



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms L Madhavan

**Respondent:** R Gil-Candon, S Douglass, P Hedges (a partnership trading as Shotton Lane Surgery)

**Heard at:** By video On: 20, 21 and 22 September 2021

**Before:** Employment Judge R Harfield  
Members Mrs L Bishop  
Mr P Bradney

**Representation:**  
Claimant: In person  
Respondent: Ms Roberts (counsel)

## RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that the claimant's complaints of constructive unfair dismissal and disability discrimination are not well founded and are dismissed.

## REASONS

### Introduction

1. The claimant worked for the respondent as a data input clerk from 30 May 1994 to 24 April 2020. Acas conciliation took place between 4 May 2020 and 26 May 2020. The claimant presented her claim form on 25 June 2020 complaining of constructive unfair dismissal and disability discrimination. The case came before Employment Judge Jenkins on 16 September 2020 for case management. EJ Jenkins clarified the issues in the case and made directions to get the case ready for hearing. He recorded that the correct respondent was Drs Gil-Candon, Douglass and Hedges a partnership trading as Shotton Lane Surgery.
2. The issues between the parties to be determined by the Tribunal at the final hearing were set out by EJ Jenkins in his case management order, together with an order that the claimant provide further particulars of the alleged

breaches of trust and confidence relied upon for her constructive unfair dismissal claim. The claimant did so. The list of issues below therefore inserts the additional information the claimant provided.

3. We had before us a hearing bundle extending to 161 pages. We had written witness statements from Dr Gil-Candon, Dr Douglass, Ms Evans, Ms Massey (all for the respondent) and from the claimant. We heard oral evidence from all of those witnesses with the exception of Ms Massey. We were told that Ms Massey was unable to attend due to a prebooked holiday. We confirmed that whilst we would take Ms Massey's statement into account, the fact that she was not in attendance and could not be asked questions would affect the weight that we would place on her evidence. We also gave the claimant the opportunity, in her own evidence, to comment upon Ms Massey's written statement. Both parties provided written closing submissions and the respondent also provided oral closing comments (the claimant ultimately having decided she did not wish to). We have taken those submissions fully into account but have not repeated their content here. The hearing took place by video. We discussed the need adjustments with the claimant at the start of the hearing and agreed that a break would be taken approximately every hour. The Tribunal panel were able to complete our deliberations on the last day of the hearing but there was not sufficient time to deliver an oral judgment. It was therefore reserved to be delivered in writing. Employment Judge Harfield apologises for the delay in delivering this reserved written judgment.

### **The issues to be decided**

4. The issues for us to decide are as follows (adopting the list of issues set out by EJ Jenkins inserting the further particulars provided by the claimant):

### **Time limit/limitation issues**

- (a) Were the Claimant's complaints of disability discrimination presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")?
- (b) Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; and whether time should be extended on a "*just and equitable*" basis.
- (c) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **5 February 2020** is potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.

### Constructive unfair dismissal

- (d) Was the Claimant constructively dismissed?
- (e) Did the Respondent breach the implied term of mutual trust and confidence, i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant?
- (f) If so, did the Claimant "affirm" the contract of employment before resigning? (To "affirm" means to act in a manner that indicates the Claimant remains bound by the terms of the contract.). EJ Jenkins ordered the claimant to provide further particulars of any explanation why she did not resign until 24 April 2020, when the date on which the act she contends forms the basis of her constructive dismissal claim took place on 29 November 2019. The Claimant in response stated:
- (i) My resignation came on 24/04/2020 after months of trying to engage with the surgery. Firstly a meeting with Dr Rosa was twice cancelled by text to me via Dr Sarah Douglass who said "something has come up for Rosa";
- (ii) A solicitor letter from Hunter Lawyer Chester to the practice on 17/01/2020 they had 28 days to rely but didn't. This same scenario went on for February, another letter from Hunter Lawyers Chester 21/02/2020, another letter dated 29/03/2020 and finally 08/04/2020 with no response from the surgery. On the 22/04/2020 my solicitor wrote to me to say there was no response from the surgery and I realised that all attempts to negotiate with the practice had failed and I had no choice but to resign and try to look forward. Acas were notified on 04/05/2020;
- (iii) On 26 May I received notification from Acas that the respondent was not prepared to engage in any discussion. If the practice had engaged with me from the beginning it would not have taken so long, an apology or further discussion on my concerns would have meant I would have returned to work but I have been stonewalled at every point, and I became clear I was not a valued member of staff despite 25 years service and my request were inconvenient, this could have been resolved in December 2019 had they engaged.
- (g) If not, did the Claimant resign in response to the breach of contract (was the breach a reason for the Claimant's resignation – it need not be the only reason for the resignation)?
- (h) The Claimant has been ordered to provide further particulars of the conduct she relies on as breaching trust and confidence. The particulars the claimant provided in response are:

- (i) The behaviour of Mrs Evans practice manager towards me in the way of harassing and threatening phone calls on 22 November 2019 and 29 November 2019;
- (ii) The refusal of my reasonable request to location to a downstairs room to work due to my mobility issues on the stairs;
- (iii) The refusal of my reasonable request to be located nearer to the downstairs toilet due to my MS related bladder issues;
- (iv) The refusal to make accessible access to the building by way of changing or adapting the doors at the entrance;
- (v) The refusal to assist me with parking even though there were accessible spaces outside reserved only for GPs even though the spaces were regularly empty also asking me to move my vehicle during working hours;
- (vi) The conduct of Ms Evans constantly asking me to do overtime whilst knowing it was not possible and her subsequent attitude when I refused;
- (vii) Mrs Evans unreasonable request for me to do more jobs such as opening post, covering reception, compiling lists etc whilst I agreed to this I was given no extra time to complete my main job of data input and was laughed at when I asked if another member of staff could help, this never happened;
- (viii) All these incidents occurred around July 2019 after I had refused to take early retirement on medical grounds, culminating in the phone calls in November;
- (ix) In March 2019 I agreed to attend work on Wednesday mornings to summarise records. This is a different job to data input and one I found less tiring. I only did this for a few weeks when Ms Evans informed me there was no more summarising work and I must go in to carry on with data input. Firstly it is not true as it is a fundamental part of a surgery's work and secondly it was not what I had agreed;
- (x) Subsequently the lack of any communication or willingness to discuss matters from the surgery has led to a failure of trust and additionally fear of Mrs Evans;

- (i) If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA, and, in particular, did the Respondent in all respects act within the "band of reasonable responses"?

*EqA, section 6: disability*

- (j) Did the Claimant have a physical or mental impairment, namely multiple sclerosis at the relevant time?

- (k) If so, did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- (l) If so, was that effect long term? In particular, when did it start and did the impairment last for at least 12 months?
- (m) Were any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have had a substantial adverse effect on the Claimant's ability to carry out normal day- to-day activities?

*EqA, section 15: discrimination arising from disability*

- (n) Did the Respondent treat the Claimant unfavourably by overlooking her for other roles/duties, and by allocating her more menial tasks, following her refusal of a request to work extra hours, which the Claimant contends she was unable to work because of her disability?
- (o) Did that treatment arise in consequence of the Claimant's disability?
- (p) If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?
- (q) Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

*EqA, sections 20 & 21: reasonable adjustments (for disability)*

- (r) Did the Respondent know or could it reasonably have been expected to know the Claimant was a person with a disability?
- (s) Did the Respondent's premises have the following physical features:
  - (i) A heavy car park barrier;
  - (ii) Heavy entry doors;
  - (iii) Stairs.
- (t) Did any such physical feature put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that she was unable to lift the barrier or open the doors and had difficulty in climbing stairs?

(u) If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

(v) If so, were there steps that were not taken that could have been taken by the Respondent to avoid the disadvantage? The burden of proof does not lie on the Claimant, however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

- (i) Allowing the Claimant to park in a space at the front of the surgery;
- (ii) Installing lighter doors or doors which could be opened automatically;
- (iii) Allowing the Claimant to work on the ground floor.

(w) If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

### *Remedy*

(x) If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded.

### **The relevant legal principles**

#### **Disability**

5. By the time of the hearing before us the respondent did not dispute the claimant's diagnosis of multiple sclerosis or that it is a deemed disability by virtue of section 6(1) of Schedule 1 of the Equality Act 2010.

#### **Duty to make reasonable adjustments**

6. Section 20(4) of the Equality Act 2020 says that an employer is subject to a requirement, where a physical feature 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. Under section 21 a failure to comply with that requirement is a failure to comply with the duty to make reasonable adjustments.
7. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and

could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

8. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.
9. The purpose of considering how a non disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.
10. Substantial disadvantage is such disadvantage as is more than minor or trivial; Section 212 Equality Act.
11. In *County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England* EAT/0068/17/DA His Honour Judge Shanks helpfully summarised the following additional propositions:
  - It is for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; she need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;
  - The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
  - Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s)
  - The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:
    - The extent to which taking the step would prevent the effect in relation to which the duty is imposed;

- The extent to which it is practicable to take the step;
- The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;
- The extent of its financial and other resources;
- The availability to it of financial or other assistance with respect to taking the step;
- The nature of its activities and size of its undertaking;

### **Discrimination arising from disability**

12. Section 15 of the Equality Act states:

*“15 Discrimination arising from disability*

*(1) A person (A) discriminates against a disabled person (B) if –*

*(a) A treats B unfavourably because of something arising in consequence of B’s disability, and*

*(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim*

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

13. The approach to determining the aspects of a section 15 claim were summarised by the Employment Appeal Tribunal in Pnaiser v NHS England and Another [2016] IRLR 170. This includes:

- In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;
- The “something” that causes the unfavourable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it;
- Motives are not relevant;
- The tribunal must determine whether the reason or the cause is “something arising in consequence of B’s disability”;



- The expression “arising in consequence of” can describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link;
  - Knowledge is only required of the disability. Knowledge is not required that the “something” leading to the unfavourable treatment is a consequence of the disability.
14. The respondent will successfully defend a claim if it can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. Legitimate aims are not limited to what was in the mind of the employer at the time it carried out the unfavourable treatment. Considering the justification defence requires an objective assessment which the tribunal must make for itself following a critical evaluation of the position. It is not simply a question of asking whether the employer’s actions fell within the band of reasonable responses. The Equality and Human Rights Commission Code of Practice suggests the question should be approached in two stages:
- Is the aim legal and non discriminatory and one that represents a real, objective consideration?
  - If so, is the means of achieving it proportionate – that is appropriate and necessary in all the circumstances? The Code goes on to say that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. “Necessary” here does not mean that the treatment is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means (see Hampson v Department of Education and Science [1989] ICR 179 and Hardys & Hansons plc v Lax [2005] ICR 1565.)

