



# EMPLOYMENT TRIBUNALS

**Claimant**  
Z

v

**Respondent**  
Y

**Heard at:** Bury St Edmunds

**On:** 30 September 2019 and 1, 2 & 3 October 2019  
5 & 6 December 2019 (Discussion days – no parties present)

**Before:** Employment Judge Laidler

**Members:** Mrs L Daniels and Mr B Smith

**Appearances:**

**For the Claimant:** Mr Z, Husband.

**For the Respondent:** Mr A Hodge, Counsel.

## RESERVED JUDGMENT

1. The claimant was not dismissed contrary to section 95(1)(c) Employment Rights Act 1996 ('ERA') and her claim of constructive dismissal must fail and is dismissed.
2. The tribunal does not have jurisdiction to determine the complaints of disability discrimination as they were submitted outside the statutory time period laid down in section 123 Equality Act 2010 ('EA') and it is not just and equitable to extend time
3. If the tribunal had found the claims in time all disability discrimination claims would have been dismissed as not well founded save for the following:
  - 3.1 That the claimant was treated unfavourably because of something arising in consequence of her disability contrary to section 15 EA and the respondent has not shown the treatment to be a proportionate means of achieving a legitimate aim when W on 31 January 2018 informed the claimant that he would no longer allow the possibility of her returning to her role under any circumstances,
  - 3.2 That the respondent failed to make reasonable adjustments contrary to section 20 EA when W enforced a practice that all members of the team need to be co-located at a specific desk location in E H for operational reasons.

## REASONS

1. The ET1 in this matter was received on the 23 October 2018. The claimant brought complaints of constructive unfair dismissal and disability discrimination.
2. The respondent defended all the claims in its response of the 17 December 2018.
3. There was a preliminary hearing to clarify the issues before this Employment Judge on the 7 February 2019. The claimant was unrepresented and there was a need for further information. The respondent had not conceded disability. The parties were to finalise the list of issues once the further information had been provided.

### The Issues

4. A list of issues appeared in the bundle at page 48a. This was prepared by the respondent from the further information provided and is dated 30 January 2019. There was further discussion about the issues at the outset of this hearing. The claimant accepted that some matters set out in the draft list as direct discrimination or discrimination arising from disability were more correctly described as a claim of a failure to make reasonable adjustments. The following represents the amended list as agreed at the outset of this hearing and which the tribunal endeavoured to ensure was kept to:-

#### Unfair Constructive Dismissal

1. Did the Claimant resign from her employment with the Respondent?
2. If so, did the Respondent breach any express and/or implied terms of her contract of employment by reason of the following acts:
  - a. Causing deterioration to the Claimant's health by failing to conclude their Grievance Process in 2017 within their own timescales, despite being warned by medical experts of the effect this would have, causing further detriment to the Claimant's health if the processes were not concluded and the issues were not resolved quickly enough.
  - b. Causing deterioration to the Claimant's health by failing to follow-up the return to work Risk Assessment of the 15<sup>th</sup> November 2017 in a timely manner. No progress was made for a month, causing stress and anxiety at a time where the Claimant was desperate to return to work. This act discriminated against the Claimant in comparison to a person not suffering from a mental health injury, who would not have suffered anywhere near the same levels of anxiety.
  - c. Failing to make Occupational Health appointments and follow the recommendations from them in a timely manner, and consequently damaging the Claimant's health and her ability to return to work more easily. For example, but not limited to, the

recommendations of the Occupational Health appointment attended on 2<sup>nd</sup> November 2017.

- d. By W refusing on multiple occasions, via telephone conversations, face-to-face meetings on 19<sup>th</sup> and 27<sup>th</sup> December 2017, and subsequent emails to allow the changes requested by the Claimant, which would allow her to return to work.
- e. By W forcing unreasonably 'a phased return to work' practice to commence on 15<sup>th</sup> January 2018, and prior to an up-to-date Occupational Health appointment organised by the Respondent for 18<sup>th</sup> January 2018 – an appointment the Respondent had asked for, in order for the Claimant's Consultant to provide input. This caused the Claimant anxiety and stress and forced her to refuse to return until outcome of Occupational Health report, for the reasons stated in her email to W.
- f. By attempting to dismiss the Claimant, by commencing Ill-Health Capability Dismissal procedures contrary to the Respondent's 'managing absence' process which states that process is triggered when Occupational Health recommend that the "employee is not fit for the current role or any alternative role in" the respondent.
- g. And by acting unreasonably, by issuing the Claimant with an invitation to an Ill-Health Capability Dismissal meeting while she was in her Occupational Health appointment on 18<sup>th</sup> January 2018.
- h. By attempting to follow both the Ill-Health Capability Dismissal process and Redeployment Process during the reconvened Ill-Health Capability Dismissal meeting on 31<sup>st</sup> January 2018.
- i. By enforcing sick pay procedures, resulting in half-pay from 10<sup>th</sup> October 2017 and zero pay from 10<sup>th</sup> February 2018, despite the Claimant's extended sick-absence being attributable to delays by the Respondent, including but not limited to:
  - (i) grievance process taking 90-working days rather than the 20-working day target outlined in the Respondent's Grievance procedure, which caused severe further detriment to the Claimant's health as warned by Occupational Health if the process was dragged out, which it was.
  - (ii) delays scheduling Occupational Health appointments.
  - (iii) delays following up on Occupational Health recommendations.
  - (iv) refusal to make changes that would have allowed the Claimant to return to her permanent substantive role.

- (v) refusal to allow the Claimant back to her permanent substantive role under any circumstances from 31<sup>st</sup> January 2018.
  - j. W discriminating against the Claimant on 31<sup>st</sup> January 2018 (and subsequent dates) that they would not allow the Claimant back to her permanent substantive role under any circumstances, following receipt of the most recent Occupational Health report.
  - k. W refusing to allow redeployment to be explored while the Claimant had a 'without prejudice' discussion; or for the Claimant to have a 'without prejudice' discussion, whilst going through redeployment.
  - l. By W refusing to continue to explore the Claimant's return to the workplace whilst 'without prejudice' discussions continued over several months, and refusing to answer any points raised in her emails regarding returning to work, or to her pay. Each email was disregarded by saying the matter was now in the hands of '... Legal'.
  - m. By leaving the Claimant on zero sick-pay, rather than on Paid Leave while 'without prejudice' discussions were ongoing;
  - n. which indirectly placed unreasonable pressure on the Claimant to accept a 'without prejudice' offer as no other alternative – other than leaving – was available.
  - o. By the Respondent conducting the 'without prejudice' discussions over an unreasonably long period of time, during which time the Claimant had no pay or opportunity to return to her permanent substantive role.
  - p. By the Claimant being left no alternative other than to seek other employment and resign from her role with SFRS on 1<sup>st</sup> June 2018, her reasons for resigning being cited in her resignation letter/email.
  - q. If the Tribunal answers 'no' to Issue 1, then the Claimant reserves the right to add additional claims, should her current contract be terminated on 31<sup>st</sup> March 2019 as has been indicated, without the requisite support and period of redeployment opportunities.
- 3. If so, was the said breach of contract a fundamental breach going to the root of the contract of employment?
  - 4. If so, did the Claimant resign in response to the said fundamental breach of contract?
  - 5. If so, did the Claimant wait too long before resigning and therefore affirmed her contract of employment and/or waived the said fundamental breach?

