the same period;
 - (g) Failure to redeploy the Claimant to another team or department (such as GSP and/or Treasury);
 - (h) January 2016, reducing the Claimant's pay and telling her that she must return to the same position or go onto SSP;
 - (i) *Withdrawn*
 - (j) 16 June 2016, rejection of her grievance and requirement to return to work;
 - (k) *Withdrawn*
 - (l) Even after her successful appeal, requiring the Claimant to return to work in her previous department;
 - (m) 21 September 2016 email from HR requiring the Claimant to attend a meeting in London, at which she could not be accompanied, and being told that her employment was likely to be terminated.
- 4.2 The Claimant relied upon the cumulative and individual effect of each of the above. Her case was that the final straw was the email on 21 September 2016.
- 4.3 If so, did the Claimant resign in response to the repudiatory breach without affirming the contract and/or waiving any breach?
- 4.4 If dismissed, has the Respondent established a potentially fair reason for dismissal? The Respondent relied upon capability, particularly managing attendance.
- 4.5 Was dismissal fair in all of the circumstances of the case, s.98(4) ERA?

- 4.6 Should there be any adjustment to any award to reflect?
- (a) Whether a fair dismissal could/would have occurred in any event, **Polkey**
 - (b) Contributory fault
 - (c) Unreasonable failure to follow the ACAS Code in respect of grievances.

Disability

- 4.7 Does/did the Claimant suffer from the mental impairment of anxiety disorder from June 2015 to date?
- 4.8 Did any such mental impairment have a long term substantial adverse effect upon her ability to carry out normal day-to-day activities?

Discrimination arising from disability, section 15 Equality Act 2010

- 4.9 Did the Respondent treat the Claimant unfavourably when it failed to refer her to Occupational Health for a second review in December 2015 and/or reduced her pay in January 2016; and/or required her to return to work in the same department or go onto Statutory Sick Pay, also in January 2016?
- 4.10 Did the Respondent treat the Claimant as aforesaid because of the “something arising” in consequence of the disability?
- 4.11 Did the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?
- 4.12 Alternatively, had the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Failure to make reasonable adjustments, section 20 Equality Act 2010

- 4.13 Did the Respondent apply the following provisions, criteria and/or practices (‘the provisions’) generally, namely: (a) requirement to work at the contracted place of work; (b) requirement to work in the contracted department.
- 4.14 Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?
- 4.15 Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant contended that the following steps would

have been reasonable: (a) providing additional counselling in December 2015; (b) allocating her to a different office/team (in particular GSP and/or Treasury); (c) allocating her to another office within driving distance of her home; (d) redeploying her to another company within the Respondent's group of companies.

- 4.16 Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

Time/Limitation

- 4.17 Were the disability discrimination claims presented within time? If not, would it be just and equitable to extend time?

Evidence adduced/Documents produced

8 The parties agreed upon the contents of a trial bundle which was available at the beginning of the hearing. The bundle marked [R1] consisted of approximately 400 pages in three lever arch files. During the hearing further documents were added by agreement. Also at the beginning of the hearing the parties relied on a bundle of the witness statements which the Tribunal marked [R2]. The Tribunal however then also allocated exhibit numbers to each witness statement.

9 At the outset of the hearing a bundle of correspondence between the parties was also presented and marked [R3]. In the event, no reference was made to that bundle during the hearing.

10 Mr Milsom had prepared a chronology which was presented to the Tribunal on the first day and marked [R4]. In addition, at the Tribunal's request Mr Milsom and the Claimant agreed on a timetable and approximate time estimates for the cross-examination of each witness. This document was produced on the second day of the hearing and was marked [R5].

11 The Claimant also produced a document which she had been directed to prepare at an earlier preliminary hearing which was marked [C1]. The document was headed: "Grievance Call/Meetings". Further the Claimant produced a supplementary bundle of documents which the Tribunal marked [C2] which consisted of the ACAS guidance on use of social media, and a printout from the website of the Anxiety Centre.

12 Due to issues relating to the availability of witnesses for both parties, certain witnesses were called out of order. Thus the first witness was Ms Watts, Regional HR Business Partner at the material time and her witness statement was marked [R6]. Her evidence was given on behalf of the Respondent. The next witness was called on behalf of the Claimant and her evidence was also interposed. This witness was Mrs Adriana Rivas and her witness statement was marked [C3]. Next the Tribunal heard evidence from the Claimant whose witness statement was marked [C4] and then from the other witness on her behalf Mrs Julie Hardwick whose witness statement was marked [C5]. Mrs Hardwick's evidence signalled the close of the Claimant's case.

13 On behalf of the Respondent Mrs Kelly Rowell the Claimant's former manager, gave evidence and her witness statement was marked [R7]. Her role at the relevant time was Customer Relationship Manager. The next witness on behalf of the Respondent was Ms Kirsty Dunn and her evidence in chief was set out in a witness statement which was marked [R8]. She was a former colleague of the Claimant's. Finally, on behalf of the Respondent the Tribunal heard evidence from Mr Tim Pritchard whose witness statement was marked [R9]. He dealt with the Claimant's appeal against the outcome of her grievance.

Closing submissions

14 The Claimant and Mr Milson both presented closing submissions in writing and were given the opportunity to supplement them orally. The Respondent's submissions were marked [R10] and the Claimant's submissions were marked [C6].

15 Further, Mr Milsom relied on various authorities as follows:

- *Habinteg Housing Association Ltd v Holleron* [UKEAT/0274/14];
- *Herry v Dudley Metropolitan Council* [UKEAT/0100/16 and another];
- *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2015] ICR 1197, EAT;
- *Monmouthshire County Council v Harris* [UKEAT/0332/14 and another];
- *O'Hanlon v Revenue and Customs Commissioners* [2007] ICR 1359, CA;
- *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 CA;
- *HM Prison Service v Johnson* [2007] IRLR 951, EAT;
- *Project Management Institute v Latif* [2007] IRLR 579, EAT;
- *Smith v Trafford Housing Trust* [2013] IRLR 86, HC;
- *Bellman v Northampton Recruitment Ltd* [2017] IRLR 124, QBD;
- *Assamoi v Spirit Pub Co (Services) Ltd* [UKEAT/0050/11];
- *Royal Bank of Scotland v McAdie* [2008] ICR 1087, CA;
- *W E Cox Toner (International) Ltd v Crook* [1981] ICR 823, EAT;
- *Wright v North Ayrshire Council* [2014] IRLR 4, EAT;
- *Brandeaux Advisers (UK) Ltd v Chadwick* [2011] IRLR 224 (QB).

Photocopies of the reports of all the above cases were produced in a bundle for the Tribunal.

Findings of fact and conclusions

16 The Respondent was part of a group of companies, Marsh & McLennan Companies (“MMC”) which was in the business of insurance. The Claimant’s employer Marsh Services Ltd (“Marsh”) was one of four companies within that group.

17 She commenced employment with the Respondent in June 2011 through an agency and became a permanent employee in February 2013. She was appointed as an EPI Analyst in the UK Finance Department of Marsh. The Finance Department was in a location in Witham, Essex referred to throughout the case as “The Hub”. She was then promoted to the position of Senior Accounting Technician in January 2015. Prior to the promotion, as of July 2014, the Claimant’s line manager was Kelly Rowell. Ms Rowell remained the Claimant’s first line manager through to the termination of the employment. At all relevant times the Claimant worked in the Accounts Payable/Procure to Pay Team (referred to hereafter as the “P to P Team”).