### **Burden of Proof**

15. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides:

*“(2) if there are facts from which the Court (which includes a Tribunal) could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*

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

16. Consequently, it is for a claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.
17. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provisions should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 as supplemented in Madarassy v Nomura International Plc [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence. Furthermore, in practice if the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

#### **Time limits in discrimination cases**

18. The initial time limit for complaints under the Equality Act 2010 is 3 months starting with the date of the act of discrimination complained about. The effect of the early conciliation procedure is that, if the notification to ACAS is made within the initial time limit period, time is extended, at least, by the period of conciliation.
19. Under Section 123(3) of the Equality Act conduct extending over a period is to be treated as done at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on a failure to do something when either P does an act inconsistent with doing it, or if P does not do an inconsistent act, on the expiry of the period in which P might reasonably have been expected to make the adjustment.
20. Sections 123(3) and 123(4) therefore establish a default rule that time begins to run at the end of the period in which the employer might reasonably have been expected to comply with the relevant duty. The period in which the employer might reasonably have been expected to comply with its duty is assessed from the claimant's point of view, having regard to facts known or which ought reasonably to have been known by the claimant at the relevant time; *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640.
21. A tribunal may consider a complaint that has been brought out of time if it considers it just and equitable to do so in the relevant circumstances.

## Constructive Unfair Dismissal

22. Section 95(1)(c) of the Employment Rights Act 1996 provides that 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.”*

23. Case law has established the following principles:

- (1) The employer must have committed a repudiatory breach of contract. A repudiatory breach is a significant breach going to the root of the contract. This is the abiding principle set out in Western Excavating v Sharp [1978] ICR 221.

- (2) A repudiatory breach can be a breach of the implied term that is within every contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 and Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL.) It was said in Woods that:

*“The Employment Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer.”*

- (3) Whether an employer has committed a breach of that implied term must be judged objectively. It is not enough to show merely that an employer has behaved unreasonably. The line between serious unreasonableness and a breach is a fine one. A repudiatory breach does not occur simply because an employee feels or believes they have been unreasonably treated.
- (4) The employee must leave, in part at least, because of the breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach; the breach must have played a part (see Nottingham County Council v Meikle [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13).
- (5) The employee must not waive the breach or affirm the contract by delaying resignation too long.

- (6) There can be a breach of the implied term of trust and confidence where the components relied upon are not individually repudiatory but which cumulatively consist of a breach of that implied term.
- (7) In appropriate cases, a “last straw” doctrine can apply. This states that if the employer's act which was the proximate cause of an employee's resignation was not by itself a fundamental breach of contract the employee can rely upon the employer's course of conduct considered as whole in establishing that he or she was constructively dismissed. However, London Borough of Waltham Forest v Omilaju [2005] IRLR 35 tells us that the “last straw” must contribute, however slightly, to the breach of trust and confidence. The last straw cannot be an entirely innocuous act or be something which is utterly trivial. Moreover, the concepts of a course of conduct or an act in a series are not used in a precise or technical sense; the act does not have to be of the same character as the earlier acts.
- (8) In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal set out the questions that the tribunal must ask itself in a “last straw” case. These are:
- (a) What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation?
  - (b) Has he or she 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 of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach.
  - (e) Did the employee resign in response (or partly in response) to that breach?
24. If it is established that the resignation meets the definition of a dismissal under section 95(1)(c), the employer has the burden of showing a potentially fair reason for dismissal before the general question of fairness arises under section 98(4).

### **Findings of fact**

25. There were some significant factual disputes in this case, and little by way of contemporaneous documentary records. Applying the balance of probabilities, we reached the following findings of fact set out below. The

claimant had some difficulties in identifying precise dates when things were alleged to have happened and, as stated, there are few contemporaneous documents to assist with that. In our findings of fact we have attempted, as best as we are able, to address the relevant facts in chronological order. There are also occasions on which it is easier to address the issue thematically. It was also not necessary for us to decide every factual point or dispute between the parties for us to decide the issues before us in this case.

### **Background**

26. The claimant began working for the Shotton Lane surgery in February 1994. Various GPs have come and gone in the partnership over the years. At the relevant time in question there were five GPs, four nurses, a pharmacist, and nine administrative staff. Most of the administrative staff are very long standing. They are made up of reception staff, secretarial staff and data management staff. The claimant worked in data management. The practice manager is Ms Evans. The claimant and Ms Evans have worked together since 1994. For the vast majority of that period they had a good working relationship. They were friends in work and whilst outside of work they may not have frequently spent time together socialising, they would celebrate family milestones with each other, such as children's weddings. They would speak by telephone and by message about non work matters, for example in August 2019 about the claimant's daughter's GCSE results.
27. In 2003 the claimant was diagnosed with multiple sclerosis. The claimant asked, and it was agreed, that she would reduce her working hours from 38 to 13 over two days a week working on a Tuesday and a Thursday. She was asked if she needed any other adjustments at the time and she said she did not, and she would see how things went.
28. The claimant told us that at the time of the events in question she suffered from numbness in her left leg which never completely went away but sometimes was a lot worse than others. She said on a good day she could feel it, but it did not stop her from walking, and she did not need a walking aid. She has multiple sclerosis fatigue and she said that if she was particularly fatigued it would make her leg worse. It could feel like trying to walk under water. She said she kept a stick in her car but did not use it in the building as she was familiar with the building. She said that over the years following her diagnosis she would fairly frequently feel not well enough to attend work. She would then arrange with Ms Evans to work the hours on a different day. The claimant and Ms Evans agreed, and it is not in dispute, that Ms Evans would tend every morning to ask the claimant how she was, and the claimant would sometimes say she was not ok. Ms Evans would then ask the claimant whether she was well enough to be in work or whether she felt she should go home. Often the claimant would say that she could manage. The claimant says that from around April 2019

she started to feel more fatigued. What is in dispute in this case is whether she communicated that to the respondent and whether she brought particular difficulties to their attention, or not.

### **Early retirement**

29. In 2017 or 2018 the claimant and Ms Evans discussed the possibility of early retirement on medical grounds and Ms Evans part filed in a form for the claimant. The claimant consulted with her own GP. They decided that work would be beneficial to the claimant's wellbeing. She decided to stay in employment.
30. The claimant alleges that Ms Evans was unhappy with her decision to stay and thereafter Ms Evans sought to make the claimant's job more difficult by doing things such as adding extra jobs for the claimant to do, asking if she could cover for a colleague Ms Massey or work extra hours, not park at the front of the building or ask the claimant to move her car. The claimant alleges Ms Evans did those things because Ms Evans wanted her to leave. The claimant says that Ms Evans also wanted to force her out because she had accrued the maximum holiday allowance and was paid more than other members of staff.
31. Ms Evans says that she only raised the possibility in an attempt to be helpful to the claimant as she was helping another member of staff through the process and the claimant had been talking about her fatigue. She says she held no ill will towards the claimant when the claimant decided it was better to keep working, and she was not trying to force the claimant out.
32. The possibility of ill health retirement was genuinely considered by the claimant in conjunction with her GP. We therefore considered, on the balance of probabilities, that the conversation between the claimant and Ms Evans, who were also friends, was a genuine exploration of that possibility, rather than Ms Evans trying to find a way to get the claimant to leave. We deal with the claimant's allegations about the various ways in which she says Ms Evans tried to force her out below. However, we also did not find it established in general that Ms Evans held an ill will to the claimant once she decided to stay or that Ms Evans was trying to find ways to force the claimant out. Ms Evans was a busy practice manager with multiple demands to juggle. The claimant worked two days a week. We did not consider it likely that any complexities thrown up in relation to the claimant's employment (if indeed there were any) would be such a big issue for Ms Evans in the wider scheme of her responsibilities that Ms Evans would have reached the view that the claimant should leave. Or indeed that Ms Evans would go to such lengths to secure the claimant's departure. Moreover, they were friends, had worked together for an incredibly long time and the claimant had skills, particularly in relation to coding, that were of value.