6. If not, and the Employment Tribunal finds that the Claimant was dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996, was the Claimant dismissed for a fair reason, namely capability, within the meaning of section 98(2)(a) of the Employment Rights Act 1996?
7. Alternatively, was the Claimant dismissed for a fair reason, namely some other substantial reason, within the meaning of section 98(1)(b), of the Employment Rights Act 1996?
8. If so, was the dismissal fair and reasonable in accordance with section 98(4) of the Employment Rights Act 1996?
9. If not, and the Employment Tribunal finds that the Claimant was unfairly dismissed, should there be reduction to any compensatory award to reflect the Claimant's unreasonable failure to follow the ACAS Code of Practice on Disciplinary & Grievance Procedures.

This allegation was not understood on the facts of this case and that the claim is one of constructive dismissal. The allegation was explained as being that the respondent did not follow the ACAS Code in relation to the dismissal meeting as they did not receive an outcome. This was not clarified further as the tribunal made it clear it would deal with liability only within this hearing.

#### Disability Discrimination – Preliminary

##### *Jurisdiction*

10. Does the Employment Tribunal have jurisdiction to consider a number of the Claimant's allegations of disability discrimination on the ground that they were not presented to the Employment Tribunal within the period of three months (as extended by the ACAS Early Conciliation period) beginning with the date on which the alleged act was done?
11. If not, do any of the Claimant's allegations amount to a continuing act?
12. If not, is it nonetheless just and equitable for the Employment Tribunal to consider those allegations which are otherwise out of time.

##### *Disability*

13. Was the Claimant at the material times a disabled person within the meaning of section 6 of the Equality Act 2010?

By the time of this hearing the respondent had conceded that the claimant was at all material times disabled with a mental health condition manifesting in anxiety and OCD (as described in her impact statement)

#### Disability Discrimination – Substantive

##### *Section 13 – Direct Discrimination*

This section was significantly changed at the outset of this hearing. Mr Z confirmed he had looked further into the legal principles and believed that some of these claims could be recategorised.

14. Did the Respondent treat the Claimant less favourably than it treated or would have treated other persons by reason of the following acts:

- a. The Respondent has an Absence Toolkit, which contains their procedures for Return to Work. This policy applies a Phased Return approach based upon working hours. This discriminates against the Claimant, whose ability to return to work required an approach that removed her perceived stressors, rather than varied her hours.

The claimant accepted that this was better put as a claim of failure to make reasonable adjustments with the PCP being the Absence Toolkit. Whilst denying the claim the respondent accepted that the Toolkit could be a PCP.

- b. W enforced a Practice that all members of the team need to be collocated at a specific desk location in Endeavour House for operational reasons. He made it clear that this was the policy for the whole team...

This was already put as a claim of failure to make reasonable adjustments and the claimant accepted that was the correct categorisation of this issue

- c. W, on 31<sup>st</sup> January 2018, informed the Claimant that he would no longer allow the possibility of the Claimant to return to her role under any circumstances. This act took place a few days after he had received the latest Occupational Health report and had a discussion with the Chief Medical Officer regarding how severe the Claimant's condition had previously been (but which, for the avoidance of doubt, indicated the Claimant was recovering and was ready to return to work with appropriate support to reduce her perceived work-place stressors). This action directly discriminated against the Claimant as this decision was taken because of her disability.

- d. On the 5<sup>th</sup> March 2018 the Claimant emailed W asking what was being done to return the Claimant to the workplace, and updates on further Occupational Health appointments, and redeployment opportunities. On 6<sup>th</sup> March 2018 W replied refusing to address the points and saying all further communications should be addressed to ... Legal. The Claimant was still employed by SFRS at the time, and refusal to consider her health and wellbeing, or explore opportunities to return, because of her disability was direct discrimination.

15. If so, was the reason for the said less favourable treatment because of the protected characteristic of disability?

*Section 15 – Discrimination Arising in Consequence of Disability*

16. Did the Respondent know or could reasonably have been expected to know that the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at the material time?

17. If so, did the Respondent treat the Claimant unfavourably by reason of the following acts:
- a. W enforced a Practice that all members of the team need to be co-located at a specific desk location in E H for operational reasons. He made it clear that this was the policy for the whole team...

Again it was accepted this was best put as a claim of failure to make reasonable adjustments.

- b. The Respondent has a flexible working policy that supports – amongst other things – the opportunity to work from an alternative location...

It was accepted that this was best put as a claim of failure to make reasonable adjustments.

- c. W, on 31<sup>st</sup> January 2018, informed the Claimant that he would no longer allow the possibility of the Claimant returning to her role under any circumstances. This act took place a few days after he had received the latest Occupational Health report and had a discussion with the Chief Medical Officer regarding how severe the Claimant's condition had previously been (but which, for the avoidance of doubt, indicated the Claimant was recovering and was ready to return to work with appropriate support to reduce her perceived work-place stressors). This action was a consequence of the Claimant's disability.
- d. On the 5<sup>th</sup> and 27<sup>th</sup> March 2018 the Claimant emailed W asking what was being done to return the Claimant to the workplace, and updates on further Occupational Health appointments, and redeployment opportunities. On 6<sup>th</sup> March 2018 W replied refusing to address the points saying all further communications should be addressed to ... Legal. The Claimant was still employed by SFRS at the time and refusal to consider her health and wellbeing or explore opportunities to return as a consequence of her disability.

18. If so, was the reason for the said unfavourable treatment because of something arising in consequence of disability?

19. If so, was the said unfavourable treatment a proportionate means of achieving a legitimate aim?

*Section 20 – Reasonable Adjustments*

20. Did the respondent apply the following provisions, criteria or practices:
- a. The Respondent has an Absence Toolkit, which contains their procedures for Return to Work. This policy applies a Phased Return approach based upon working hours. This discriminates against the Claimant, who's ability to return to work required an approach that removed her perceived stressors, rather than varied her hours.