18 Initially the members of the P to P Team were the Claimant, Mr Donker and Mrs Julie Hardwick. The Claimant had a good and close working relationship with Mrs Hardwick who was employed by the Respondent from July 2013 to 15 July 2015 on a fixed term contract. From the second half of 2014, Ms Rowell took over management of that team, alongside the Projects Team which she was already managing. There were about nine members of the Projects Team, including Ms Goff, who was the leader of that team.

19 Ms Rowell’s management of the two teams was initially temporary but by the end of 2014, she was given permanent responsibility for managing the combined team. The Respondent had spent some time considering where the P to P team should sit in the Group structure.

20 Mr Donker left the Respondent’s employment in mid to late March 2015 but a new member of staff was recruited to replace him, by the name of Kirsty Dunn, on 21 March 2015. She joined the P to P Team shortly after Mr Donker had left. Ms Raafia Khan was recruited in April 2015 as the P to P Team Supervisor.

21 Another member of the team, Jenny Ahmed, was on maternity and/or sick leave. She was not said to be present during any of the material times that the Tribunal was concerned with. In any event she did not return to the Respondent at any time prior to the Claimant’s absence on sick leave at the end of July 2015.

22 At the very end of March 2015, shortly after leaving the Respondent’s employment, Lee Donker made derogatory comments on his Facebook account which were visible to other employees of the Respondent and to Mr Donker’s friends. The comments were ostensibly aimed at Mr Donker’s former colleagues, but did not name anyone specifically.

23 On 6 April 2015, the Claimant responded to Mr Donker’s messages also on Facebook, and on 13 April 2015 she raised concerns as to the comments entered on the Facebook account by one of her more senior colleagues Sue Goff with her

manager Kelly Rowell (pp. 6-7). As a result of this a meeting took place between the Claimant, Ms Goff and Ms Rowell on 15 April 2015. The Claimant complained both about the comments by her work colleagues on Facebook and about the conduct of the meeting on 15 April 2015 by Ms Rowell and Ms Goff as part of her constructive unfair dismissal complaint.

24 Some two weeks after the meeting, Ms Rowell sent an email update to her manager David Rowley, in which she summarised the issue which had been brought to her attention about the Facebook entries; the action she had taken in terms of checking with the Claimant what she wanted to do about it; the subsequent meeting which she understood had been held to “clear the air” between the Claimant and Ms Goff on 15 April; and the outcome which she understood to have been in accordance with the Claimant’s wishes to draw a line under the incident and “move on” (p.7A). Ms Rowell also recorded in the email that she had also spoken to certain other members of the team, namely Tim, Rex, Mike and Julie – a reference to Julie Hardwick.

25 There was no request for action from Mrs Hardwick, the other person who the Claimant believed was affected by Mr Donker’s posts, although Mrs Hardwick was aware of the comments at the time. Indeed it was Mrs Hardwick’s position during the Tribunal hearing and that of Mr Donker at the time, that the comments were “childish”. At the Tribunal hearing, she accepted that the effect on her could be characterised as ‘water off a duck’s back’ and she had moved on.

26 Nothing further was said by the Claimant after the ‘clear the air’ meeting and she did not seek any follow-up from Ms Rowell.

27 The Tribunal considered in all the circumstances therefore that Ms Rowell’s email recording the way in which matters were left (at page 7A) was an accurate record of events.

28 It was not in dispute that from about the beginning of January through to the end of July 2015 the Claimant’s team and indeed the whole of the Finance department were working on a specific piece of work, namely a project which was referred to as a clean up of the R11 information in order that the R12 project could be launched. It was due to “go live” in the middle of August 2015 with a “black out” period starting on 28 July 2015 just prior to that. From March 2015, the Claimant worked more or less exclusively on that task and indeed it was not in dispute that she was the only person in the UK working for the Respondent with sufficient access to the relevant information in order to carry out the particular task allocated to her.

29 Further it was not in dispute that the Claimant had worked overtime prior to January 2015 but had not made any claims for payment for overtime. Ms Rowell spoke to her about this towards the end of 2014 as she did not consider that it was fair that other employees on similar pay and contract terms as the Claimant did overtime but were paid for it. She therefore encouraged the Claimant to submit appropriate overtime claims and she approved them in due course as the Claimant’s manager. There was undisputed evidence that the Claimant worked a considerable amount of paid overtime through to the end of her employment. Ms Rowell did not dispute during her evidence that the overtime was appropriately worked, namely that the Claimant

had done work for the Respondent during that time. An issue was raised during the hearing about whether the Claimant had chosen to work the overtime hours more so over the weekend than during the week and it was said that she was paid more highly for working overtime at the weekends. The Tribunal did not consider that this was an indication that the Claimant carried out any more overtime hours than she needed to and the Tribunal was mindful that she was working towards an objective, namely to complete the clean up work by a looming deadline. We drew no adverse inference from the way the Claimant worked the overtime in the circumstances.

30 One of the consequences of the R12 project was that an increasing number of people within the hub were working overtime, in order to ensure that all of the necessary work was completed by the go live date. When Ms Rowell joined the team, she observed that the Claimant was not paid for overtime. She did not feel that this was fair and she therefore spoke to Mr Rowley, the overall manager of the Hub, to arrange for the Claimant to be paid overtime. Once this had been agreed, she informed the Claimant of this change and the Claimant was very grateful to her for arranging this.

31 Mr Rowley's formal title was Head of RIS EMEA Accounting Operations (p.143). RIS stood for Risk Insurance Services. RIS was made up of Marsh Services Ltd and Guy Carpenter (another company in the group) and it covered risk insurance services operations in Western Europe.

32 As the R12 work got closer to the go live date, work levels began to increase.

33 The Tribunal was given overtime claim forms identifying the overtime worked by the Claimant and other members of staff for the periods from May to July 2015 inclusive. It was accepted by the Respondent that the Claimant was carrying out a lot of overtime but it was argued that she was not the only one doing so. The records tended to support that submission.

34 Ms Rowell disputed that she had been made aware on a regular basis as the Claimant contended that the Claimant was having difficulty coping with the work during the run up to the Claimant's absence on leave at the end of July 2015. The Respondent's position was that the first time that the Claimant informed her that she was feeling stressed was roughly two days before 30 July 2015 and that this was the first occasion on which she did so. It was not challenged that the Claimant had seen her doctor on about three occasions in the month or so prior to this but Ms Rowell disputed that the Claimant had fed back to her what were the reasons for these visits to the doctor and/or that she had been informed that the Claimant's late arrival at work and/or early departure from work were in order for the Claimant to attend medical appointments.

35 The Tribunal had to determine whose account we accepted. It was clear from the background as already referred to, for example in relation to the overtime claims, that Ms Rowell had done what she could to assist the Claimant. She also gave an example of the one occasion on which she recalled the Claimant raising an issue about her workload, namely during a team meeting in which the Claimant said that she would not be able to "get across" the little iProcurement clean up and the APTB clean up

work. Ms Rowell took on board the Claimant's comments and removed this work from the Claimant and gave it to another member of the project team. This evidence by Ms Rowell was not disputed by the Claimant.