### **Agreement to work extra hours**

33. The claimant says that in about February or March 2019 Ms Evans was asking her to do extra hours on data input work and that she declined the work as working long hours at a screen fatigued her. She says she agreed to do 3 hours extra a week summarising GP records for new patients to help clear that backlog as summarising work was less tiring and involved less screen time. The claimant said she agreed a permanent change to her contract to increase her hours of work but that it was on the understanding that it would only be for the length of time needed to clear the summarising backlog.
34. The claimant initially did the summarising work on a Wednesday. After an unknown period of time, she asked instead to work longer hours on the Tuesday and Thursday.
35. Ms Evans says that she did not recall the claimant saying she would do the summarising work because it was less tiring or involved less screen time. She understood that the claimant enjoyed the work. She said when the claimant asked to work the hours on a Tuesday and a Thursday, it did not bother her which day the hours were worked. She said she did not know if the claimant had given a reason for the request but had herself surmised it was probably so that the claimant made one less journey to work. Ms Evans said, and we accept, that she asked the claimant if she thought she could manage two long days. The claimant had said she would be alright.
36. On the balance of probabilities, we find that Ms Evans thought the claimant agreed to do the summarising work because she enjoyed that more than the data input work. We do not find it established that Ms Evans understood that the claimant to be saying she would find additional data input work to be tiring, but the summarising work not to be.

### **Using the stairs**

37. The claimant says that in or about April 2019 she told Ms Evans she was getting more fatigued and asked to work downstairs to make it easier. The claimant had to navigate 12 steps to the first floor, and then a separate landing with two steps, to get into the office she shared with Ms Massey. She said she had to use the stairs multiple times a day to undertake tasks such as delivering post and speaking to colleagues. The claimant said she could not remember an exact date, but they had had many conversations about it which would result in Ms Evans saying “no” and that it was the “state of play.” The claimant says Ms Evans stated she could not afford an additional scanner (the claimant shared the existing one with Ms Massey) and logistically it would be too difficult to move the claimant’s equipment

- downstairs. The claimant said that she only mentioned wanting to move downstairs to Ms Massey in passing as Ms Massey had no authority to resolve the issue and she did not otherwise raise it with Ms Massey or the doctors in the surgery. She said, however, that Ms Massey, knew the stairs were difficult for her as she quite often tripped on the two steps on the landing when making coffees. The claimant in her pleaded case also asserts that she asked to move downstairs so that she could be closer to the downstairs toilet because of multiple sclerosis related bladder issues.
38. Ms Evans says that the claimant did not tell her about her increased fatigue or that she was having difficulties with the stairs. Ms Evans said she could not recall any conversation about the scanners or a request by the claimant to move downstairs. She could vaguely recall an incident when the scanner broke. She said if there had been a request to move, she would have cleared a room downstairs and moved the claimant there with the scanner. She said it would not have been sensible to buy a second scanner, but that Ms Massey could have used the scanner downstairs on the days the claimant was not in work or, if they were both in work, then Ms Massey could use the scanner when the claimant was not, bearing in mind only one person could scan at a time in any event.
39. Ms Massey in her written witness statement said that she had worked with the claimant for around 22 years. She said she had not seen a deterioration in the claimant's health, and that the claimant had not said anything to her about wanting to work downstairs, or that the claimant was feeling tired or overloaded, or that the claimant had difficulties with the stairs or other matters such as the car park. Dr Gil-Candon and Dr Douglass said that the claimant had not told them about any particular difficulties at the relevant time, and they had not observed her having difficulties, including with the stairs. The claimant said that she was not permitted to raise practice management issues with the doctors and that they had to be raised with Ms Evans. Dr Gil-Candon and Dr Douglass did not agree. They said they had a good relationship with the claimant and an open-door policy. They said the claimant could have raised matters with them, and that they would be the obvious port of call if the claimant wanted to raise a matter relating to the practice manager. The claimant and Dr Douglass are close to the extent that they would socialise outside of work.
40. As is the position for most of the factual disputes in this case, we are faced primarily with two conflicting version of events from the claimant and Ms Evans. On the balance of probabilities, we consider it more likely that the claimant had not clearly expressed that she was suffering from increased fatigue or any difficulties she was having with the stairs. The tenor of the claimant's evidence was that she reluctant to draw attention to herself and her condition. We consider that makes it more likely the claimant had not mentioned difficulties with the stairs with Ms Evans (or indeed anyone else) that would have put them on notice.



41. Further, we do not consider it plausible that Ms Evans would have ignored a request not to use the stairs or she would have set out to make the claimant continue to use them in the face of the claimant saying she was struggling. The claimant and Ms Evans had a long-standing friendship. Adjustments for the claimant had been accommodated in the past, such as changes to the claimant's working hours and patterns. The claimant had recently taken on additional hours and Ms Evans had checked the claimant felt well enough to work them. We consider these factors made it unlikely that Ms Evans would have behaved in the way that is alleged.
42. We also consider that if the claimant was facing significant difficulties with the stairs, she would have discussed it directly with Ms Massey bearing in mind they shared an office and had worked together for 22 years. Furthermore, even bearing in mind the fact we did not hear from Ms Massey in evidence, we consider it implausible that Ms Massey would have knowingly seen the claimant struggling on the stairs carrying coffee and would just leave the claimant to struggle. We accept that there may well have been a discussion at some point about buying a second scanner, which was declined by Ms Evans. But we do not accept that this discussion included a request by the claimant to move downstairs or her stating she was having difficulties with the stairs.
43. Furthermore, we consider that if the claimant was having significant difficulties and was getting nowhere with Ms Evans, she would have ultimately raised it with Dr Gil-Candon or Dr Douglass. She did contact Dr Gil-Candon after the phone call on 29 November 2019 which suggests that she understood it was ultimately an option, notwithstanding the fact that normally practice matters would be raised with the practice manager in the first instance.
44. We therefore find that Ms Evans, nor anyone else at the respondent, were told by the claimant that she was having difficulties with the stairs or were in receipt of a request by the claimant to move downstairs. Furthermore, such individuals were not aware visually from observing the claimant that she was having any such difficulties or that her condition was deteriorating.
45. There was no need for the claimant to be placed on the ground floor to be closer to toilet facilities as there was a toilet on the floor she worked on. We likewise do not find that the claimant made any request to move downstairs to be closer to a downstairs toilet or that anyone in the respondent had any inkling that the claimant was in need of easy access to one of the downstairs toilets. In fact, the evidence suggests the claimant did not like the downstairs toilets because she did not like the lack of a window in the staff toilet and felt that the disabled toilet which patients could use, could sometimes be messy.

**Removal of summarising work**

46. The claimant says that after a matter of weeks of her starting the summarising work she found there was no more summarising work prepared ready for her to do. The Lloyd George cards from the patients' former surgeries had not been transferred to A4 folders for the claimant to work from. To the best we can identify this would appear to have happened some time in or around April or May 2019.
47. The claimant says that when she spoke to Ms Evans she was told there was no summarising work to do at that time and to carry on with data input work instead. She says the same thing happened the following week and it then became the norm. The claimant says that she told Ms Evans that she would like to go back to her normal hours but Ms Evans told her there would be summarising work back in the future and so the claimant reluctantly held out for its return as she could see there were records in the room that required summarising. The claimant complains that it was untrue that there was no more summarising work as there were vast amounts outstanding, and that she could, as part of her summarising work, sort out the physical transfer of the papers to a file. She complains that she was sent by Ms Evans to do data input when it was not the work she had agreed extra hours to perform. She feels that it was an underhand move by Ms Evans to get her to work more hours on data input and she was moved to do work that caused her additional fatigue.
48. Ms Evans denies that the claimant said she did not want to work the hours if there was no summarising work to do. She says the claimant was given additional data input work to do because the claimant had been promised the additional hours. Ms Evans says the summarising work temporarily dried up because they did not have available staff to do the file transfers and that it was not an efficient use of time to give the claimant the file set up to do as it was a job that a school leaver could do. She says the file administration would eat too much into the summarising time when the purpose of the additional hours was for the claimant to make a dent in the summarising backlog.
49. We accept that the summarising work temporarily dried up for the reasons given by Ms Evans and that it legitimately was not seen as a good use of time for the claimant to do the file transfers. We find that the claimant was therefore asked to do additional data input hours in the meantime because Ms Evans did not understand that the claimant wanted to return to her original hours or that she was finding the additional data input work fatiguing. We do not find that the claimant told Ms Evans that she wanted to return to her original hours. We accept if the claimant had asked, then Ms Evans would have facilitated this. We also do not find that the situation was a plan devised by Ms Evans to find an underhand way to get the claimant to do more data input work.

### **Parking**

50. The claimant says that in or around April, May and June time of 2019 she had various difficulties with car parking. The surgery faces onto a road. There is a small space out the front where bins are stored but there is also unofficial space where two cars can fit. On the other side of the road there is the official surgery car park. Not everyone is able to park in that car park and there is further parking up the road by a church. The claimant says the parking by the church was too far for her to walk and that if she came into work for her start time of 8:30am the surgery car park would be full. She says she would come in early to get a space, and also to get into the building and settled before there was a rush of staff and patients arriving because she was feeling tired. She says that often the barrier would be closed in the surgery car park when she arrived. She says she had difficulties opening the lock on the barrier and pushing the barrier open. She says sometimes she could not move the barrier and ending up having to park by the church and walk. She did not have difficulties walking from the carpark across the road but did from the church.
51. The claimant says that she would sometimes park immediately outside the building and the doctors did not raise any issue with her parking there. She says that initially Ms Evans did not raise any issue about this, but that Ms Evans then started asking her to move her car off the front and said the spaces were for doctors. She also says she had been asked to move because she was blocking the bins. She says she does not know how many times that happened but there was lots of occasions when she ended up having to park by the church. The claimant says when she was asked to move her car it sometimes meant there was no space to park in the surgery car park and she would have to park by the church and walk. She also complains that she was taken away from work for about 20 minutes to move her car but there was no adjustment to her workload.
52. The claimant says she reached the point when she would only park out the front when she knew Ms Evans would not be in work. She said if she thought Ms Evans would be in then she would park in the car park over the road but that meant she had the problems with the barrier. She said she would also sometimes wait on the front until another member of staff arrived for work and opened the carpark. She says that she then lost 10/15 minutes of her time to get settled in work ahead of patients arriving.
53. The claimant says she told Ms Evans about problems with the barrier and Ms Evans told her to wait for another member of staff to move the barrier. She says she then told Ms Evans that the spaces were not mobility sized. She says that Ms Evans was aware she was a blue badge holder and that Ms Evans still told her to park elsewhere. The claimant said she had also complained about the barrier to another colleague, Wendy.
54. Ms Massey in her witness statement says that the claimant did start coming into work early when the claimant moved to work two longer days,

and on occasion it was before 8am. She says the claimant did not mention any car parking complaints to her.