- b. W enforced a Practice that all members of the team need to be co-located at a specific desk location in E H for operational reasons. He made it very clear that this was the policy for the whole team. He refused to allow the Claimant to work from an alternative location (from home, a manned fire station, or elsewhere in the office), and insisted his policy was that the Claimant return to work sitting next to the colleague she had raised a grievance against, and who had raised a grievance against her, and to be managed by the manager she had also raised a grievance with. W was fully aware of the Claimant's anxiety, and the disadvantage this would place on her compared to her colleagues or a hypothetical person who were not suffering from this disability, including a hypothetical person who had raised a grievance against a colleague.
- c. The claimant had her sick pay cut to half pay on 10<sup>th</sup> October 2017 and to zero pay on 10<sup>th</sup> February 2018. The Respondent's Sick Pay Policy discriminates against a disabled person (as defined in the Act) suffering from anxiety, depression and mental health injuries. Receiving letters notifying her of the changes, this caused her increased stress and anxiety, worsened her mental health, and increased the time it would take her to recover to a level where she could return to the workplace. This discriminates against a person with a mental health disability when compared to a person with – hypothetically – a broken leg or other long-term non-mental health sicknesses – who's recovery period would not be impacted by a reduction in sick pay.
- d. The Respondent has a flexible working policy that supports – amongst other things – the opportunity to work from an alternative location, generally home. This discriminates against the Claimant as a person with a mental-health condition is treated unfavourably because they are much more likely to have their request for flexible working refused. Reasonable adjustments, such as those that the Claimant requested, could have mitigated this discrimination had they been agreed.

The respondent accepted the sick pay policy and flexible working policy as PCPs

- 21. If so, did the said PCPs place the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?
- 22. If so, and the duty to make reasonable adjustments arose, did the Respondent fail to take such steps as were reasonable to avoid the said substantial disadvantage to the Claimant?
- 23. Did the Respondent know or could reasonably have been expected to know that Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at the material times and was likely to be placed at the said substantial disadvantage?"



5. At the preliminary hearing it had been agreed that even though the claimant had raised a grievance in June 2017 and been subject to a counter grievance this tribunal would only be concerned with matters from November 2017. This was confirmed in the claimant's witness statement yet the very first issue, as set out above, was stated to be the delay in dealing with the grievance process. On taking further instructions Mr Z confirmed that the claimant did wish the tribunal to consider the first issue as set out above as the delay caused the claimant further stress and anxiety.
6. The claimant's husband acted as her representative. There was discussion as to whether the claimant was well enough to proceed as she was very tearful whilst the issues were clarified. The claimant explained that whilst she had been daunted at the outset of the hearing, she had learned some techniques e.g. breathing to assist her and felt that any further delay in the hearing of her claims would be detrimental to her health. The tribunal hearing therefore continued with the claimant having breaks every hour whilst being cross examined.

**Rule 50 – Anonymisation order**

7. By letter of the 12 September 2019 the claimant had requested that the hearing be conducted in private for the following reasons:-
  - 7.1 Health reasons as her health had declined recently,
  - 7.2 The evidence contains sensitive personal information,
  - 7.3 The claimant was worried that information about her health might affect her future career prospects.
8. The respondent did not express a view about the application, and it was directed it would be considered at the outset of the hearing.
9. The tribunal emphasised to the claimant the principle of open justice and enquired whether the claimant's concerns would be addressed by an anonymisation order. This was agreed and made in respect of the parties and witnesses.

**Fresh proceedings – case number 3319546/2019**

10. New proceedings were issued on the 20 June 2019 and relate to the claimant's fixed term contract. Employment Judge Warren had directed on the 7 September 2019 that as this was a discrete claim and that it was not in accordance with the overriding objective for there to be delay in hearing the first claim by consolidating the claims and relisting them. This tribunal did not hear this new claim which remains to be determined.

### **Timetable**

11. This tribunal was only able to sit for four of the allocated five days. The bundle of documents ran to 1110 pages but with many additional documents also added in. It was not clear how some of these were relevant to the issues and many of them were never referred to or considered by the tribunal. It was possible to hear the evidence and submissions in the four days the tribunal had available and then further days were found for the tribunal's deliberations.

### **Witnesses**

12. The tribunal heard from the claimant and her husband and from seven witnesses on behalf of the respondent.

12.1 X

12.2 W

12.3 U

12.4 T

12.5 S

12.6 R

12.7 Q

13. From the evidence heard the tribunal finds the following facts.

### **The facts**

14. The claimant commenced employment on the 1 July 2015 as a Risk & Statistical Data Advisor on a full-time basis. Her normal place of work was the respondent's main premises in Ipswich.

### **Issue 1 – the Grievance process 2017**

15. The claimant confirmed in cross examination that she is claiming that the respondent's failure to conclude the grievance process in timescales caused a deterioration in her health, that the respondent had been warned of that effect by medics and that it would be a further detriment to her health for there to be delay.
16. On 8 June 2017 the claimant raised a grievance against A, B and R. (pages 279 – 301). Her document contained extracts from websites on bullying in the workplace before setting out her complaints and details of incidents from December 2015.

17. The grievance was acknowledged by HR on the same day as it was submitted. It was also forwarded to S, Area Commander with a request that he meet with the claimant to identify what exact elements in the grievance she wished to be investigated. S confirmed that X had agreed to undertake the grievance hearing and would meet with the claimant to discuss the details and agree the terms of reference. It was also agreed that S would liaise with a colleague in Public Health for the claimant to be temporarily redeployed away from her permanent workplace during the grievance process.
18. By letter of the 15 June 2017 X invited the claimant to a meeting on the 23 June 2017 to explain her grievance and discuss how it could be resolved. That meeting did not actually take place.
19. By letter of the 21 June 2017 A raised a counter grievance against the claimant, stating that as this was the second time she had raised the same issue allegedly without grounds he believed it was 'malicious and vexatious with the intention of damaging my career and professional integrity'. S spoke to the claimant about it on the 22 June 2017 and recorded in an email to HR how upset the claimant was and that she would contact him to rearrange the meeting with X. The tribunal accepts the claimant's evidence that she was not aware of the contents of the grievance, the outcome or that A appealed until she was much later advised that the appeal was not successful. X's evidence to this tribunal was that it was not common practice to share the details of a grievance with the individual(s) named in it. The tribunal does not understand how a grievance can be investigated if the person against whom it is raised is not aware of the allegations and spoken to about them.
20. X spoke to the claimant on the 6 July 2017 and the claimant agreed to continue with the grievance investigation whilst off sick and prior to her occupational health appointment on 20 July. The claimant had been signed off sick by her GP from 1 June to 1 July 2017 and then from 3 July to 3 August 2017.
21. By email of the 12 July 2017 HR Advisor, provided an update to all involved in the grievance process. He confirmed that X had given his Terms of Reference to Q to conduct the investigation. Interviews had already been arranged with the claimant for the 14 July and R for the 18 July. Their aim was to conclude the investigation by the 29 July, but they might apply for an extension if the evidence took longer to gather. The email confirmed that X would be absent on leave from the following week for 3 weeks so it was anticipated he would receive the investigation report on his return.
22. The tribunal accepts the evidence heard from the respondents that absences on annual leave were inevitable during this summer period and others that were approached were unable to assist with the grievance. The claimant was advised of the annual leave commitments by this email.