36 The Tribunal considered that these agreed pieces of evidence about the Claimant being invited to claim overtime, the absence of any query by Ms Rowell about the overtime being claimed, and also this example of Ms Rowell responding promptly to alleviate the Claimant's workload when issues were raised about it, tended to support the Respondent's case that Ms Rowell was not aware of any such issue of the Claimant reporting that she was feeling stressed or having difficulty coping with the work on any other occasions. In short, the Tribunal considered that if the Claimant had been reporting difficulties in coping and being put under undue stress as the Claimant alleges, it was likely on the balance of probabilities given our findings above that Ms Rowell would have addressed the concerns appropriately.

37 In addition, the Tribunal took into account the changes to the composition and management of the team in which the Claimant worked as outlined above.

38 The background set out in her witness statement and elsewhere about the reorganisations involving or affecting the P to P team was not in dispute. There was during that time some review by the Respondent as to where the P to P Team sat within the Respondent. When they were placed under Ms Rowell's management this was potentially going to be a temporary measure until the Respondent decided where the team would sit permanently. The options were that it would be located either within the Finance department or the Procurement Team. During the time the Tribunal was concerned with, the P to P Team remained as part of the Finance department.

39 This background as to the merging of the P to P Team under Ms Rowell's management with a larger team which she already managed is relevant to the Claimant's contentions of being isolated or ostracised. She made those complaints in relation to timeframes which preceded the contentious issue of the comments on Facebook at the end of March 2015. She also described that she, Mrs Hardwick and Mr Donker were excluded from the activities of the rest of the team.

40 The team that Ms Rowell managed up to July 2014, before she was given the additional responsibility for managing Mr Donker, the Claimant and Mrs Hardwick, was the Projects Team which consisted of roughly nine people, one of whom was Sue Goff, along with a few administrative staff.

41 The first day of sickness absence for the Claimant was Thursday 30 July 2015. The last day worked therefore by the Claimant in the absence of contrary evidence was Wednesday 29 July 2015. She did not return to her work thereafter prior to her resignation. It was also not in dispute that she was certified unfit to work until the resignation in September 2016.

42 The Tribunal then considered some of the issues which related to findings of fact relevant for the constructive unfair dismissal complaint.

43 The conduct relied on by the Claimant in support of the constructive unfair

dismissal claim included a complaint about the Facebook comments on 31 March 2015 made by Mr Donker, Ms Goff, Ms Rowell and Ms Mandalay. There was no dispute that the comments were originally made by Mr Donker on 31 March 2015, and then the others referred to above also made various comments.

44 Before raising this matter with Ms Rowell, the Claimant communicated directly online with Mr Donker between 6 April 2015 until 13 April 2015, the date on which she referred the matter to Ms Rowell. The Claimant raised the matter with Ms Rowell during the morning at approximately 9.30am on 13 April 2015 (p.6), as a complaint primarily about Ms Goff's comments. Her correspondence with Mr Donker straddled this contact.

45 The evidence of the exchanges with Mr Donker was by way of screenshots. In the screenshots it was clear that on 6 April 2015 the Claimant challenged Mr Donker in robust language about his making what she saw as derogatory comments about herself on his Facebook page. There was no evidence on the documents before us that Mr Donker was prepared to give ground and accept that his comments were hurtful to the Claimant. He defended his actions on the basis that he believed he was responding to negative comments which he believed the Claimant had made about him. Mr Donker had left the Respondent's employment in late March 2015.

46 Then the Claimant made her complaint to Ms Rowell about Ms Goff's involvement in the comments on Facebook. This was done via the Respondent's messaging service and it was also not disputed that Ms Rowell was frequently out of the office. While they were discussing some other matters the Claimant indicated that she wanted to have a chat with Ms Rowell when Ms Rowell was "next in the office" regarding Ms Goff. Ms Rowell indicated that she would be in the following day and asked if everything was OK. Miss Little referred her to the Facebook comments and complained that Ms Goff and others were putting comments regarding the Claimant and Mrs Hardwick on Facebook and that these had "really cut deep". However the complaint at that point was about Ms Goff's actions. Miss Little indicated to Kelly Rowell that she thought the matter needed to be "sorted before it gets anymore out of hand". Ms Rowell readily agreed to discuss the matter with her the following day. Ms Rowell also noted that she knew that the Claimant and Ms Goff did not "really see eye to eye on things" but she stated that they could get the matter sorted.

47 It was not in dispute that the Claimant then met Ms Rowell the following day and they discussed the way forward. It was agreed that a meeting would take place between the three of them, namely the Claimant, Ms Rowell and Ms Goff to "clear the air".

48 That meeting then took place on 15 April 2015. Before that however, and it was accepted that this was as a result of Ms Rowell having communicated with Lee Donker on 13 April 2015, Lee Donker sent a message to the Claimant at 2.51pm on 13 April 2015 acknowledging that he was perhaps "a bit rash and knee jerked" before and indicating that he believed that the Claimant had said unkind things about him and that he had become angry and he accepted that he should not have acted the way he did. He characterised his behaviour as acting "like a kid" and "very childish".

49 Insofar as the Claimant complained about the comments written by Mr Donker, the Tribunal accepted the Respondent's submission that that could not properly be a matter relied on in support of a constructive dismissal complaint because at the time he made the comments Mr Donker had already left the Respondent's employment and the Claimant was aware of this.

50 The next person whose actions the Claimant complained about was Ms Goff. Ms Goff as far as the Tribunal could see was a colleague of the Claimant's and not one of her managers. Ms Goff was in the Projects Team which was managed by Ms Rowell and then in late 2014 was in the same overall team as the Claimant also managed by Kelly Rowell, when Kelly Rowell took over those responsibilities temporarily between July and November 2014 and then thereafter. To that extent therefore Ms Goff's actions were not the actions of the Claimant's employer. Further, in any event, as set out above, when the Claimant raised this issue about Ms Goff's actions Ms Rowell acted very promptly to address the Claimant's concern in accordance with the Claimant's wishes, namely the "clear the air" meeting.

51 The next person that the Claimant named in issue 4.1(a) as someone whose comments on Facebook she was unhappy with and which contributed to the constructive unfair dismissal was Ms Rowell. There was no record of the comments made by Ms Rowell but Ms Rowell accepted that she had said something along the lines of "cheeky I wash". She included this in her update to Mr Rowley in the email of 27 April 2015 and subsequently he accepted this also in the grievance when she was being interviewed. Her response was to Mr Donker's Facebook comments to the effect that he no longer had to work with people who did not wash/use soap.

52 First the Tribunal considered that Ms Rowell's own response to this post by Mr Donker indicated that she did not initially see Mr Donker's comment as something which was directed at the Claimant and/or Mrs Hardwick specifically but she clearly saw it as a general comment addressed to the team, including herself. This is the natural reading of her response.

53 Second, there was no suggestion that she made that entry after she became aware that the Claimant considered that the comments were directed at her i.e. at the Claimant. The Tribunal therefore did not consider that there were any comments that Ms Rowell on the Facebook page which were comments about the Claimant.

54 The fourth person about whom complaint was made in issue 4.1(a) was Ms Mandalay. Her Facebook handle/moniker was "fortunate Mandla". It was clear that she had engaged in further conversation with Mr Donker about Mr Donker's original comments about people not using soap and about having no longer to work with "Chavs" or people who did not dress smartly for work. After she started to engage with Mr Donker, he described conduct of his former work colleagues without naming names which she then picked up on in a subsequent post and characterised it as the conduct of "2faced bitches".