55. Ms Evans says she did not know and was not told about any problems the claimant had with parking or with the barrier. She says she often got to work early herself at about 7:50am and would open the barrier and that a couple of other members of staff also tended to get there early too. She said a member of reception staff was also always scheduled to start at 8am who would also open the car park and the building if necessary. The claimant says the reception staff were late. Mrs Evans denies this, other than perhaps by a few minutes.
56. Ms Evans initially said in evidence she could not recall asking the claimant to move her car from the front, but she could see it would be sensible to not have cars in the way on bin day. Later on in evidence, in response to questions from the panel, she said the claimant had been too close to the bins and getting the bins out had been her concern. When asked if she had a problem in her own mind of the claimant parking there she said "somewhat" and said this was because previous partners had been adamant that they were spaces for doctors, but new partners did not seem to have that issue. She said in her mind the spaces were there for the doctors to get out on calls, but she also denied telling the claimant the spaces were for doctors. She said she could also remember an occasion when she asked the claimant to move her car in the car park over the road because the claimant had parked between two lines of cars and had unknowingly blocked in a patient.
57. Ms Evans denied knowing that the claimant had a disabled badge in her car. She accepted that in theory it would be possible to reserve the claimant a space for the claimant. Dr Gil-Candon and Dr Douglass said they were unaware of the claimant having any difficulties with the carpark or the barrier. They said they had no problem with the claimant parking at the front and were not aware of her being asked to move her car at all.
58. Again, this is a dispute of fact where the claimant and Ms Evans have differing versions of events and there are no contemporaneous documents. On the balance of probabilities we conclude that Ms Evans did not know that the claimant had difficulties with parking. We do not find it established that the claimant told Ms Evans that she had problems with the barrier because of the lock and because of difficulties moving the barrier. We also do not find that the claimant told Ms Evans she had difficulties in being left without a space and difficulties then walking from the church car park. We consider that if the claimant had told Ms Evans this information then Ms Evans would have taken action to resolve the situation. It would have been easy to fix with a communication to staff that on the days the claimant was working a space should be left for her and to tell the claimant to arrive shortly after 8am so that the barrier could be opened by other members of staff (bearing in mind the claimant did not

start work until 8:30am). We considered it more likely that on the occasions the claimant was asked to move her car it was for a specific reason: because of a need to get the bins out and because a patient needed to get their car out. We do not consider it established that Ms Evans knew or was told that asking the claimant to move her car would mean the claimant would need to walk from the church and that this would aggravate her condition. We accept that the claimant may have discussed the barrier with her colleague, Wendy, but we do not find that this complaint was escalated to Ms Evans or anyone else in a position of responsibility at the respondent.

59. We also find that, bearing in mind the claimant liked to arrive early, it is likely that there would usually be space in the car park. We also consider it likely that there were only a limited number of occasions on which the claimant would have had a problem with the barrier. The claimant says her problems only started in April, May or June. She went on sick leave at the end of November. She worked 2 days a week (or 3 for a short period of time). We do not consider it likely that there were numerous occasions on which the reception staff would be significantly late. It is likely Ms Evans would take action about such lateness as the surgery needed to be up and running. Moreover, there were a number of staff who tended to get into work early and, if so, would open the barrier. The likely infrequency of there being a problem also supports our finding that it is not likely, on balance, that the claimant complained to Ms Evans about any problems.

#### **The surgery door**

60. The claimant says that in or around July 2019 there was a refusal to improve access to the building by changing or adapting the heavy entrance doors that she struggled to open. She says it caused her difficulties on entry and when she was in and out of the building during the day dealing with prescriptions, going to the shop or opening the door for patients. She says if she had difficulties she would not ring the bell but would lean into the doors or ask someone, such as a patient, to open it. She says that she complained to Ms Evans on many occasions and that Ms Evans said they were looking into the doors and that "I know we are not DDA compliant but they won't dare shut us down as there is a GP shortage".
61. The claimant accepted in cross examination that she was not constantly in and out and that it would not cause too much problem to ring the bell. However, she also said it would cause problems for the receptionist as they were never off the phone, and that she did not want to make a big deal out of the fact she was disabled as not everyone on reception knew about her condition. She said she was also quite often the first person to get to work. The claimant said in her subsequent grievance investigation that Ms Evans had told her to wave or knock if she needed help but that was not the evidence she gave to the Tribunal. She said in evidence that

Ms Evans just said they were looking into the doors. She also said that Ms Evans did not know how hard the door was for her, but that Ms Evans definitely knew it was a problem.

62. Ms Evans accepted in evidence that the entrance doors were heavy as they had to increase the door tension otherwise the doors would stay open, and it would be too cold for the reception staff. She accepted that since the events in question the doors had been replaced as they had secured funding from a Covid improvement grant. Ms Evans denied knowing that the claimant had difficulties with the door and said she could not remember telling the claimant to knock or wave. She said if the claimant had a problem the claimant could have used the bell and there was a member of admin staff in the back office who could open the door if reception staff were busy on the phone. She said the claimant could also have waited for the member of staff due on at 8am to arrive in the mornings.
63. On the balance of probabilities, we do not consider it likely that the claimant told Ms Evans she had difficulties with the door. The claimant's accounts of what was supposed to have been said are somewhat inconsistent. Her evidence that she was reluctant to draw attention to herself and that she used alternative means to open the doors all tends to suggest she did not tell Ms Evans. Again, if the claimant had told Ms Evans we consider that Ms Evans would have taken easy steps to resolve the situation such as guidance to the claimant (and other staff as appropriate) for the claimant to ring the bell. Moreover, we do not consider it likely that Ms Evans would have asked the claimant to go on errands such as a trip to the shops or to deliver prescriptions if she genuinely knew that the claimant had such mobility difficulties, including with the doors. We consider that if there was any conversation between the claimant and Ms Evans about the door then it was simply a conversation about whether the door was suitable for patients and was not related to the claimant and Ms Evans did not relate it to her.

### **Overtime**

64. The claimant says that around the time of April to July 2019 Ms Evans would make constant requests for her to do overtime whilst knowing it was not possible for the claimant to do it. She says Ms Evans had a negative attitude towards her when she refused to work it. The claimant said in evidence that historically she had said yes to overtime if she could work it and if she could not it was usually for practical reasons such as childcare. She said that around this time she started refusing the overtime because of her tiredness but that Ms Evans would keep on asking her. She said Ms Evans was polite but that the requests were never ending and made her

feel bad. She considered Ms Evans was trying to break her and get her to leave. She accepted that Ms Evans was asking multiple people in the practice to do overtime but said only she and Ms Massey could do the coding. She also accepted she did not say point blank to Ms Evans that she was not accepting any more overtime.

65. Ms Evans accepted that that she asked the claimant to work overtime and said that she was asking all staff to do so. She said it was the claimant's choice whether to accept the offers of overtime or not. She denied that the claimant had told her that she could not do overtime because of fatigue.
66. On the balance of probabilities, we find that Ms Evans was asking the claimant to do overtime because the surgery was in general busy and over stretched and she was asking all staff if they could do overtime. We do not find that Ms Evans was constantly asking the claimant or trying to break the claimant or trying to get the claimant to leave. We do not find it likely that the claimant specifically told Ms Evans that she did not want to do overtime anymore because of fatigue and a deterioration in her condition. Moreover, the claimant did not ask Ms Evans to stop asking her to do overtime, full stop. That tends to suggest that the claimant did not tell Ms Evans that fatigue was the reason she was refusing overtime. We also consider it likely that if the claimant had done so, then Ms Evans would have stopped. We therefore find that Ms Evans was simply offering more overtime because it continued to be available, and she was offering it out to staff. We also do not find that Ms Evans held ill will towards the claimant because she was no longer taking on overtime. It was part of Ms Evans day to day working life to offer staff overtime and some would accept and some refuse.

#### **Requests to take on additional tasks**

67. The claimant says that she was asked to take on other tasks additional to her core responsibilities such as opening post, covering reception and compiling lists. She said in the grievance investigation meeting that her and Ms Massey were given the post to open and stamp at the end of October or November which included handing out the post. She says she was then not given extra time to complete her main job of data input and that when she finished extra tasks, such as the flu list, the scanning was still therefore her to do. She says that other staff could have been given scanning to do. She did accept in cross examination that she had not said to Ms Evans that she needed someone to do her scanning if she was doing the flu list. The claimant also accepted in evidence that the tasks she was given were all within her job description and said that it was not the work which was the issue but the fact the workload was excessive. (She also said it was not the work that was the problem but her treatment by Ms Evans). The claimant also confirmed that all staff were complaining about the amount of work to be done, including the doctors.