**Meeting with the claimant on 14 July 2017 (P498-503)**

23. Q met with the claimant on 14 July 2017 to discuss her grievance. He then had interviews with the following:-
  - 23.1 R – 18 July.
  - 23.2 A – 24 July.
  - 23.3 B – 25 July.
  - 23.4 C – 25 July.
24. Q produced his report on 27 July (pages 459 – 654). The claimant accepted in evidence and the tribunal finds that he finalised it within the given time scale. No extension had been required and he completed his report promptly.
25. X returned from holiday on the 16 August 2017. He contacted the claimant the next day 17 August 2017 to update her on receipt of the investigation report. The claimant accepted in evidence and the tribunal finds that it would have been inappropriate for X to give her the outcome over the telephone and that it was perfectly proper to arrange a meeting with her.
26. As Q was on annual leave until the 24 August X scheduled a meeting with him on that day to conclude the investigation. On that day he arranged to meet the claimant on the 25 August to deliver the investigation outcomes.
27. At the meeting on 25 August 2017 the claimant was informed that her grievance had not been upheld. This was confirmed in writing with a recommendation that mediation be sought between all parties involved. To develop the claimant, it was suggested that she should arrange attendance at a personal resilience course and a managing stress course.
28. The claimant was not happy with the outcome and wrote to X on the 31 August expressing her concerns although she made clear she did not wish to appeal. Although the claimant accepted that her grievance had been concluded within just over two months her position was that she was still anxious about the grievance against her.
29. By letter of the 29 August 2017 A was advised that his grievance against the claimant had not been upheld. He appealed that decision which was also not upheld. He was advised of the dismissal of his appeal by letter of the 27 September 2017. The claimant was advised of this by letter of the 13 October 2017. The claimant was never provided with the details of A's grievance against her the position of the respondent's witnesses being that it was an allegation that her grievance was vexatious and as it was so inextricably linked to her grievance there was no need for further discussion with her. As already stated the tribunal does not understand how it could be investigated without speaking to the claimant about the detail in it.

30. The claimant accepted in evidence that the respondent did not have access to her medical records at this time. Her medical records note that on 5 August 2017 she was seen in accident and emergency following a drug overdose but the respondent did not know that detail at that time. She did not stay in hospital but saw her GP on the 7 August 2017 when the note records 'low mood suicidal ideation'. The claimant saw Dr Bellhouse privately on 21 August 2017 and he reported then and on the 25 August 2017 in more detail to the claimant's GP.
31. The claimant had been signed off as unfit for work by her GP from 2 August to 2 September and then to 29 September 2017.

### **Occupational health appointments**

32. The claimant had been seen by Dr Varadarajan on the 28 April 2017 and a report produced on the same date. At that time the claimant was working from home. The report stated that it was for the employer to undertake a workplace risk stressor assessment and to identify support measures. An amicable resolution to the workplace issue would help the claimant return to the office comfortably. There was no medical reason to consider that her capacity would be affected. There was not at that time any clinical diagnosis of anxiety or depression or clinical signs of such. He did not therefore believe that CBT or other therapies would assist at that stage.
33. The claimant was seen by Dr Maqsood on the 20 July 2017 and he reported on the 25 July 2017 (page 456). The claimant came across as 'quite anxious' and a questionnaire tool used to assess her mental health showed her suffering from mild symptoms of anxiety and depression. The doctor acknowledged that the grievance process would have added further to her stress and therefore he 'would strongly recommend that you resolve the grievance process at the earliest opportunity. Prolonging the process has the potential to further have a negative impact on psychological health'. The claimant remained unfit for work. In addition to a resolution of the grievance, counselling was recommended through the Employee Assistance Programme, it being considered that the claimant would benefit from perhaps six sessions.
34. On 26 September 2017 Dr John Bellhouse, Consultant Psychiatrist treating the claimant wrote to S (page 735). He advised he had seen the claimant on two occasions and had been treating her for a moderately severe depressive episode with some anxiety. He was concerned that there were plans for her to return to work without Occupational Health input as he thought she had been very unwell. He was concerned that her 'recovery to date is not yet robust'. He considered it would be another 2-3 weeks before her recovery was robust, and he would also recommend a phased return to work.

## Mediation

35. One of the recommendations made by X when he determined the claimant's grievance was mediation between all those named, A, R, B and the claimant. By letter of the 4 September 2017 HR wrote to various managers at the respondent confirming this and that the following would also be provided to the claimant: -
- 35.1 Counselling as recommended by OH, the claimant had by that date had 3 sessions.
  - 35.2 Attendance at a Personal Resilience Course and Stress Management Course, which the claimant was responsible for booking.
  - 35.3 The claimant to investigate if there were any E-learning modules on My Learning that could further develop her.
  - 35.4 A 4 week phased return to work with the claimant increasing her hours from 25% in week 1 to full hours by week 4.
36. The claimant was due to return to work on 2 October 2017 and this was confirmed in an email to her of the 25 September 2017 as was the mediation date of 10 October. An invite was seen (page 739a) notice for 10 October mediation and on 7 October 2017 the claimant confirmed her attendance. This appears just to have been with R.
37. R agreed to undertake mediation with the claimant but due to claimant's health there was only one session.
38. On the 16 October 2017 S received an email from the claimant confirming she had arranged for R to convey a message to the team prior to her return (pages 762 – 763). This was the email in which the claimant acknowledged receipt of the grievance appeal outcome brought by A.
39. It was also arranged that on 27 October 2017 there would be mediation with B and A but the claimant wrote to HR 11 October that she didn't think she would be well enough for mediation on the 27<sup>th</sup> but there appears to have been some discussions the day before.
40. On 10 October 2017 the claimant had moved onto half pay.

## Occupational Health Report 2 November 2017 (P1083)

41. The claimant was seen by Occupational Health on 2 November 2017. A stress risk assessment of the 'perceived workplace issues and address any concerns that arise' was recommended. From the examination the adviser felt that the claimant would struggle to re-integrate at work at that stage. Support arrangements would be required along with a phased return to work. The respondent was asked to advise of the support measure so that OH could advise on a phased return. It was hoped that might be possible by mid-December 2017 but that if the employer could

accommodate working from home 'then it is highly likely that Z can commence on some work'.

42. On 14 November 2017 the claimant submitted another fit note for the period 10 October to 22 December stating that she was not fit for work.

**Stress risk assessment (Page 829b)**

43. This was carried out by U on 15 November and indicated a short-term wish of the claimant to work away from colleague who had bullied her.
44. By email of the 22 November 2017 (page 796a) U updated the claimant about the work/stress action plan.