55 At the time as can be seen from the messaging between the Claimant and Ms Rowell on 13 April 2015, the Claimant did not raise any objection to the comments by Ms Mandalay and directed her concerns only at the actions of Ms Goff.

56 Further, the Tribunal took into account that Ms Mandalay was a team colleague of the Claimant's as opposed to a manager. The Claimant could not possibly have reasonably seen the actions of Ms Mandalay especially in the context of Facebook comments on the private account of a former employee, as the actions of her employer.

57 Issue 4.1(b) was a complaint about the failure by Ms Rowell to deal with the Claimant's complaint when it was raised informally by her on 13 April 2015. The findings of fact set out above did not establish the primary facts of this complaint in the Tribunal's view. Ms Rowell dealt promptly with the Claimant's issue when it was brought to her attention. It was accepted by the Claimant that Ms Rowell had contacted Mr Donker promptly after the Claimant had raised her concern about Ms Goff's involvement in the comments with her on 13 April and as set out above Mr Donker had then apologised to the Claimant. Ms Rowell had taken this action even though Mr Donker was not her staff member any more, and the complaint was not about him. Then as set out above Ms Rowell had met with the Claimant and Ms Goff in accordance with the Claimant's wishes for a meeting to clear the air.

58 The next issue under 4.1(c) was about inappropriate conduct by Ms Goff and Ms Rowell at the 'clear the air' meeting. The list of issues refers to that meeting as having taken place on 14 April 2015 but it appeared to the Tribunal that this was a typing error and there was no dispute that the 'clear the air' meeting took place on 15 April 2015. Although the Claimant did not set out a lot of detail she said on a number of occasions including in her witness statement that she was not happy about the way, as she saw it, Ms Goff and Ms Rowell turned the "the whole situation around on [her] saying that [she] had been slagging Sue Goff off to the office and [that she] was not a team player ..."

59 The Claimant explained that she anticipated that Ms Rowell would act as a detached arbiter during the discussion and that she felt that she got involved on Ms Goff's side.

60 This was a matter which the Claimant raised in her grievance which was presented by her solicitor Slater & Gordon dated 6 May 2016. The Claimant alleged also that Ms Rowell concluded the meeting by telling the Claimant that if she did not "sort her act out" and start being a team player, Ms Rowell would have to involve HR. The Claimant alleged that she asked if HR could be involved in any event due to the fact that the meeting had turned into a review about her performance, and that Ms Rowell refused to accede to this request.

61 In her evidence to the Tribunal Ms Rowell rebutted this allegation. She indicated that she had in any event spoken to Human Resources before the meeting on 15 April 2015 in order to get some guidance as to how to conduct the meeting and that she would have been quite happy, if it was appropriate and wanted by the parties involved, to pass the matter over to Human Resources. The Tribunal considered that this was a credible account and it was consistent with the way in which Ms Rowell had dealt with the Claimant earlier specifically in relation to the prompt way in which she had held the meeting with Ms Goff on 15 April and also her other actions in terms of setting up the meeting and also in communicating with Mr Donker so that he could

apologise to the Claimant.

62 Miss Little alleged that Ms Rowell effectively got involved and sided with Ms Goff. Once again the Tribunal found Ms Rowell's account that she said very little during the meeting as credible. The Tribunal has already referred above to her 27 April 2015 email in which she set out a frank and credible account of both her knowledge of the Facebook entry and about the Claimant raising the matter with her and the actions that she took. The 27 April 2015 email was also sent relatively contemporaneously. She noted that the Claimant had very aggressive body language and that they "walked through what had happened". She indicated that the Claimant got a little aggressive verbally at one point and that she jumped in and said that if they could not clear the air and move forward then she would take the matter to Human Resources and work out next steps. She then continued that the Claimant indicated that she just wanted to draw a line and move on.

63 The Tribunal considered that Ms Rowell had indeed referred to bringing in Human Resources during the meeting but that it had not become necessary to do so because the Claimant had backed down and indicated that she also wanted to just draw a line and move on. Although the Claimant disputed that she had agreed that a line should be drawn and they should move on, this was consistent with the absence of any further action about this issue by the Claimant after 15 April 2015. Indeed, after the Claimant went off on sick leave the first record of her raising this issue with the Respondent was during the telephone conversation between herself and Ms Watts of Human Resources on 2 October 2015 (p.16a). She had clearly been in touch with someone else from Human Resources prior to that in about mid-September 2015 but there was no record in the notes of the Facebook issue being referred to.

64 Further, in the first Occupational Health report following a discussion with the Claimant on 20 August 2015 (pp.11-2) there was no reference to the Facebook comments. The closest reference to any such matter was the reference in the Occupational Health report to the Claimant telling the Occupational Health adviser about "some relational strain within her department and despite her raising it to management she feels it has not been acknowledged and therefore it further contributed to a lost sense of support and job satisfaction".

65 In all those circumstances, the Tribunal concluded on the balance of probabilities that Ms Rowell's account of the conduct of the meeting on 15 April 2015 was the more credible. Further, the Claimant made no complaint about Ms Rowell's conduct of the meeting until considerably later i.e. in the grievance letter a year after the events i.e. in April 2016. Second, the Claimant behaved in a way which was consistent with Ms Rowell's account that she had agreed that they would draw a line under the issue of Ms Goff's comments, until she raised the matter some six months later in October 2015 with Ms Watts.

66 In all the circumstances therefore the Tribunal rejected the Claimant's contention that the meeting had been conducted inappropriately by Ms Goff and Ms Rowell.

67 The Claimant also complained that she had been isolated and ostracised from

the team from 14 April 2015 until 30 July 2015 when she commenced her period of sickness absence.

68 The Respondent drew the Tribunal's attention to the Claimant's oral evidence to the effect that there was evidence of isolation and ostracism in relation to not being invited to the Christmas party in December 2014. Mr Milsom relied on the fact that this incident occurred some four to five months prior to the timeframe which the Claimant identified in the list of issues as being the relevant timeframe for the incidents of ostracism complained about. He also pointed to the Claimant's failure to have particularised this allegation.

69 It is also apparent from the dates on which the ostracism is alleged to have occurred in the list of issues, namely 14 April 2015 to 30 July 2015, that the Claimant was alleging that she was isolated and ostracised from the team after she raised concerns about Ms Goff's involvement in the Lee Donker Facebook exchange. To that extent therefore her reference to not being invited to the Christmas 2014 party, which she also accepted during her evidence impacted on not just herself but also Mrs Hardwick and Mr Donker, did not support the picture of isolation or ostracism from 14 April 2015. Mrs Hardwick had not raised any issue about the Donker Facebook comments, so any adverse treatment of her could not have been a result of having taken that action.

70 The Claimant also described in her oral evidence that her perception was that there had always been a divide between the two teams which were eventually managed by Ms Rowell. The Tribunal considered that it was likely that the organisational changes described earlier accounted for that perception. Moreover, the Claimant's contention that this had always been a divide further undermined the contention that there was isolation and ostracism as a result of having raised the concerns about Ms Goff's involvement in the Facebook comments.

71 The Tribunal considered that there may well have been some delay in the two teams gelling once they came jointly under Ms Rowell's management but this was inconsistent with the case put by the Claimant that she was isolated and ostracised from 14 April 2015 and because she described the divide being between the P to P Team of which she was a member and the Projects Team. The existence of the two teams patently did not arise from the Claimant having raised concerns about the involvement of Sue Goff on 14 April 2015.