68. Ms Evans accepted that the claimant did complain about the level of post and the scanning and coding that needed to be done and she accepted that the work in a sense was never ending. However, she said that everybody complained about the workloads and that the claimant had never said she was overburdened and could not cope. She said that she only expected a day's work to be done. Ms Evans said there were additional tasks, such as the flu list, which needed to be divided up amongst all staff. Ms Massey in her witness statement confirms that the scanning of the post was never ending but that the claimant had not complained it was having a negative impact upon her health.
69. We find that whilst the claimant did complain about the amount of post, and in particular the amount of scanning there was to be done, she did so in a manner that was no different to other staff complaining about how busy the surgery was. We do not find that the claimant told Ms Evans that the amount of scanning, or having to juggle that with other tasks, was causing her difficulties relating to her disability. Indeed, when questioning Ms Evans about the scanning on 28 November 2019, the claimant said she was not fatigued by the amount of post and that she had gone home that day at 4pm with the post not all scanned in simply because there was too much post, and she was at the end of her working day.

**Assistance for the claimant**

70. The claimant says that she asked for another member of staff, Camille, to help with her work and although it was agreed by Ms Evans it never happened. She also says when she asked for Camille to help, she was laughed at. She said in evidence that Camille had been sent to help with the post on induction and that Ms Evans had said once Camille had been trained on reception she would come to help with the scanning of the post.
71. Ms Evans said in evidence she could not really remember a conversation with the claimant about Camille or Camille going to help with the post when being inducted. However, she also said that Camille was doing an induction in each post and that she thought there was more of a need for Camille to do secretarial work than post. She said she had no recollection of saying to the claimant that Camille would come to help the claimant.
72. We consider it likely that there was a conversation in which the claimant asked if Camille could help with the post but that it is likely this request related the amount of post/scanning to be done and the claimant did not specifically tell Ms Evans that she needed help for disability related reasons. We consider it likely that Ms Evans was facing competing demands for resources in an over stretched practice and at the time put Camille to work where she saw there was overall the greatest need. We consider that Ms Evans having to make difficult decisions about staff resourcing rather than her setting out to make a decision to inconvenience or disadvantage the claimant. We also do not find that Ms Evans laughed at the claimant.



**The flu jab list phone call**

73. The claimant was given a list of vulnerable cancer patients to call about a flu jab. Different dates are given for this as being possibly either 12 November or 14 November or 21 November. The claimant was unable to complete the list in her working day. She says that at the end of her shift she went into Ms Evans' room with the list, but Ms Evans was not there, so she placed the list in her locker. The claimant was not in work the next day. She says she was also due to take some holiday the following week.
74. Ms Evans did not expect the claimant to get through the whole list and expected the claimant would make it available for someone else to take over. She says that was the usual practice. The next day Ms Evans looked for the list, could not find it and so at 8:30am telephoned the claimant at home.
75. The fullest account of what it said to have happened in that phone call is in the record of the claimant's grievance interview. She said Ms Evans asked her where she had got to on the list and that she gave Ms Evans the name of the patient she had last contacted, about halfway up the list. She said Ms Evans then asked where the list was, and the claimant said it was in her locker. She said that Ms Evans said, "well its no good in there is it" and that she had responded to say, "well you printed the list you can print the list off." She said Ms Evans then said, "Well if you are not going to be in I will give it to Helen" and then hung up. In her grievance letter the claimant also said that she told Ms Evans it was not appropriate for Ms Evans to contact her when she was not in work and that it was then Ms Evans had said "if you are going to be off, I'll have to give the job to Helen, goodbye," before hanging up. She says that Ms Evans was seeking to dissuade her from taking leave the following week.
76. The claimant says that it was inappropriate for Ms Evans to call her at 8:30am on her day off and when she had severe fatigue. She says Ms Evans did not need to ask her about the flu list anyway as Ms Evans had the up-to-date information on the systems as the computers update patient information overnight. She said the list was a point of reference for her alone if she had to come back to it. The claimant alleges that Ms Evans only rang her to shout at her and that Ms Evans was abrupt with her and hung up on her.
77. Ms Evans accepts she phoned the claimant and says that she was calling to ask where the list was. She says when she explained why she needed it, the claimant said it was in the claimant's personal work locker. Ms Evans says she was surprised by this and was trying to understand what had prompted the claimant to leave the list in a locker that no one else would have access to. She says the claimant became defensive and she told the claimant that patient information should not be stored in personal lockers and should be available for another member of staff to takeover. She did not recall asking the claimant to come in to work and said she did

not hang up on the claimant as she needed to resolve the issue and did not want to leave this task until the claimant was next in. She said in the end she reprinted the list, and it was double checked against booked appointments to avoid duplication.

78. We do not find that Ms Evans behaved unreasonably in that phone call. The flu jab arrangements were important. It was not appropriate for the claimant to put the list in her personal locker when she was not going to be in work. We do not accept that it was valueless to anyone other than the claimant. It was a starting reference point and a helpful aid for anyone picking up the task. We accept Ms Evans' evidence that it would be normal practice and the expectation that the list would be left or passed for another member of staff to work on. It was appropriate for Ms Evans to call the claimant to simply ask where the list was, and we accept that was the purpose of the call. The claimant had not told Ms Evans she did not want to be called about work related matters on a non working day and she answered Ms Evans phone call at the time. We consider that during the phone call Ms Evans expressed her views on what was an important subject in a matter of fact way including telling the claimant that such lists should not be stored in a personal locker and that she said she would have to give the list to someone else if the claimant was not in. Mrs Evans was justified in making those comments in the circumstances even if the claimant did not like what she was hearing.

**Phone call of 29 November 2019**

79. On 28 November 2019 the claimant says Ms Evans spoke with her about tasks to get through that day and asked her to get through the scanning and some gateway call down tasks. (The gateway is where some digital post can be downloaded). The claimant says that it was never a possibility that all the post was going to be completed and so her understanding was that the instruction was to get through as much as she could. The claimant says there were about 400 letters to process, and she did 111 between 1:30pm and 4pm. She says that in the morning she had dealt with 89 returns from the previous day's post, where she was placing codes into medical records following their assessment by Ms Massey or the GPs. The claimant accepted in evidence that the pile of post may have looked about the same size to Ms Evans because more post came in in the afternoon, but she says if Ms Evans had checked the logs Ms Evans would have seen the work the claimant had done.
80. Ms Evans said in evidence that Ms Massey told her that she did not have much coding to do and that there was a big backlog of scanning. She said that whilst the post and scanning could be said to be never ending, the backlog at this time was particularly large. She says she therefore decided to speak with the claimant about it. She says she asked the claimant if she would get through it and the claimant said she thought she would get through the scanning by 4pm. She said her understanding was that the

claimant was saying she would get through the backlog and that the claimant had not said there was too much there to complete. Ms Evans said that when she went in the next day she expected the post pile to look significantly reduced but it looked like the post pile had not moved. Ms Evans said that Ms Massey told her that the claimant had not done the scanning in the afternoon. She said she did not check the logs for herself because she trusted Ms Massey. Ms Evans said Ms Massey also said the claimant had not pulled down the gateway.

81. Ms Evans accepted in evidence that if the claimant had spent the morning coding returns then that was part of the claimant's job and that she did not ask Ms Massey what the claimant had been doing. Ms Massey had told Ms Evans she was waiting for the claimant to start the scanning and the claimant had not done so.
82. Ms Evans therefore rang the claimant at 8:33am at home on the morning of 29 November 2019. It was a non working day for the claimant. In the subsequent grievance meeting, the claimant's account was that Ms Evans had asked her if she was busy, the claimant had said no, and that Ms Evans had then said, "well you are going to come in then, you are going to come in and you are going to do the work you didn't do yesterday." The claimant said in the grievance meeting that her response had been to ask what Ms Evans meant and that Ms Evans said, "when I left to go to my meeting there was a stack of post on your desk and when I came back from my meeting the stack of post was still there." She said she tried to explain that she had processed 111 letters and that Ms Evans shouted loudly (such that the claimant's husband heard her from another room) "You haven't done the gateway either." The claimant says she tried to explain that the gateway was not working, and Ms Evans spoke over her saying "you still haven't done it". The claimant says that she also said in relation to the gateway that she did not always do it and sometimes Ms Massey did it and that Ms Evans said, "don't bring Jill into it."
83. The claimant says that Ms Evans said again that the claimant would come into work, and she told Ms Evans not to speak to her like that. She says Ms Evans replied: "on the contrary, don't you speak to me like that, I never pull rank but I am pulling rank now I have got the post to manage, you will come in and you will do this post." She said Ms Evans ended by saying "have a think about what you have done and phone me back" before hanging up..."
84. The claimant says that Ms Evans was loud and rude, and the conversation made her feel incredibly upset, humiliated and degraded and she could not believe that somebody would speak to her like that, after 24 years service and early in the morning on her day off. She said she felt attacked in her own home and physically sick and that if it had been anyone else she would have called the police because the call was so threatening and nasty. The claimant says that Ms Evans only rang her to shout at her and