**Fit note 24 November 2017 (P1107)**

45. The claimant obtained a revised and backdated fit note dated the 24 November 2017. This followed a telephone consultation with her GP. It stated that the claimant 'may be fit for work' taking into account 'working from home and phased return to office work'. The claimant accepted in evidence that it said 'may'. It provided no other details. The claimant explained this to U in an email of the 27 November 2017. She explained that as her GP had reviewed the report from OH she had agreed 'that it was both appropriate and prudent for me to have been working from home on a flexible basis, hence she has amended it to a fit note in support of this'. The claimant expressed her hope that the OH report and this fit note were enough to 'make a good case to support working from home flexibly and a phased return to the office can be agreed'.
46. U replied on the 29 November 2017 (page 796c) that she had asked for advice from OH and HR in view of the two different fit notes. The claimant accepted in evidence and the tribunal finds that this was a 'fair stance for her to take' and that there was nothing wrong with her seeking advice from HR or OH.
47. By email of the 8 December 2017 (page 800b) U advised the claimant that she was still waiting for OH to give her advice on the claimant's return to work programme. The claimant accepted there was nothing wrong with her sending that email to her. However, she is critical of U for not having arranged an OH appointment for mid December.
48. U was then absent in view of ill health herself and was then on leave. W asked HR to try and organise a conference call with Dr Varadarajan.
49. On 15 December the claimant emailed U (page 805b) stating she was a little anxious as she had not been given a date for a follow up appointment with occupational health and asked for the date of that appointment. U confirmed that she was also off sick at the present time and had asked W to look at the matter in her absence.

50. On 15 December 2017 W wrote to HR (in a document the claimant would not have seen at the time) that he did not feel a return to work was the way forward regarding Z (page 806).
51. The claimant advised HR on 15 December 2017 that she had “ended my sickness on My HR as advised”. This was queried by payroll enquiries as they were uncertain whether the claimant had now returned to work albeit working from home.
52. W spoke to the occupational health doctor on 15 December and confirmed the position in an email to HR of that day. The occupational health doctor had confirmed that the claimant was fit to commence a phased return to work. He understood that the GP had updated the claimant’s fit note to reflect this. He confirmed that there had been no agreement to the claimant working from home. He then asked that a conference call be arranged with the occupational health doctor for the following Monday. He had spoken to the claimant also informed her that he would call her back by the end of Monday.
53. The Tribunal saw a call action diary note for the conference call held on 18 December between W and the occupational health doctor. The occupational health doctor confirmed the claimant was fit to work fully at work. No adjustments (other than phased return) were required. W telephoned the claimant that evening and a meeting was arranged for Tuesday 19 December 2017.
54. The claimant accepted and the tribunal finds that once W was alerted to the difficulties he took prompt action in speaking to OH. The respondent clearly needed to seek clarification of the second fit note.

**Meeting on Tuesday 19 December 2017 (Page 822a)**

55. The claimant’s husband was allowed to attend this meeting with the claimant. It is believed that the notes the Tribunal had in the bundle were from the claimant
56. At this meeting W pointed out that the claimant would be sitting at least 10 yards from the principal officers in an open plan environment. He considered this to be a safe environment. He offered a phased return. The claimant raised that she was meant to have an occupational health follow up in mid-December which had not yet occurred.
57. A further meeting took place on 27 December 2017 (page 824c). Again, the notes in the bundle appear to be from the claimant. The claimant’s notes record that W would not entertain her working from home as he could not accommodate this. The claimant stated that working from home could mean working from another location other than E H and gave suggestions. She states in her notes of the meeting that W seemed to be “completely fixated on the fact that I wanted to work from home”. She notes he repeatedly told her he would not allow it. The note ended that W had agreed that further input from the claimant’s consultant would be useful and to feed this into occupational health ahead of her next



appointment.

58. The claimant also stated at that meeting and gave evidence that she offered a compromise that she work at E H but at another bank of desks in the business support team around the corner from her team, just in the short term to get her confidence back and get used to interactions with her colleagues but at arms length. That she suggested would have given both parties time to allow professional relationships to be mended and to get used to each other following the grievances. The claimant felt that would have been in the best interests of all involved.
59. R (who had agreed some home working in April) gave evidence which the tribunal accepts that it would have been possible for the claimant to work at a different bank of desks but in view of the specialist nature of her role (which only she and A worked in) they would need to discuss work related matters. They both needed to know what the other was working on. She accepted that she had agreed to colleagues working at home so long as she knew about it.
60. The claimant forwarded a fit note to W dated 29 December 2017 which stated that the claimant may be fit to work on a phased return to work “to not include stressors pertinent to her case”, that was covering the period 22 December 2017 to 31 January 2018.

**Phased return to work – 5 January 2018 (page 828d)**

61. The plan seen in the bundle showed a period of six weeks during which the claimant would have a phased return culminating in a full return by the week commencing 26 February 2018. She would be able to take short breaks within the day as and when required, a member of staff would continue to provide support to her, U would be the first and initial point of contact and the claimant would make U or any other colleague aware of any concerns within the workplace as soon as they happened. Occupational health were to consider whether any further counselling would be helpful.
62. The claimant did not return on 5 January but by email of 8 January following recent conversation W forwarded to her the 7 week phased return to work programme. An appointment had been arranged with occupational health for 18 January 2018. He looked forward to seeing her on 15 January.
63. By email of 9 January 2018 (page 835) the claimant sought further clarification from W. She stated that this proposed return to work had been drafted in consultation with HR and occupational health but she was not a party to it. He had not implemented any of her ideas or suggested measures from the stress in the workplace risk assessment that she had had with U on 15 November 2017 and she suggested he had disregarded her GP fit notes.

64. The claimant concluded that she was keen to return to work and appreciated that the service was committed to helping her back to work however to return to the current situation was likely to have a detrimental effect on her recovery in the short term. The last thing she wanted was to return to the workplace and to become ill again. The claimant explained in cross examination that she had an issue with the return to work plan being sent to her a week before her OH appointment. She considered it would have been reasonable to delay another week to see what recommendations OH made at that appointment.
65. By email of 11 January U wrote to the claimant stating that she was looking forward to meeting her the following Monday.
66. On 11 January W also replied to the claimant's email setting out his comments to each of the points made by her.
67. The claimant replied on 12 January (page 841b) stating that she was unable to return to work on 15 January for the following reasons:-
- 67.1 Her fit note made it clear that she was fit to return subject to a phased return "to not include stressors pertinent to my case". She did not want to sit near A or to be managed by R which were the stressors of which she had complained.
- 67.2 The penultimate paragraph of the occupational health report of 2 November 2017 had stated that occupational health should advise on the mutually agreed workplace support return to work programme which should have been booked for mid-December. That appointment was to take place the following week and it was premature therefore to suggest her return to work before that appointment.
- 67.3 They have to act on the advice of the claimant's medical advisors and were not doing so.