72 Also in any event the Claimant accepted that she was reluctant to socialise with her work colleagues in activities which involved alcohol because of another health condition relating to her gall bladder. The Respondent did not seek to criticise the Claimant for this choice nor indeed does the Tribunal. However, it further paints a picture of the Claimant not socialising with her colleagues not because she was being isolated or ostracised by them but because of other issues which were completely unrelated to the actions of her colleagues.

73 The next issue raised by the Claimant under 4.1(e) was about increased working hours between March 2015 and 30 July 2015. The Tribunal has already set out above the background of the need for the work to be done which had been entrusted to the Claimant in relation to the preparation for the change over from the

R11 to R12 system. The documentary evidence about the overtime worked by the Claimant certainly from May 2015 to July 2015 inclusive also confirms that she had increased working hours. The Tribunal considered however that it was important in considering the effect of this in the context of constructive unfair dismissal complaint to record that the Claimant was clear that this extra work was because she was working on a specific project which had a specific end date, namely at the end of July 2015 in prospect. Further, the Tribunal also considered that the findings above about the steps taken by Ms Rowell to assist the Claimant in terms of removing areas of her work which she was finding it difficult to cope with along with the R11 clean up work to somebody else also indicated that she was aware that the Respondent was prepared to assist her with this.

74 It was also noteworthy that although the Claimant had taken steps to bring her concerns about the Facebook comments to Ms Rowell's attention in April 2015, there was no documentary evidence of any similar action taken by the Claimant in terms of complaint about her working hours between March 2015 and the end of July 2015 beyond the two occasions already set out above. On the balance of probabilities, we were not satisfied that the Claimant reasonably believed that the Respondent would not have assisted her if she had brought to their attention that she was finding the working hours difficult to cope with.

75 A further point that the Claimant made in this context was that there was a weekend when she was unable to work overtime and that she had told Ms Rowell about this. It was accepted by the Respondent that there was no-one else who could have worked on the project of R11 clean up during that weekend because only the Claimant had the relevant access. It was also not in dispute that when the Claimant indicated to Ms Rowell that she could not work that weekend that Ms Rowell agreed that that was fine. However, the Tribunal did not consider that this was evidence that the Claimant was telling Ms Rowell that she was having difficulty in keeping up with the work.

76 The next matter relied on by the Claimant in support of her constructive unfair dismissal complaint was at paragraph 4.1(f) in which she complained about inadequate support and/or unwarranted blame by Ms Goff and Ms Rowell during the period March 2015 to 30 July 2015. The Tribunal has already made findings about both aspects of this complaint in relation to support. The Tribunal assumed because this was not further clarified by the Claimant that the reference to unwarranted blame by Ms Goff and Ms Rowell was a reference to the Claimant's allegations about the meeting of 15 April 2015. These have already been dealt with above and have not been found in the Claimant's favour.

The Claimant's sickness absence from 30 July 2015 to resignation in September 2016

77 The first sick note relied on by the Claimant was dated 30 July 2015 and certified that she was unfit for work for the next two weeks because of anxiety stress at work.

78 She apparently then contacted her employer to indicate that she had been signed off again for a further two weeks on about 13 August 2015 (p.9). The Respondent then arranged for the Claimant to be assessed by their occupational

health service and this led to a telephone consultation on 20 August 2015 and a report of the same date to the Respondent. The occupational health adviser who assessed the Claimant on three occasions between August and October 2015 was Ms Elmarie Verwey. On each occasion, it was noted that a copy of the occupational health report was to be sent to the Claimant at the same time as it was released to Human Resources. The report to the Respondent included, among other matters, the following opinion:

“From a clinical point of view Mrs Little is fit and capable to perform her contracted duties; however her anxiety and exhaustion because of described work related concerns are the main barriers to her successful return to work and these concerns need to be addressed through an organisational rather than a medical approach.

It is unlikely that the Disability legislation will apply to her stress related health concern at the moment as it is reactive to perceived work circumstances and once resolved it is not expected to affect her ability to perform day to day activities.”

79 The adviser also made some recommendations. These included:-

75.1 A workplace stress risk assessment as well as an independent mediation meeting between the Claimant, management and HR to discuss, clarify and resolve her perceived work concerns;

75.2 Once she was fit to return to work, a phased return was suggested;

75.3 A review of the Claimant’s workload to ensure that the Claimant had achievable targets that could be met within her contracted working hours; and the possibility of the Claimant contacting the available EAP if she felt it could be of benefit to her was also mentioned.

80 Ms Verwey also indicated that she thought that the Claimant may need some work time flexibility to attend medical appointments and reviews in the next two to three months once she was fit to return to work. She concluded the section on recommendation/opinion by stating that if the Claimant’s raised work concerns and the perceived relational conflict within the department could not be resolved the Respondent may wish to consider a move to a new department or team. However, she also stated that this was a managerial decision that should be considered on an HR level in line with organisational policies and procedures.

81 When describing the current situation Ms Verwey outlined symptoms which had been reported to her by the Claimant. In her descriptions of the symptoms however she distinguished between the Claimant’s current presentation as at August 2015 and the potential development of *“more significant health concerns, higher levels of absence as well as a susceptibility to minor infections and ailments”*. The Tribunal considered and the Claimant accepted in her evidence that the occupational health adviser was distinguishing between the current state of health for the Claimant and the potential for the development of more serious health concerns down the line.

82 The Claimant commenced counselling through the auspices of an organisation paid for by the Respondent on 1 September 2015. It was agreed that this was for a course of eight sessions.

83 There was an update from the occupational health service on 14 September 2015 after Ms Verwey contacted the Claimant for a review assessment. The Claimant gave her consent for the information to be relayed to the Respondent. Ms Verwey noted:

“Ms Little tells me there has been some progress and improvement since our last consultation. She commenced counselling which she is finding helpful and she remains on medication as prescribed by her GP. She attended a review with her GP last week and it was advised that she continues with counselling for some further sessions before attempting a return to work. Ms Little has been signed off for a further four weeks but I am hopeful that with the support and therapy she is receiving she will continue to see improvement and be fit to return to work at the end of her current medical certificate.”

84 The Claimant spoke to occupational health on 20 August. The resulting report recorded that she had been signed off until 10 September 2015 with stress, anxiety and exhaustion. The update of 14 September 2015 recorded that she had been signed off for a further four weeks. That fit certificate was therefore due to expire on about 7 or 8 October 2015.

85 Based on this information therefore the Respondent would have been anticipating that the Claimant would be returning to work in early October 2015. The Tribunal has already referred to a conversation on the telephone between the Claimant and Ms Woods of the Human Resources Department who was dealing with her case but who was about to leave. When she left she handed over to Ms Saminder Watts.

86 Ms Watts as already stated above contacted the Claimant on 2 October 2015. Ms Watts made notes of her contact (p.16a) introducing herself to the Claimant on 2 October 2015. During that conversation, Ms Watts noted that the Claimant referred to the inappropriate Facebook entries, having spoken to Kelly (Rowell) and subsequently feeling that she was isolated and attacked. She also recorded that the Claimant had said that all the work was put on her and that she got headaches therefore she was signed off for two weeks. She complained that she subsequently got a text from Kelly and she felt attacked.

87 In fact the next fitness certificate was dated 2 October 2015 and the Claimant was signed off for four weeks with the diagnosis being anxiety aggravated by unfavourable work situation.