- that Ms Evans deliberately used her personal mobile to make the call because she knew if she used the surgery phone line the call would be recorded. The claimant accepted that Ms Evans may have been stressed when making the call and that Ms Evans' behaviour was out of character. She said they had previously had a great working relationship and regarded them to be friends, so she expected Ms Evans to tell her that Ms Evans was stressed and not take it out on her without any explanation. The claimant accepted that Ms Evans was right to think the post tray looked bigger than when Ms Evans had left but that was because more post had come in in the afternoon. She said instead of asking or checking the post logs Ms Evans just presumed that the claimant had not done her job.
85. Ms Evans says that she telephoned the claimant to ask her to come in to do overtime. She says the claimant asked why, and Ms Evans then said the claimant had not done the scanning they had agreed and had not done the pull down tasks. She says the claimant told her she had been doing other things and that she asked the claimant "why haven't you don't the tasks that you agreed, that's your job." Ms Evans says the claimant said: "how dare you tell me I haven't done my job" and when she replied: "yes because you haven't" that the claimant then became aggressive shouting how dare you accuse me of not doing my job, anyway Jill Massey knows how to do it." Ms Evans says she replied, "because I am your manager and I can tell you that you have not done your job properly" and that she said the claimant should leave Jill Massey out of things as it was not her job (i.e. the gateway). She says that at this point both of them were speaking with raised voices. She says that she said to the claimant she did not want the conversation to continue in that vein and she asked the claimant to think about things and call her back. Ms Evans said she did not check the post logs to see what work the claimant had done because she trusted what Ms Massey had said to her. She accepted in evidence that she had been irritated with the claimant.
86. Ms Massey in her written statement says that she had heard Ms Evans ask the claimant on a number of occasions to scan the post and that the claimant said she would. Ms Massey says the claimant did not do it, but she thought the claimant would do it that afternoon after Ms Massey had left for the day. Ms Massey says the following day she overheard Ms Evans raising her voice and she knew it was with the claimant as Ms Evans was referring to the conversation about the scanning. Ms Massey says Ms Evans sounded frustrated and later said she had asked the claimant to come in to do overtime to complete the work that the claimant had been asked to do the day before. She says Ms Evans said they had both raised their voices in the call. She says she personally saw it as a little spat at the time.
87. The claimant ultimately never returned to work after this phone call.

88. We accept that Ms Evans was concerned about the size of the post backlog at that time and that she thought, following her discussion with the claimant, that the claimant had said, in effect, that she would make significant progress with clearing it. The next day the post pile looked like it had not gone down, and Ms Massey told Ms Evans that the claimant had not done the scanning and had not pulled down the gateway. Bearing in mind that matched her own observations of the post pile Ms Evans took what Ms Massey was saying at face value.
89. Ms Evans was therefore annoyed with the claimant and wanted the claimant to come in and do the work. She therefore decided to phone the claimant. We accept it is likely that Ms Evans demanded that the claimant come into work to finish the work, rather than making a request of the claimant. When the claimant asked what she meant, Ms Evans said words to the effect that the stack of post had not gone down, and the claimant had not pulled down the gateway. It is likely that the claimant said she had been doing other things and Ms Evans said the claimant's job was to do the tasks that had been agreed. Ms Evans also said words to the effect that she was pulling rank or was the claimant's manager and that the claimant had not done her job properly and would come in to do it. We accept it is also likely Ms Evans concluded the call by saying words to the effect the claimant should have a think about things and call Ms Evans back. It is likely that Ms Evans was speaking forcefully and with a raised voice given (and we accept) both the claimant's husband and Ms Massey could hear raised voices from other rooms in their respective locations.
90. We accept and find that the claimant also raised her voice too as the call went on. She was offended by being accused of not having done her job. She said somewhat petulantly that Ms Massey knew how to do it, inferring that Ms Massey should or could be doing the gateway task.

**Communication with the claimant thereafter**

91. The claimant was very upset after the phone call with Ms Evans and contacted Dr Gil-Candon. They had a long phone call lasting about an hour during which the claimant said she would not return to work unless Ms Evans was dismissed or resigned. Dr Gil-Candon says, and we accept that the concerns the claimant expressed were dominated by the phone call with Ms Evans, but that the claimant had also mentioned that she had too many letters to process and Dr Gil-Candon and said if it was too much for the claimant, they could also look at reducing the job the claimant did. Dr Gil-Candon said she also needed to get Ms Evans version of events and suggested that they meet on the Monday.
92. On the Monday Dr Gil-Candon then received an email from the claimant to say she was seeing her GP to get a sick note and she wanted to raise a grievance. The claimant was given an initial sick note for 3 weeks.

93. At some point the claimant then spoke with Dr Douglass and said she wanted Dr Douglass to know her side of the story. Dr Douglass asked the claimant what they could do and suggested an informal meeting with Dr Gil-Candon to see if it could be sorted out. She says, and we accept, that the claimant again stated she would only return to work once Ms Evans had left the practice.
94. Either at the end of December 2019 or early January 2020, when the claimant's first sick note came to an end Ms Evans contacted her to see how she was and to see if there was a way to resolve things. The claimant said she was still not well and was going back to her GP and that she did not know how it could be resolved. The claimant was given a further sick note to 19 January 2020.
95. On or around 17 January 2020 Dr Douglass made arrangements with the claimant for her to come in for a meeting on or around 23 January 2020. Before that meeting took place the claimant's solicitors sent a letter on 17 January 2020 indicating the claimant had claims for constructive unfair dismissal and disability discrimination and seeking a termination of employment with a settlement agreement. This was followed by a grievance letter from the claimant dated 20 January 2020. The grievance raised complaints about being given data input work rather than summarising work, being contacted on her days off, the way Ms Evans spoke to the claimant on 29 November, the claimant's increased workload and lack of assistance and that her medical condition had not been taken into account and had been exacerbated. She said she was being targeting because she was unable to offer additional hours due to her condition and fatigue. The grievance letter added "separately, since I have been diagnosed with MS, I have asked for reasonable adjustments to be put in place, such as a downstairs toilet and somewhere for my car to park close to the building." The grievance letter did not raise any issue about the stairs or the door, or the carpark barrier. It also suggested there was no downstairs toilet when in fact there is.
96. The anticipated meeting then did not take place. Dr Douglass emailed the claimant saying she had spoken to Dr Gil-Candon and something had come up for Dr Gil-Candon such that they could not make the meeting the following day and also said: "plus since we have now had your email we need to see what the HR company advises now ... this is all new territory for us."
97. The solicitor's letter and the grievance letter were passed on to the respondent's HR advisors, Peninsula Business Services. They told the respondents not to respond and they would deal with it. In particular, they said that a formal grievance process needed to be followed which they would handle.
98. On 27 January the claimant was signed off further from work for the period 19 January to 29 February 2020. The grievance letter was acknowledged

on 3 February 2020 in a letter from Dr Gil-Candon in which the claimant was invited to a meeting with a Face2Face consultant from Peninsula on 7 February 2020. The claimant attended the grievance meeting on 7 February 2020. Peninsula prepared a grievance report dated 13 February 2020.

99. The grievance findings are at [89] to [95] of the bundle. The claimant's grievance was not upheld. The claimant appealed in a letter of 21 February 2020. Within her appeal she raised the fact it would be easier for her to work from downstairs as she would have access to the signing in and out book and would not have to use the stairs which caused her fatigue. She also raised the fact that she considered the downstairs toilet was not suitable as she did not consider it met health and safety standards and she found the disabled toilet, used by patients to be unpleasant in terms of cleanliness. She also raised the difficulties with car park barrier and being told that she cannot park outside the surgery.
100. On 27 February 2020 the claimant was invited to an appeal meeting with another representative of Peninsula on 3 March 2020. The grievance appeal report is dated 12 March 2020. The claimant's appeal was partially upheld on the basis that the first stage grievance investigator had not spoken to other members of staff other than Ms Evans, and in particular Ms Massey. It was also partially upheld on the basis that the grievance conclusion did not mention the issue of the claimant working downstairs. It was recommended that the post be brought up to the claimant to stop her having to go up and down the stairs frequently in the day or to look at the possibility of moving the claimant downstairs. Workplace mediation was suggested to try to rebuild a professional working relationship between the claimant and Ms Evans, and it was said there should be a handover of work at the end of each shift and a workstation assessment for the claimant.
101. On 27 March 2020 Dr Gil-Candon wrote to the claimant inviting her to attend a mediation meeting. Dr Gil-Candon sent a further letter on 8 April 2020 asking for a response by 16 April 2020. That day the claimant wrote stating she wanted to raise a further grievance, that mediation was not an option as her concerns had not been addressed and there was no willingness on the part of the surgery to admit that Ms Evans behaviour was unacceptable and unreasonable. The claimant sought confirmation that correspondence had been received from her solicitors dated 9 April 2020.
102. On 24 April 2020 the claimant submitted her resignation letter, resigning with immediate effect. On 30 April 2020 Ms Evans wrote to the claimant asking her whether she wanted to reconsider and expressing concern there could be some underlying issues with the claimant's employment that they needed to address. She said correspondence had not been received from solicitors and she was unaware of its content. In fact, the

correspondence had been passed to Peninsula, who did not respond to the claimant's solicitors. The claimant says there were 4 solicitor's letters which were not responded to dated 17 January 2020, 21 February 2020, 29 March 2020 and 8 April 2020. We were not given a copy of the solicitor's correspondence, but it is not in dispute that it related to seeking the termination of the claimant's employment by way of a settlement agreement as opposed to mediation or the claimant's return to work or that there was no response. The claimant says that on 22 April her solicitor wrote to say there remained no response from the surgery and she says she then realised that all attempts to negotiate with the practice had failed and she had no choice other than to resign.