### **III-health capability dismissal meeting (page 844)**

68. By letter of 18 January (the date of the OH appointment) W invited the claimant to a meeting to discuss the situation around her ongoing absence. The letter made it clear that the claimant was entitled to be accompanied by a colleague or Trade Union representative and that depending on the facts established "the outcome could be termination of your contract of employment on the grounds of ill-health capability".
69. Dr A Varadarajan prepared a report dated 21 January 2018 (page 845) following her meeting with the claimant and in this she concluded:-

"With regard to the structure of a phased return to work I am happy to support the suggested plan that you have sent in terms of the hours and days through week 1 to week 6. In terms of her support arrangements Z informed me that her main concern was sitting next to the person her grievance was raised and having the same manager to line manage her. She informed me that these are what she perceives as the main stressors at work. This will need to be explored in the light

of the psychiatrist's report. I have discussed with the CMO [Chief Medical Officer] with Z's consent and she has agreed for the CMO to have discussions with you.

Following my assessment today and my opinion Z is more positive and determined to return to work. Emotionally, although she is anxious about starting work, she is keen to make the start and is working towards a phased return to work. Z has been advised by her psychiatrist to increase her dose of anti-depressants in order to cope with the increasing anxiety that she feels. Z has been having counselling sessions which she has found useful. I discussed the benefits of exploring cognitive behavioural therapy with Z. I would like to recommend a course of CBT for her, as this would help her through the phased return to work process. Z is happy to commence CBT as soon as possible to support her return to work.

As mentioned above, the CMO will have a discussion with you regarding the psychiatrist's report. I would like to review Z 6 weeks after she commences her phased return to work for a F2F assessment."

70. In the tribunal bundle at page 846a was a note that Dr S Varadarajan had telephoned T of HR sharing her concern regarding the treating psychiatrist's view on sitting next to the same person and reporting to the same manager. The note states that T noted her concern regarding foreseeable nature of decline in stress and health.

### **III-health capability dismissal meeting - 24 January 2018**

71. The claimant attended this hearing with a colleague. The hearing was chaired by W. The meeting was adjourned in order that W could read the occupational health report and take HR advice. It then resumed and W referred to the recommendations made in the occupational health report. He asked the claimant if she would be able to work with her existing line manager and colleagues if she returned to work. The claimant said she would not be able to work with these two individuals and said this was highlighted in the report. W said that he would need to speak to the OH doctor and reconvene the meeting.
72. By letter of 24 January the meeting was reconvened to 29 January.
73. On 25 January Dr Varadarajan stated in an email to the respondent that he would be emailing the psychiatrists report to W for his and HR view only. He had the claimant's consent to do so. They must have then discussed the report as Dr Varadarajan emailed on 25 January referring to a call that morning. He had tried to call the claimant but without success but was exploring ways of making the report available to W securely. It appears that there were difficulties with regard to sending the report electronically, but this was eventually sent it appears by letter (page 856). This was the report of Dr John Bellhouse dated 10 January 2018. This recorded:-

"The mediation process she has been through from her point of view feels very unsatisfactory and she is dipping in mood and becoming more suicidal as the build up to returning to work approaches. I am very worried that we will see further deterioration in her mood with a significant risk of suicidal thinking and

behavior if her concerns about the way she was treated during her initial complaints in the workplace are not resolved in a way that she feels make this less likely to occur in the future. I am a little worried that I am told she is being asked to sit next to the gentleman who she believed bullied her over a sustained period and to remain under the line manager who she felt unhelpful in resolving this. I think further consideration needs to be given to resolving this matter or we will see deterioration in her mood quite rapidly.”

74. W liaised with colleagues on 26 January stating that the information the claimant had tried to take her own life “bring a different legal and moral perspective”.
75. By email of 2 February (page 862m) the claimant advised W that she was prepared on a without prejudice basis to explore the possibility of entering into a settlement agreement.

### **Ill-health capability dismissal meeting - 31 January 2018**

76. W said that the organisation would like to offer the claimant potential re-deployment via the flexible resourcing pool and if the claimant did not consider that suitable one further option could be discussed.
77. W concluded the meeting by stating that the service had considered all reasonable adjustments but the claimant had said she was not able to work with the two named individuals. The claimant needed to be “embedded” in this team if she were to return to her role. He confirmed that the service no longer felt this was a viable option which had been confirmed by further independent medical advice. The service had looked at other roles that the claimant could potentially consider but there was nothing suitable available at the time. The claimant was to consider the option and advise W of her decision by 2 February.
78. The allegations of direct discrimination were put to the claimant in cross examination. Regarding what she was told at this meeting by W it was put to her that his position was not ‘because of’ her disability but in light of the reasons given at the meeting. The claimant replied that ‘he wouldn’t be allowed to would he’ and that ‘he is not saying that’. It is those two responses that the tribunal understands Mr Hodge to rely upon as a concession by the claimant that this could not be direct discrimination. The tribunal does not accept that as a concession by a litigant in person in relation to what is a legal issue.
79. There were then without prejudice discussions between the parties.
80. On 6 February 2018 W confirmed to the claimant that:-
  - 80.1 For medical reasons following the receipt of the psychiatrist report the claimant would not be returning to her post of data analyst in the respondent. They had a duty of care to the claimant and the contents of the recently disclosed report meant that it would not be appropriate for the claimant to return to that team. Re-deployment was not an option at that time.

80.2 As explained the claimant had the option of placing herself on the re-deployment register to look for another role within the service.

80.3 The other potential option was a without prejudice discussion.

81. W forwarded the minutes of the meeting of 31 January 2018 to the claimant with an email of 8 March 2018. On 27 March the claimant raised some issues about them. By reply on 29 March W stated "The Y legal team are now dealing with the matter please forward any correspondence to the legal team via your solicitor. This is one of the issues for this Tribunal to determine as the claimant was not happy with that response. Again this issue was put to the claimant in cross examination. This time though the tribunal does accept that the claimant gave a much more emphatic response in accepting that he did not write the two letters the way he did 'because of' her disability or because of anything arising in consequence of her disability but because he believed that the legal department were now dealing. The claimant was very clear in her response that these were not because of her disability or because of anything arising in consequence of disability.

#### **Claimant's new position**

82. The claimant had applied for and was shortlisted for the role of service desk analyst and invited to interview on 12 April 2018. The claimant states she was only offered a fixed term contract and not a permanent post that she had applied for (page 896a). She started on the 1 May 2018 subject to satisfactory employment checks and her appointment was not confirmed or secure at that time.

83. The claimant resigned her permanent post on 1 June 2018 (page 925 and pages 988 – 990).

#### **Occupational Health Report 25 June 2018**

84. This appointment went ahead due to a referral having been made because of the claimant's absence in a previous role and for any advice or support required. The claimant was noted to be feeling more optimistic regarding the new role and her colleagues, and ready "to embrace these new opportunities". She felt much improved and currently had no symptoms related to anxiety and stress. The occupational health consultant advised that there be "open and honest dialogue with management in order to highlight and address any perceived work related stressors in order to reach a result/compromise prior to any issues arising". On the information provided the claimant was fit for her role. Despite the previous absences they did not foresee a higher than average sickness absence for the claimant moving forward.