88 Occupational health then contacted the Claimant once again on 7 October 2015 for a review assessment to monitor her progress. The following was contained in the report:

“Ms Little tells me there has been a set back in her general mood and health since our last consultation. She tells me she had a phone conversation with her

manager and experienced an anxiety attack shortly after speaking with her manager. In addition she developed 'sleep seizures' which may be a subconscious response to perceived stress and anxiety. Ms Little consulted her GP and was prescribed additional medication for these episodes which she is finding effective. She also continues with counselling every fortnight which she tells me is beneficial.

Ms Little has been signed off for a further four weeks but told me today she cannot foresee herself returning to the department as she feels it will impact on her health and well being in the future.

I explained to Ms Watts that these perceived issues need to be addressed and resolved internally and unfortunately there is little clinical advice I can add at this stage to support her return to work.

Recommendations from my previous report remain relevant in supporting a successful return to work once she is signed fit by her GP."

Ms Verwey then referred back to her earlier recommendations and set them out again, as set out above in these reasons. She then continued:

"I have not arranged a further review with Ms Little at this stage as the main barrier to her return appears to be perceived and unresolved work issues and concerns. I am hopeful that once these stressors are addressed she would be fit to return to and render reliable service and attendance at work.

Please do not hesitate to refer her back should there be any change in her health status or if she has not been able to return to work in the next two months."

89 It appears that Ms Rowell contacted the Claimant by telephone between 18 and 23 September 2015 and asked her to call her as occupational health had informed Ms Rowell that they were unable to get in touch with her and Ms Rowell therefore wanted to make contact with the Claimant. Ms Rowell's evidence was that during the telephone call she asked the Claimant how she was doing and the Claimant told her that she was seeing a counsellor. Ms Rowell asked her again if there was anything she could do but the Claimant said there was not.

90 The Tribunal did not consider it necessary to make any further findings about this telephone contact because it was not something about which the Claimant complained in these proceedings. Ms Rowell also was not questioned further about this during her evidence.

91 Thereafter Ms Watts, HR business partner for MMC took over contact with the Claimant and Ms Rowell did not have any further involvement in speaking to the Claimant.

92 The occupational health report dated 7 October 2015 was the last such report in this case.

93 Against the general findings of fact set out above the Tribunal then considered the specific issues identified in the list of issues.

94 In this case the Claimant alleged that she had been constructively dismissed and although she did not specifically allege that her dismissal was caused by any disability discrimination it appeared appropriate to the Tribunal, given the issues, to consider the allegations of disability discrimination during the employment under sections 15 and 20 of the Equality Act 2010 (“the 2010 Act”) first before determining the constructive unfair dismissal complaint.

95 The first matter the Tribunal considered was the question of whether the Claimant met the definition of a disabled person under the Equality Act 2010. The Respondent put the Claimant to proof as to whether she was a disabled person. The relevant timeframe for the Tribunal as agreed in the list of issues was from June 2015 to the termination of the Claimant’s employment. The Claimant relied on having a mental impairment at the material time which had a long term substantial adverse effect on her ability to carry out normal day to day activities. She relied on a diagnosis of “*anxiety disorder*” (p.365).

96 The Tribunal accepted the Respondent’s submission that this was not a condition identified in the World Health Organisation ICD although this was not necessarily fatal to the determination of the issue. There was certainly no evidence put before the Tribunal to indicate that it was identified as such in the ICD. Further, there was no evidence before the Tribunal which supported that diagnosis. There was one fit note out of the four that the Tribunal was shown covering a timeframe from 30 July 2015 through to the last dated 3 December 2015 for two months, which identified anxiety disorder as the diagnosis. The other fit notes (pp.7G, 17, 26) all reported that the Claimant presented with symptoms described as “*anxiety, stress at work*”. The diagnosis of anxiety disorder was simply in the fit note and there was no explanation why this diagnosis varied from that which had been provided previously or subsequently.

97 In addition to that the Tribunal had the evidence of the occupational health reports and also the subsequent evidence when the Claimant applied to the income protection insurance company (Unum) for payments because of her continued ill-health. Both these sources of information failed to support the Claimant’s case that she was disabled. In particular, Ms Verwey, the occupational health adviser stated:

“From a clinical point of view Mrs Little is fit and capable to perform her contracted duties; however her anxiety and exhaustion because of described work related concerns are the main barriers to her successful return to work and these concerns needs to be addressed through an organisational rather than a medical approach. ...

It is unlikely that the Disability legislation will apply to her stress related health concern at the moment as it is reactive to perceived work circumstances and once resolved it is not expected to affect her ability to perform day to day activities.” (pp.11-12).

98 The application for income protection to Unum led to the following comment from a report from Unum (p.101) as follows:

“Ms Little has reported anxiety and exhaustion due to work related concerns. It is indicated in the occupational health records and medical records that these are not the result of a significant mental health illness, but rather a manifestation of her work situation.

In addition, on review of her reported ability to function outside of the workplace and away from these concerns, it is reported by Ms Little that she can carry normal activities.”

99 There was further evidence before the Tribunal originating from the Claimant herself in which she agreed that the restriction on her ability to function was limited to the particular work situation in the finance department. This picture is inconsistent with meeting the statutory definition of being a disabled person.

100 The Tribunal adopted the submissions by the Respondent set out in paragraphs 18 to 21 of [R10] as to the Claimant not having been a disabled person at the material times. In the case of *J v DLA Piper* [2010] ICR 1052, Underhill P (at para 42) drew a distinction between two ‘states of affairs’ which could produce broadly similar symptoms of low mood and anxiety. The first state of affairs constituted a mental illness or condition, which was conveniently referred to as “clinical depression” and which was unquestionably an impairment within the meaning of the 2010 Act. The second state of affairs was not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or ‘adverse life events’. These observations were adopted in the case of *Herry v Dudley Metropolitan Borough Council* UKEAT/0101/16 at para 56.

101 It appeared to the Tribunal that these observations were fully consistent with and indeed assisted with applying the statutory definition of disability. The symptoms in the former category did not meet the necessary thresholds of severity (substantial adverse effect on the Claimant’s ability to carry out normal day to day activities), or longevity (lasting or likely to last 12 months etc). Further, the evidence in this case clearly established that the Claimant had developed an entrenched position in relation to her work situation (as in the *Herry* case) but that in other respects, she suffered no or little apparent adverse effect on normal day to day activities. The EAT held that in such a case, an Employment Tribunal is not bound to find that there was a mental impairment.

102 There was a dearth of evidence about how the claimed impairment affected the performance by the Claimant of normal day to day activities.

103 The Tribunal was satisfied in the circumstances that the Claimant was not a disabled person.

104 It followed therefore, as we did not find that the Claimant was a disabled person within the meaning of the Equality Act 2010, that she was not entitled to bring

complaints of breaches of the Equality Act 2010 in relation to disability. However, the Tribunal considered that it might be helpful to the parties if we set our findings in relation to the factual matters complained of even though we did not find that the Claimant was a disabled person. These findings were also relevant to the constructive dismissal complaint.

105 The Claimant complained that the Respondent should have taken certain steps and that the failure to take those steps was a failure to make reasonable adjustments in breach of Section 20 of the 2010 Act. These were:

- 4.15(a) Providing additional counselling in December 2015;
- 4.15(b) Allocating her to a different office/team (in particular GSP and/or Treasury);
- 4.15(c) Allocating her to another office within driving distance of her home; and
- 4.15(d) Redeploying her to another company within the Respondent's group of companies.