### **Discussion and Conclusions**

#### **Constructive Unfair Dismissal**

103. Applying our findings of fact to the issues to be decided in this case, we start with the constructive unfair dismissal claim and the particulars the claimant relies upon as being said to breach trust and confidence in the list of issues.
104. The claimant alleges that Ms Evans held a negative attitude towards her and wanted the claimant to leave the surgery after the claimant refused to take early retirement on medical grounds. We have found as a matter of fact that the offer to explore ill health retirement was made in good faith and had been genuinely considered by the claimant with her GP. We do not find that the offer was without reasonable and proper cause or that, when viewed objectively, it was conduct calculated or likely to damage the relationship of trust and confidence. We have also found as a matter of fact that Ms Evans did not hold the claimant's decision against the claimant or that she was seeking to then force the claimant out.
105. The claimant says that the respondent refused her request to locate to a downstairs room made due to both her mobility issues on the stairs and to be nearer to a downstairs toilet. She also alleges that the respondent refused to make accessible access to the building by changing the entrance doors. We have not found as a matter of fact that the claimant made a request to locate to a downstairs room because of difficulties with the stairs or because she wished to be nearer to a downstairs toilet and in turn there was therefore no refusal of such a request. We have also not found that the claimant made a complaint about the doors. As such the alleged refusals cannot amount to conduct calculated or likely to damage the relationship of trust and confidence. When it was raised in the grievance process, the respondent said a downstairs move could be sorted.
106. The claimant relies on an alleged refusal to help her with parking, saying even though there were accessible spaces outside reserved only for GPs and even though the spaces were regularly empty, and she was also



asked to move her car within working hours. Looking first at the allegation of being required to move her car, we have found as a matter of fact the small number of occasions when the claimant was asked to move her car (whether from the front of the surgery or the carpark opposite) were for specific reasons such as her car blocking the bins or unknowingly blocking in a patient. We are satisfied that such requests had reasonable and proper cause.

107. The claimant complains about the knock-on effect in terms of her having to move her car within working hours with no reduction in her workload. We do not consider this amounted to conduct without reasonable and proper cause that was likely to damage the relationship of trust and confidence. Viewed objectively, an occasional request for a worker to move their car is the type of request made regularly in a multitude of workplaces day in day out and would not require discussions about reducing someone's workload for the time spent. The claimant did not generally have a set requirement to get through a certain number of pieces of correspondence meaning she was at risk of being penalised in some way because she had spent time moving her car. She was generally trusted to get on with her work and do what she could within her day's work, which would factor in this kind of occasional request. We have not found that the claimant communicated to the respondent that being asked to move her car would cause her difficulties related to her disability.
108. In relation to the claimant's wider complaint that the respondent refused to assist her with parking, we have not found that the claimant, prior to the grievance process, made a complaint about parking or that any difficulties the claimant had with parking were known to the respondent, including securing a parking space or opening and moving the carpark barrier. In turn there was therefore no refusal to assist. When parking was raised in the grievance process the respondent stated adjustments could be made for the claimant. There has therefore not been conduct by the respondent in this regard that was without reasonable and proper cause and likely to damage the relationship of trust and confidence.
109. The claimant alleges that Ms Evans constantly asked her to do overtime whilst knowing it was not possible and that Ms Evans had a negative attitude when the claimant refused to do so. We have not found that Ms Evans constantly asked the claimant to do overtime. The surgery in general was very busy and Ms Evans would offer all staff, including the claimant, overtime. The claimant had the option to accept it or decline it. The claimant had historically worked overtime. She started declining but we have not found that she told Ms Evans that this was because of fatigue related to her multiple sclerosis or that she wanted Ms Evans to stop asking her to work overtime because it was making the claimant feel bad or under pressure. Furthermore, the claimant took on additional hours. Whilst this was to do summarising work, we have not found that the claimant told Ms Evans that she only wanted to do summarising because

- she found it less tiring than data input. Ms Evans believed the claimant enjoyed summarising more. As such we have not found that Ms Evans had any reason to consider that asking the claimant if she wanted to do overtime was inappropriate in the claimant's circumstances. We have not found that Ms Evans knew it was not possible for the claimant to do overtime. We have also not found that Ms Evans generally had a negative attitude to the claimant because the claimant was declining overtime. The offers of overtime had reasonable and proper cause and they did not, when viewed objectively and in light of the findings of fact made, amount to conduct calculated or likely to damage the relationship of trust and confidence.
110. The claimant asserts that Ms Evans made unreasonable requests for her to do more jobs such as opening post, covering reception and compiling lists. She says that while she agreed to do the tasks, she was not given extra time to complete her main job of data input. She also says she was laughed at when she asked if another member of staff could help, and the help was never given. The claimant did not have an issue with undertaking the tasks themselves and accepted that they were within her job description. The actual requests to do the tasks therefore had reasonable and proper cause and were not calculated or likely to undermine trust and confidence.
  111. The claimant's complaint is more that her other responsibilities were not reduced to reflect time spent on these other tasks, and in particular scanning. The claimant did not enjoy the scanning work. The claimant complained that there was too much work to do in the same way that all staff and doctors were complaining in general that the surgery was too busy. But we have not found that she asked for her scanning to be reduced or said she was feeling overloaded, and it was making her unwell. Moreover, we have found that in general there was no requirement for the claimant to complete a set amount of scanning in each day she was working. Ms Evans was aware if the claimant was doing other tasks she was not scanning and that the scanning was never ending. Later on, the claimant did make a specific complaint to Dr Gil-Candon that she felt she had too much scanning to do. It was then made clear that they could look at that with the claimant. Set in that wider context we do not find that the claimant's workload was without reasonable and proper cause or was conduct calculated or likely to undermine trust and confidence. Ms Evans was spreading tasks out across her staff as she could when faced with a surgery that had many competing demands. She was not generally pressurising the claimant to complete a certain amount of work but accepted that all the claimant could do was fair day's work.
  112. We do not find as a matter of fact that Ms Evans laughed at the claimant when the claimant asked if Camille could help with the post. We have found that Ms Evans indicated that Camille may be able to help at some point, but she was inducting Camille in all of the administrative fields in the

- practice. It turned out that at the time Ms Evans considered that there was a greater need for Camille to help out in other areas. Ms Evans was juggling limited resources as the practice manager, and it was her job to make those decisions. It was not a decision made in the context of knowing that the claimant was struggling with work for disability related reasons or generally undue pressure being placed on the claimant. As such we do not find that the non-allocation of Camille to scanning/post work was conduct without reasonable and proper cause or that it was calculated or likely to damage the relationship of trust and confidence.
113. The claimant relies upon the removal of the summarising work. We have found it was removed because at the time Ms Evans did not have sufficient staff resources to undertake the transfer of the Lloyd George cards over to the A4 folders. She did not wish to pass that administrative aspect over to the claimant because it could be done by a very junior worker and would mean the claimant would spend less time doing the actual summarising. She did not consider that to be an efficient use of resources. Again, that was a decision that was within Ms Evans' ambit as practice manager to make. It was a decision that had reasonable and proper cause, and we have not found that it was done deliberately to trick the claimant into working more hours undertaking data input. Ms Evans belief was that she owed those hours paid work to the claimant and she therefore asked the claimant to do data input work until the summarising work could return. The claimant did so. She did not say to Ms Evans that she wanted to revert to her old hours if there was no summarising work. All parties expected that the summarising work would return at some point as there were plenty of patient records outstanding. Ms Evans' actions, set in that factual context, had reasonable and proper cause and were not calculated or likely to damage the relationship of trust and confidence.
114. We have not found that Ms Evans made a threatening and harassing phone call to the claimant about the flu jab list. Ms Evans expected the claimant to leave the flu jab list somewhere where it would be accessible so another member of staff could pick it up. Ms Evans had reasonable and proper cause to briefly call the claimant at home to find out where the list was. The allocation of the appointments was important to the patient group and needed to be completed. The claimant picked up the phone call knowing who was calling and therefore that, amongst other things, Ms Evans might have some kind of quick practice related enquiry for her. She had never told Ms Evans not to call her on non working days. When Ms Evans learned the list was in the claimant's personal locker where it could not be accessed, Ms Evans had reasonable and proper cause to tell the claimant that it should not be kept there and that she would have to give the list to someone else to complete. What Ms Evans said may well have subjectively not been well received by the claimant and it may have been a somewhat terse exchange, that the claimant contributed to by telling Ms Evans that she should just reprint the list. However, set in its context and

- viewed objectively, we do not consider that either what was said or the manner in which it was said by Ms Evans was without reasonable and proper cause or that it was conduct calculated or likely to damage trust and confidence.
115. We turn therefore to the phone call of 29 November 2019. We do consider that some of Ms Evans' conduct in making and during that phone call was inappropriate and unreasonable. Ms Evans was irritated with the claimant and thought the claimant had not done her work. We accept that from her perspective it was reasonable of Ms Evans to have a concern about whether the claimant had done what Ms Evans considered the claimant had promised to do, based on what she had been told by Ms Massey and having viewed the pile of post. Ms Evans had no particular reason to doubt Ms Massey and it seems a counsel of perfection made with the benefit of hindsight to say Ms Evans should have gone and checked the post logs before taking any other step, such as asking the claimant what had gone on the day before.
116. However, what was inappropriate was how Ms Evans dealt with that situation. The phone call was not a quick query to clarify a straightforward matter on the claimant's non working day. Ms Evans rang the claimant on her non working day both to express her irritation and to require the claimant to come into work to do the work Ms Evans believed was undone. Notwithstanding we accept it is likely that Ms Evans was stressed and concerned about the post backlog, if Ms Evans wanted to speak to the claimant about what had happened the day before or raise a conduct matter it should properly have been done in the work environment, on a working day and done in an appropriate way where the claimant was asked what work she had been doing the day before. The phone call went beyond, for example, Ms Evans making a light touch enquiry as to how much post the claimant had been able to scan the day before or a simple query whether the claimant was free for overtime. Ms Evans, we have found, during the phone call demanded that the claimant come into work, and said that the claimant had not done her job properly. We do not find that Ms Evans was threatening or "harassing" the claimant, but we do accept that she spoke forcefully and with a raised voice.
117. Notwithstanding the stress that Ms Evans was no doubt under, the manner in which she conducted herself during that phone call was without reasonable and proper cause. It was also conduct that was likely to harm the relationship of trust and confidence. However, and we have considered the point with considerable care, we do not find that the conduct of that phone call by itself met the threshold of being a repudiatory breach. Viewed objectively and within context we did not consider that it met the threshold of being conduct that was calculated or likely to *destroy or seriously damage* the relationship of trust and confidence. Put another way it was not conduct that was a significant breach going to the root of the contract or conduct that in its cumulative