#### **Relevant Law**

85. The Claimant resigned but says that this amounted to a dismissal in accordance with the provisions of s.95(1)(c) of the Employment Rights Act 1996 (ERA). That section provides that a dismissal includes the situation

where:-

“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.”

86. The test which the tribunal must apply to determine whether there was a constructive dismissal is still that set out in Western Excavation (ECC) Ltd v Sharp [1978] IRLR 27

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

87. The breach of contract may be of the implied term of the contract that the employer will not ‘without reasonable and proper cause, conduct its business in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.’ (Malik v BCCIS [1997] ICR 606 HL.

88. As was stated in Woods v WM Cre Services (Peterborough) Ltd [1981] ICR 666 it is not necessary to show that the employer intended any repudiation of the contract but ‘the tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it’.

89. As stated in Western Excavating the employee must resign in response to the breach of contract by the employer or will be deemed to have affirmed the contract. The tribunal must consider whether on the facts of the case the employee’s conduct has shown an intention to continue in employment rather than to resign. It is not merely a question of the passage of time in isolation.

90. The also claimant brings claims under the following provisions of the Equality Act 2010.

91. Section 13 – direct discrimination

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

92. Section 15 – discrimination arising from disability states as follows:-

“(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.”

93. Section 20 – duty to make reasonable adjustments, sub-paragraph 3 states as follows:-

“(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

94. Regard has been had to the Equality and Human Rights Commission's Statutory Code of Practice on Employment (2011). Chapter 5 deals with discrimination arising from disability and provides as follows:-

**“What is ‘unfavourable treatment’?”**

5.7 For discrimination arising from disability to occur, a disabled person must have been treated ‘unfavourably’. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

**What does ‘something arising in consequence of disability’ mean?**

5.8 The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

5.9 The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability. The consequences will be varied and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment.

Others may not be obvious, for example, having to follow a restricted diet.”

95. Chapter 6 deal with duty to make reasonable adjustments. 6.5 makes it clear that the duty comprises three requirements as follows:-

“6.5 The duty to make reasonable adjustments comprises three requirements. Employers are required to take reasonable steps to:

- Avoid the substantial disadvantage where a provision, criterion or practice applied by or on behalf of the employer puts a disabled person at a substantial disadvantage compared to those who are not disabled.
- Remove or alter a physical feature or provide a reasonable means of avoiding such a feature where it puts a disabled person at a substantial disadvantage compared to those who are not disabled.
- Provide an auxiliary aid (which includes an auxiliary service - see paragraph 6.13) where a disabled person would, but for the provision of that auxiliary aid, be put at a substantial disadvantage compared to those who are not disabled.”

96. The Code also deal with what is meant by “reasonable steps”. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for the employer to take will depend on all of the circumstances of each case. There is no onus on the disabled worker to suggest what adjustments should be made. However, where the disabled person does so the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable.

97. Paragraph 6.28 sets out some of the factors which might be taken into account when deciding what is a reasonable step for the employer to take:-

“6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

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



98. Although it was submitted that section 18B of the Disability Discrimination Act 1995 had not been reenacted in the EA as can be seen the Guidance still uses similar wording which the tribunal should take into account.

99. Paragraph 6.29 states as follows:-

“6.29 Ultimately the test of the ‘reasonableness’ of any step an employer may have to take is an objective one and will depend on the circumstances of the case.”

100. In O’Hanlon v Revenue and Customs Commissioners [2007] ICR 1359 CA the court found that only in exceptional circumstances could it be considered a reasonable adjustment to give a disabled person higher sick pay than would be payable to a non-disabled person. The Code states:

“paragraph 17.21

Workers who are absent because of disability related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a work is absent due to disability related sickness, an employer should consider whether it would be reasonable to do so.”

## **Conclusions**

### **Equality Act claims**

#### Direct disability discrimination

101. The claimant has not established facts from which the tribunal can conclude that the alleged conduct was less favourable ‘because’ of her disability.

102. The claimant and her husband acting for her accepted at the outset of the hearing that some of the claims of direct discrimination could more correctly be put as claims of a failure to make reasonable adjustments. Two allegations were left.

*That on 31 January 2018 W informed the claimant he would no longer allow the possibility of the claimant to return to her role under any circumstances.*

103. The respondent sought to rely on a concession made by the claimant in cross examination but as stated in its findings the tribunal has concluded it would be wrong to do so. However, it has concluded that the reason for W stated position was the contents of the claimant’s treating psychiatrist and not ‘because’ of the claimant’s disability.

*6 and 27 March 2018 letters to claimant saying all further communications should be addressed to ... Legal*

104. The tribunal has accepted that the claimant conceded this was not said 'because' of her disability and the tribunal has also concluded that was the case. He understood that was now the position and would have said that in the same or similar circumstances irrespective of the claimant's disability.

105. The claims of direct disability discrimination are not made out and are dismissed.

Discrimination arising from disability

106. The same two matters as set out above in relation to direct discrimination are relied upon by the claimant as discrimination arising from disability.

*Knowledge*

107. In submissions the respondent conceded that the respondent could reasonably have been expected to know that the claimant was disabled within the meaning of the EA. The tribunal finds that an appropriate concession in view of the factual background as found by it above. W acknowledged in evidence that he had approached the situation by considering reasonable adjustments, so he was treating the claimant as if she came within the definition which she clearly did.

*That on 31 January 2018 W informed the claimant he would no longer allow the possibility of the claimant to return to her role under any circumstances.*

108. The respondent also accepted that it was bound to concede that informing the claimant that she was not going to return to her role was unfavourable treatment and was because of something arising from disability. The tribunal has also reached that conclusion. The contents of the psychiatrist report are clearly 'something arising in consequence of' the claimant's disability.

109. The respondent then seeks to argue that it was justified within the meaning of section 15(2) in telling the claimant she could not return to her role. The legitimate aim was to preserve the claimant's health and well being and it was wholly proportionate in light of what was said in the consultant's letter.

110. The tribunal cannot accept the argument on justification when it has found, as set out below, a failure on the part of the respondent to make reasonable adjustments.

*6 and 27 March 2018 letters to claimant saying all further communications should be addressed to Suffolk Legal*

111. This allegation fails for the same reasons as it failed as a direct discrimination claim. Firstly, the claimant conceded that the letters sent by W were not because of something arising in consequence of her disability but secondly, and in any event, the tribunal would have concluded that was the case. They were sent because he believed that legal were now dealing and not for anything arising from the claimant's disability.

Reasonable adjustments

*The Respondent's Absence Toolkit*

112. This claim was put on the basis that the policy applies a Phased Return to work approach based on working hours. That discriminated against the claimant whose ability to return to work required an approach that removed her perceived stressors rather than varied her hours. Whilst the tribunal accepts that the Absence Toolkit is a 'policy' of the respondent it does not accept, and the claimant has not established that it put a disabled person at a substantial disadvantage in comparison to someone not disabled. In similar circumstances where a grievance had been raised against another a non-disabled employee would have had stressors of coming back to work near the alleged harasser. What has been identified in the way this allegation has been worded is what the claimant wanted to happen e.g. the adjustment she sought of not sitting near to her alleged harasser. She cannot and has not established that was a provision criterion or practice of the respondent. The tribunal does not accept that a phased return to work approach put those with disabilities at a substantial disadvantage.

*W enforced a practice that all members of the team need to be collocated at a specific desk location in E H for operational reasons.*

113. It was conceded in submissions on behalf of the respondent that if what was now being argued was that the substantial disadvantage was the anxiety this caused and would cause the claimant then the respondent would concede that the duty arose as a non-disabled person would not have experienced those feelings of anxiety. There was it was conceded potential for the duty to arise. The tribunal accepts that as an appropriate concession and it has concluded that the employer did in this respect impose a practice that but an employee with a mental health disability and did put the claimant at a substantial disadvantage.
114. The respondent argues that adjustments were made and a phased return to work plan put in place. The adjustments proposed by the claimant were not workable. The tribunal does not accept that. R gave evidence that it would have been possible for the claimant to work at a different bank of desks although she and A would still have had to liaise because of the specialist nature of their work. The tribunal's criticism is that the adjustment proposed by the claimant of working at a bank of desks around

the corner to her team was never even tried. The tribunal therefore has no evidence before it that this suggestion was unworkable as the respondent states.

115. There is further no evidence to support the respondent's submission that this adjustment would not have alleviated the substantial disadvantage which would have remained. That is not known as it was not tried. The tribunal has concluded that it would have been a reasonable adjustment to have allowed the claimant to work at a different bank of desks during the return to work plan. Dr Bellhouse expressed concern that the claimant was being asked to 'sit next to the gentleman who she believes bullied her...'. The respondent has given no explanation as to why it could not have tried the claimant's proposal albeit for a limited period. It has concluded there was a failure to make a reasonable adjustment in this respect.

*The respondent's sick pay policy*

116. Whilst the sick pay policy is clearly a 'provision, criterion or practice' it does not inevitably place a disabled person at a substantial disadvantage compared to those who are disabled. On the contrary it may benefit a disabled person who may have more time off than an employee without a disability.
117. The tribunal does not find that there were exceptional circumstances in this case which should have led the respondent to consider adjusting its policy. There was no failure to make reasonable adjustments in this respect.

*Respondent's flexible working policy*

118. This claim was put as discriminatory as someone with a disability is 'more likely to have their request for flexible working refused'. It was however brought as a failure to make reasonable adjustments. The 'provision, criterion or practice' has not been identified. When the claimant's husband made submissions, he accepted that the claimant had not made a flexible working request. She was suffering from stress and he suggested that perhaps if she had not been then she would have made such a request. She thought there was no point as it was only going to be turned down. No PCP has been identified, the claimant never made a flexible working request and the allegation as a claim of failure to make reasonable adjustments must fail and is dismissed.

*Time limits*

119. The ET1 was received on the 23 October 2018. The claimant started ACAS EC on the 16 August and the certificate was issued on the 24 September 2018. The respondent submits that anything before the 17 May 2018 is out of time and that it would not be just and equitable to extend time. The claimant commenced her new role on 1 May 2018 and resigned on 1 June 2018.

120. The tribunal has to accept those submissions and has concluded that the disability claims were submitted out of time. Nothing has been advanced by the claimant as to why it would be just and equitable to extend time. The claimant was working in her new role from the 1 May 2018 and was no longer off work with any disability related issues. No evidence has been heard as to why the claim was not submitted in time and why it would be just and equitable to extend time. The tribunal has therefore had to conclude that the two areas where it has found disability discrimination namely the claim of discrimination arising from disability of telling the claimant on 31 January 2018 that she could not return to her role and the failure to consider her working at another bank of desks as a reasonable adjustment are claims the tribunal has no jurisdiction to determine as having been submitted out of time.

#### Constructive unfair dismissal

121. From its findings the tribunal has concluded that the respondent did investigate the claimant's grievance and did not unduly delay. It concluded the grievance within its own timescales. The claimant was aware there might be slight slippage in the timetable due to annual leave commitments at that time of year, yet Q reported within the given timescale. There was no breach of the implied or express terms of the contract in the way that was handled.
122. The tribunals findings show that the respondent was following up the stress risk assessment and obtaining OH appointments as required. The difficulty following the stress risk assessment was the receipt of not one but two fit notes for the same period but saying different things. This is an unusual situation which the respondent had to investigate. The claimant accepted that. The tribunal is satisfied it was reasonable for the advice of both HR and OH to be sought on these. There was a slight delay due to U being off with flu, but the claimant accepted, and the tribunal has found that W quickly took over dealing with the matter.
123. From its findings the tribunal must conclude that OH appointments were made and followed up in a timely manner. OH wanted advice from the claimant's treating consultant and the respondent cannot be criticised for needing to see that.
124. The tribunal has found a failure to make reasonable adjustments by W failing to allow a period of time within the phased return to work of the claimant sitting elsewhere.
125. It would have been preferable for W to have waited to receive the OH report following the appointment organised for the 18 January 2018 before sending the claimant the return to work plan to commence 15 January. However, both HR and OH had agreed to the phased return to work and the claimant wanted it.

- 126. W was entitled to commence the Ill Health Capability procedure when it appeared that the claimant was not going to return to work. He did not dismiss the claimant and the subsequent meeting was adjourned and without prejudice discussions embarked upon.
- 127. The respondent was contractually entitled to follow its sick pay procedures.
- 128. The tribunal has concluded that it was discrimination arising from disability to advise the claimant on 31 January that she could not return to her role. That and the failure to make reasonable adjustments identified above must therefore amount to a breach of the implied term of trust and confidence.
- 129. The tribunal has had to conclude that the claimant did not resign in response to a breach of the implied term. She continued to work for the respondent. For a while she had her new role and her existing role. She only resigned that when told she couldn't have two roles. She did not however leave the employment of the respondent. There was not in law therefore a dismissal.
- 130. If the tribunal were wrong, then the claimant waived any breach by applying for another job with the respondent and continuing to work for it.
- 131. It follows from those conclusions that all claims fail and are dismissed.

\_\_\_\_\_  
Employment Judge Laidler

Date: .....24.12.19.....

Judgment sent to the parties on

.....15.01.20.....

.....  
For the Tribunal office