106 The Claimant relied on a PCP of *"the requirement to work at the contracted place of work"* and *"the requirement to work in the contracted department"*.

107 The evidence did not suggest that the Respondent ever placed such a requirement on the Claimant. The Claimant's position as early as October 2015 onwards was that she could not see how things could be resolved *"as the trust has been broken"* (p.23). This remained her position during the grievance hearing when she stated: *"I honestly don't know what else could be done"*. Instead she sought to explore the possibility of an exit package. In her eyes the relationship had broken down and was irretrievable: *HM Prison Service v Johnson* [2007] IRLR 951.

108 Even if the Tribunal were wrong about that, the Tribunal accepted the Respondent's submission that in any event the adjustments would have had no prospects of enabling a return to work. The fact that counselling was offered and refused supported this. The Witham office was a single floor open-plan area. The Claimant's stated desire to *"avoid those that had upset her"* would not have been addressed by transferring her to a different team in the same space. The Tribunal refers to the references above by the Claimant to all the people who she considered were implicated in the Facebook issue.

109 Further, the adjustments argued for in Issue 4.15(b) – (d) above were so vague as to be meaningless – allocating her to a different office/team/company. They did not shift the burden of proof to the Respondent: *Project Management Institute v Latif* [2007] IRLR 579 at paras 53 – 55. The Claimant's failure to engage in discussion on the same subject alluded to by these adjustments in September 2016 was also relevant and undermined her case in this respect.

110 The Tribunal also considered whether there was any alternative role beyond those put to the Claimant and which she rejected. There was no evidence to suggest that there was such a role. There was no duty on the Respondent to create a role particularly where the grievance which was identified as the reason for redeployment was not upheld. The issue in the grievance was the bullying allegation against Ms Rowell. The Respondent had a simultaneous duty of care to all employees therefore it was not open to them fairly to treat those within the Claimant's team as culpable in the absence of evidential support for that conclusion. It would have breached their duty of care to those employees.

111 The Tribunal considered therefore that even if we had found that the Claimant was a disabled person, the complaints alleging failure to make reasonable adjustments would not have been upheld.

112 It was unclear what the timeframe of the adjustments sought in the second to fourth subparagraphs above was. In practice however, they largely covered a period up to certainly the time that the Claimant put in her grievance as by then, as set out above, she was indicating that it was certainly not appropriate for her to return to work. There would therefore have been an issue as to whether the Claimant had brought the claim in time in any event. This is dealt with below also in relation to the Section 15 claims.

113 The Claimant also alleged that she had been subjected to discrimination arising from disability under Section 15 of the Equality Act 2010. The unfavourable treatment relied on by the Claimant was:

- 1.1. That the Respondent failed to refer her to occupational health for a second review in December 2015 and/or reduced her pay in January 2016; and/or
- 1.2. Required her to return to work in the same department or go onto statutory sick pay also in January 2016.

114 In relation to these allegations the Claimant was more specific as to the relevant timeframe. It is clear therefore that the claim was presented outside the three month time limit in respect of these allegations.

115 The early conciliation process was not relevant here as the time limit had already expired before the early conciliation process was started. The two claim forms were presented on 6 September and 10 November 2016 respectively. The matters complained about therefore were at the very least six months out of time.

116 The Claimant had sought legal advice by 1 February 2016 (reference in her GP notes p.215). Certainly, by early May 2016, solicitors on her behalf wrote to the Respondent setting out the details of her complaints. All the facts which were necessary for her to present the claim were fully known by that stage. The Claimant advanced no reason whatsoever as to why the time should be extended. In those

circumstances therefore the Tribunal had no material on which to base a proper exercise of its discretion to extend time: *Habinteg Housing Association Limited v Holleron* UKEAT/0274/14.

117 The Tribunal therefore considered that we had no grounds on which we could properly exercise our discretion to extend time and therefore we had no jurisdiction to determine these complaints alleging that the Claimant had been the subject of disability related discrimination.

118 We then set out our findings and conclusions in relation to the constructive dismissal complaint.

119 The Claimant relied upon the implied term of mutual trust and confidence namely the obligation upon each party to the contract of employment not to “*without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*”: Per Lord Nicholls in *Malik v BCCI* [1997] 3 WLR 95. It was held that the words “*destroy or seriously damage*” should not be diluted – not every blemish in an employment relationship should be transmuted into a breach of the implied term.

120 The treatment by the Respondent which the Claimant relied upon are set out at Section 4.1 of the Preliminary Hearing Order which listed the issues in this case (pp.364-365). These were the matters which were addressed during the hearing. The original numbering of those paragraphs as set out in the Order of Employment Judge Russell and as set out above in these reasons will be used below also in order to avoid any confusion.

121 The Claimant first relied at issue 4.1(a) on the comments about the Claimant on Facebook on 31 March 2015 made by her colleagues (Mr Donker, Ms Goff, Ms Rowell and Ms Mandalay).

122 As the Tribunal found above Mr Donker who made the initial comments was by 31 March 2015 an ex-colleague in that he had left the Respondent’s employment. The Claimant was aware of this and therefore she cannot rely on his comments as constituting a breach of her contract of employment with the Respondent. In any event as the Tribunal has found above Ms Rowell, despite the fact that Mr Donker had already left, took steps promptly without being requested to do so by the Claimant, to elicit an apology from Mr Donker which was forthcoming.

123 As to the three other members of staff cited by the Claimant in paragraph 4.1(a), the Tribunal accepted as accurate the submission that it has been held that the Courts should be slow to impose requirements on employee usage of social media in their social life even when such usage may touch upon work-related matters: *Smith v Trafford Housing Trust* [2013] IRLR 86, especially at paras 26-29, 57-59, 68 and 76. Against that legal background and in the circumstances of this case therefore the employer cannot sensibly be held vicariously liable for its employee’s comments on social media. This applies even more so to the position of Mr Donker which has

already been dealt with above.

124 Further, the Tribunal considered that issues 4.1(a) and (b) were very closely related so they were dealt with together. Our findings of fact as set out above in relation to the actions of the other three colleagues tend to support the Respondent's case that the Claimant could not reasonably have considered that these constituted breaches of the employment contract. The actions of Ms Mandalay were those of a colleague of the Claimant and the Claimant had no reasonable grounds for believing that they were the actions of her employer.

125 The actions of Ms Rowell as the factual findings above show were innocent in the sense that she did not interpret the comments as referring to the Claimant indeed she responded as if the comments could have been directed at herself. Thereafter once she was made aware of the Claimant having been upset by the comments she acted promptly to assist the Claimant to resolve any difficulties. As the Claimant's line manager, the Claimant could not reasonably therefore have believed that there was anything in relation to these comments which was the action of her employer.

126 Insofar as complaint is made about Ms Goff's comments on Facebook as the findings above set out, we had no evidence about what Ms Goff had actually written.

127 In all the circumstances given the findings above about how Ms Rowell dealt with the Claimant's complaints about Sue Goff and the absence of any evidence about what Sue Goff's comments were, the Tribunal did not consider that this was a matter which the Claimant could reasonably have treated as a breach of or contributing to a breach of the implied term of mutual trust and confidence by her employer.

128 The Tribunal next addressed 4.1(c). Once again the findings of facts set out above meant that the Claimant had not established the primary facts to support her allegation that there was inappropriate conduct by Ms Goff and Ms Rowell at the meeting on 15 April 2015.

129 The Tribunal next addressed issue 4.1(d) – isolation and ostracism from team from 14 April 2015 to 30 July 2015 when the Claimant commenced a period of sickness absence. The Tribunal's findings of fact above also indicate that the Claimant had not established that she was isolated and ostracised from the team in the period that she complains about.

130 Issue 4.1(e) – increased working hours between March 2015 and 30 July 2015. The findings of fact relating to this are set out above. In summary, we found that Ms Rowell did not compel the Claimant to carry out the increased working hours indeed she had prior to this timeframe as set out above arranged for the Claimant to claim payment for the overtime. Also, on the occasion when the Claimant indicated that she could no carry out overtime over a weekend Ms Rowell indicated that that was perfectly acceptable. Finally, the Tribunal found that there was an occasion when the Claimant brought to her attention that she was not able to do a particular task and Ms Rowell arranged for this task to be done by somebody else.

131 The Tribunal also took into account in this context that the project that the Claimant was working on was time limited with a go live date in August 2015. This was also relevant in determining whether the Claimant was reasonable in considering it as a breach of contract. The Tribunal did not consider that this was the case. We therefore rejected the contention that this was a matter which indicated that the Respondent had conducted itself without reasonable or proper cause in a manner which was likely to destroy or seriously damage the implied term of mutual trust and confidence.

132 Issue 4.1(f) appeared to be a global complaint addressing the issues already dealt with individually above.

133 The next issue relied on was 4.1(g) – failure to redeploy the Claimant to another team or department (such as GSP and/or Treasury). GSP stood for Global Source Procurement. The Claimant accepted during her evidence that the GSP and Treasury teams were also based in the Hub and indeed these teams would therefore have been in the same building and on the same floor as the team in which she previously worked. If she had worked in those teams, the GSP and/or Treasury, she would still have had interaction with the members of the team that she complained about. In that context therefore the Respondent's failure to redeploy her to those teams would not have addressed the complaints and concerns that the Claimant expressed to them. In any event, the Tribunal accepted the Respondent's submission that an implied term cannot override the express terms of the contract. The Claimant was expressly contracted to work in her specific role and there was no mobility clause in her contract.

134 The next issue was 4.1(h) – January 2016, reducing the Claimant's pay and telling her that she must return to the same position or go onto SSP. The evidence did not support the Claimant's contention that she was told this. The Respondent had a sick pay policy and in fact gave the Claimant more generous payment than was strictly necessary under the policy. A failure to provide ex gratia (voluntary) payments did not in the circumstances of this case amount to a breach of the implied term.

135 The next issue was 4.1(i) – which was withdrawn.

136 The next matter relied on by the Claimant was 4.1(j) – 16 June 2016, rejection of her grievance and requirement to return to work. There was no requirement imposed by the Respondent on the Claimant to return to work. Further, the Tribunal had regard to the detailed exercise carried out by the Respondent in assessing the Claimant's grievance and accepted that the rejection of the grievance was based on evidence and was reasonable on the part of the Respondent. There was a clear consensus of evidence obtained by them which not only undermined the grievance but painted a different picture about the Claimant's involvement in the issues in the workplace which was adverse to her. The essence of the grievance was an allegation of bullying of her by Ms Rowell. The findings of this Tribunal as set out above undermined the validity of that grievance.

137 This matter therefore could not in the Tribunal's view either taken singly or with other matters constitute conduct which could support the constructive dismissal complaint.

138 The next issue was 4.1(k) which was withdrawn in relation to delay in deciding the grievance appeal.

139 The next issue was 4.1(l) – requiring the Claimant to return to her previous department. This was directed at the conduct of the Respondent in the period August to September 2016. The correspondence between the Claimant and the Respondent at about this time (pp.171-172, 182, 185-186) did not establish the primary facts relied upon by the Claimant. The Tribunal considered that the Respondent acted perfectly reasonably in communicating with the Claimant to set out clearly the position in relation to seeking to discuss a return to work and advising the Claimant of the potential options if she did not return to work.

140 Also, the Tribunal considered that the Claimant had rejected the opportunities to transfer to other posts and that the Respondent was not under a contractual duty to create an alternative post.

141 The Tribunal did not consider that in the circumstances the Respondent had breached the implied term in this respect.

142 The final matter relied upon by the Claimant was the email dated 21 September 2016 from Human Resources requiring her to attend a meeting in London at which she could not be accompanied, and being told that her employment was likely to be terminated.

143 Once again, the Tribunal did not find that the Claimant had established the primary facts. First, there was no requirement on the Claimant to attend the meeting since Ms Watts explicitly raised the possibility of the Claimant dialling in her attendance and of sending in written representations.

144 In relation to the issue of being accompanied, the Respondent gave the Claimant the option of being accompanied by either a member of her union or a work colleague. As a matter of fact, the Claimant was not a member of a union and ...?...

145 The initial invitation to the meeting on 26 September was in a letter dated 16 September 2016 (p.187-188). The Claimant rejected the opportunity of attending and also of making written submissions for various reasons including her ability to use public transport and the stress of participating in a conference call (p.189). It followed therefore if the Claimant immediately stated that she was not going to be attending the meeting that the issue of being accompanied was not material. The Claimant expressed her perception that the outcome was already predetermined.

146 The Tribunal considered that the Respondent set out carefully and appropriately

the decision that they were considering in relation to the Claimant's future employment. It is consistent with fair employment practice and indeed in accordance with the ACAS code that the employee should be on notice of the possible outcomes in such circumstances and should have a fair opportunity to express their views about such matters. The summary of the history which was set out by Ms Watts was accurate and the Tribunal considered that the Respondent acted reasonably and in accordance with its policies to review the Claimant's continued employment at this stage. The Tribunal also considered that the Respondent had acted reasonably in not seeking a further occupational health report given the recommendations and the essence of the report from the occupational health service which was that there was no disability and that the issues were organisational/managerial.

147 The Claimant relied on the email of 21 September 2016 as the final straw. This was the email written by Ms Watts after having received the Claimant's notification that she would not be attending the meeting of 26 September. In that email she sought to address the concerns raised by the Claimant in her email in response of 18 September 2016 (p.190-191). The Claimant helpfully sent an email with her comments on Ms Watt's email back to Ms Watts on 21 September 2016 at 10.26am (pp.192-194).

148 It is now well-settled law that the final straw does not in itself need to be a breach of the contract but needs to be more than innocuous: *Omilaju v Waltham Forest LBC (No 2)* [2005] ICR 481.

149 The Tribunal did not consider that there was anything inappropriate or unreasonable in the terminology and the terms of the email sent by Ms Watts. In any event as set out above the Claimant had already decided that she had no trust in the Respondent and this had been the position for some months. This was also consistent with her refusal to attend the meeting. In all the circumstances, therefore even if the email could reasonably be viewed as constituting a breach of the implied term of trust and confidence, (which we did not consider to have been the case) the Claimant could not rely on it as causing the termination of the employment because she had already reached the view that there was no trust.

150 In all the circumstances, therefore, the Claimant had failed to establish that she was constructively dismissed. She was therefore not dismissed. She had resigned and was not entitled to claim unfair dismissal under Section 94 of the Employment Rights Act 1996.

Employment Judge Hyde

14 August 2017