- effect, viewed objectively, meant that the claimant could not be expected to put up with it any longer and could treat herself as being discharged from any performance of the contract of employment.
118. The claimant had worked at the surgery and with Ms Evans for some 24 years. They were colleagues and friends. It was the first incident of such nature in all that time. The claimant knew it was likely that Ms Evans was stressed and that her behaviour was out of character. Viewing objectively the conduct in the phone call within that context we considered it was a situation and a relationship that was not completely destroyed or seriously damaged to the requisite threshold. We consider that viewed objectively the relationship was a retrievable one if there was communication between the parties to clear the air and to set the parameters for what was and was not appropriate going forward. We consider that is a process that objectively an employee in that situation, and with that particular working relationship and length of service, would go through before reaching a conclusion that the conduct was such that the situation was intolerable, and they could not be expected to put up with it any longer. Ms Evans conduct was inappropriate but, in that context, it did not meet the high threshold of being a repudiatory breach.
119. We have not found that there was any earlier improper conduct that is to be viewed cumulatively with the events of 29 November such that the requisite threshold would be reached. We therefore go on to consider whether there was any consequential conduct which, added with 29 November, met the appropriate threshold.
120. The claimant says that there was no communication or willingness to discuss matters by the respondent which led to a failure of trust and fear of Ms Evans. We do not find that was the case. Dr Gil-Candon spoke with the claimant the same day and listened to the claimant. The claimant was in obvious and considerable distress. Dr Gil-Candon said they should meet on the Monday. That did not happen because the claimant said she was going sick and was considering raising a grievance. The claimant was not saying she wanted the meeting to go ahead on that Monday. It is not unreasonable or improper in such a situation for an employer to take a period to see what is happening with an employee's health and whether a formal grievance was going to arrive and to seek professional advice. The claimant then spoke with Dr Douglass who again listened to the claimant. She again then sought to arrange an informal meeting. Dr Gil-Candon became unavailable on the date, but it would have been cancelled in any event because the claimant's solicitor's letter then arrived closely followed by her formal grievance. In the face of a now received formal grievance it is not unreasonable or improper in those circumstances for an employer to place an informal meeting on hold and instead utilise a formal grievance procedure. The grievance procedure whilst formal is designed to achieve the resolution of the exact same disputes. The claimant was therefore not left without communication or an unwillingness to discuss things. Her

grievance letter was acknowledged, and she was invited to a grievance meeting. Thereafter the next steps in that process, including at appeal stage were communicated to her. The grievance process also ultimately culminated in a willingness to discuss matters with the claimant through mediation. It was the claimant who did not wish to go through that process. In addition, at an earlier stage Ms Evans had also contacted the claimant to see if they could resolve things. In the context of what had happened and their longstanding relationship that was not improper and again was an attempt to engage with the claimant.

121. The claimant's solicitor's letters had no response. They were without prejudice letters that were not in the bundle, but which were referred to in the pleadings and in witness statements. In closing submissions we clarified with the parties whether the allegation and the evidence could be properly before us bearing in mind the common law principles of without prejudice or section 111A of the Employment Rights Act 1996. The respondent's counsel considered the matter and accepted that the point could be properly before us. It was accepted that common law privilege had been mutually waived and that the circumstances fell under section 111A(4) in that the claimant's allegation (albeit not accepted by the respondent) was that not responding to the solicitor's letters was improper conduct.
122. It was discourteous of Peninsula to at least not acknowledge the solicitor's letters. However, these were without prejudice correspondence in which the claimant, via her solicitor, was anticipating employment tribunal complaints of constructive unfair dismissal and disability discrimination and was seeking the termination of her employment under the terms of a settlement agreement. The letters were not about matters of grievance or offers of mediation or reconciliation or about a return to work. There is nothing wrong with seeking an agreed exit, however, not engaging in negotiations about an agreed termination under a settlement agreement cannot amount to conduct that that would harm mutual trust and confidence in the employment relationship. It cannot be said that a refusal to agree terms that would allow an employee to leave employment with an exit package is conduct that undermines trust and confidence in the continuation of the employment relationship. A request for an agreed exit is the antithesis of a negotiation for a return to work or the continuation of the employment relationship. Aside from the solicitor's letters on that discrete point, the respondent was engaging with the claimant in the grievance process about the employment relationship and was willing to discuss matters with her. The claimant was specifically asked in the grievance process what could be done to resolve her grievance. She said she was not able to identify anything other than, in effect, she did not know as she was not able to work with Ms Evans. Whilst she said it in these tribunal proceedings, she also did not say in the

grievance process that she thought there was some middle ground if Ms Evans were due to retire (in fact she has not).

123. We therefore do not find that the respondent failed to engage or have further discussion with the claimant as alleged. As such there was no other material undermining of the duty of mutual trust and confidence such as to, together with the events of 29 November 2019, mean that cumulatively the respondent was in repudiatory breach of contract. The claimant resigned and was not dismissed. Her constructive unfair dismissal claim is therefore not well founded and is dismissed.

### **Discrimination arising from disability**

124. The list of issues asserts that the claimant was treated unfavourably by overlooking her for other roles/duties and by allocating her more menial tasks following her refusal of a request to work extra hours. We have not found as a matter of fact that the claimant was overlooked for other roles/duties. We have also not found, and the claimant did not herself assert in evidence, that she was allocated menial tasks. In reality the claimant's complaint seems to be more that her scanning work was not reduced.
125. We do not consider that this amounts to unfavourable treatment because of something arising in consequence of the claimant's disability. Even if it could be said that giving the claimant scanning work amounted to unfavourable treatment, such treatment was not because of something arising in consequence of the claimant's disability. What matters here is what was in Ms Evans' mind. The claimant's complaint is predicated on the basis that because she refused to work overtime (because of the effects of her disability), that Ms Evans then gave her too much scanning to do. However, we have not made any finding of fact that the claimant's scanning work allocation was related to the claimant refusing to work overtime and we have found that Ms Evans held no ill will to the claimant in respect of the claimant declining overtime. The treatment was therefore not because of something arising in consequence of the claimant's disability (an inability to work overtime).
126. The discrimination arising from disability claim is therefore not well founded and is dismissed.

### **Reasonable adjustments**

127. Turning to the reasonable adjustments claim, we do not find that the respondent knew or could reasonably be expected to know that the claimant had difficulty in climbing stairs. We have made a finding of fact that the claimant did not report such a problem to the respondent, whether Ms Evans or the doctors. When the claimant was first diagnosed and her hours of work reduced, she said that she would let the respondent know if

she considered further adjustments were required. She did not ask for such further adjustments. The stairs are open plan. We have found that the respondent did not witness the claimant having any difficulties with the stairs. The claimant's condition had not visibly changed to the respondent. We therefore do not find that there was anything that reasonably put the respondent on notice that the claimant was having difficulty with the stairs such as to trigger the duty to make adjustments. When it was raised during the grievance process, the respondent said they could make arrangements to move the claimant downstairs.

128. We also do not find that the respondent knew or could reasonably be expected to know that the claimant was unable to open the carpark barrier. We have made a finding of fact that the claimant did not raise any difficulties with the respondent that would give them actual knowledge. We have also not found that the respondent, saw, for example, the claimant struggling with the carpark barrier. The respondent knew that the claimant suffered with fatigue and with leg numbness. We have made no finding that the claimant told the respondent about difficulties with her upper limb mobility or strength. In circumstances in which difficulties with the stairs were not reasonably anticipated by the respondent despite knowing of the claimant's leg numbness, and in circumstances in which they did not know about any upper mobility difficulties, then we do not consider that the respondent could reasonably have been expected to know about the claimant having difficulties with upper limb activities such as the carpark barrier. When parking difficulties were raised in the grievance process the respondent said arrangements could be made.
129. Finally, we do not find that the respondent knew or could reasonably be expected to know that the claimant had difficulty opening the front door to the surgery. We have made a finding of fact that the claimant did not report any difficulties. We would also repeat our observation above as to the respondent's lack of knowledge of the claimant having upper limb difficulties. Furthermore, the claimant did not ring the bell or ask colleagues to get the door for her which may otherwise have placed the respondent on notice, and she accepted in evidence that Ms Evans did not know how bad it was for the claimant.
130. The complaint of a failure to make reasonable adjustments is therefore not well founded and is dismissed.

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Employment Judge R Harfield  
Dated: 14 January 2022

JUDGMENT SENT TO THE PARTIES ON 17 January 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche