THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
Mrs J Coburn	**AND**	**Solutions4Health Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: North Shields ON: 17, 18 & 19 May 2017
Deliberations: 24 May 2017

EMPLOYMENT JUDGE HUNTER MEMBERS: Mr M Brain
Mr D Morgan

Appearances
For the Claimant: Mr J Barker
For the Respondent: Mr M Howson

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claims of unlawful disability discrimination and constructive unfair dismissal are not well-founded and are dismissed.

REASONS

1 Issues

1.1 The following is an extract from an Order of Judge Reed at a preliminary hearing dated 31 January 2017

1.2 The respondent concedes that the claimant is disabled within the meaning and for the purposes of the Equality Act 2010 (EqA).

1.3 By a claim form presented on 2 December 2016, the claimant describes as the causes of action on which she seeks determinations by an Employment Tribunal, as follows: -

(a) whether she suffered harassment because of her disability – sections 26 & 40 EqA

(b) whether she suffered discrimination arising from disability – section 15 EqA

(c) whether the respondent failed to make reasonable adjustments – sections 20 & 21 EqA; and

(d) whether she was dismissed unfairly – the dismissal being effected by her resignation – on her case in response to a fundamental breach of the terms of her contract of employment.

1.4 Matters in issue between the parties (so far as concern liability) as agreed by them are as follows:

Harassment –Sections 26 & 40 Eqa

1.4.1 Did the respondent engage in unwanted conduct of, or by reason of, the claimant's disability? If so;

1.4.2 What were the acts of unwanted conduct? and

1.4.3 Did the alleged conduct have the purpose or effect of either violating the claimant's dignity and/or creating an intimidating hostile degrading humiliating or offensive environment for the claimant.

1.4.4 In deciding whether the conduct had the effect referred to in section 26(4) Eqa note that each of the following must be taken into account: -

(a) the claimant's perception;
(b) other circumstances of the case;
(c) whether it was reasonable for that conduct to have the effect on the claimant.

1.4.5 Can the respondent provide a non-discriminatory reason for the conduct?

1.4.6 Is the claimant in time to pursue a complaint of harassment?

1.4.7 Can the request by the respondent for identity documentation amount to harassment.

Discrimination arising from Disability Section 15 Eqa

1.4.8 Did the respondent treat the claimant unfavourably?

1.4.9 Was that treatment because of something arising in consequence of the claimant's disability?

1.4.10 Can the respondent show that the treatment of the claimant was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

1.4.11 What provision criterion or practice of the respondent's organisation put the claimant at a substantial disadvantage in comparison with others who are not disabled?

1.4.12 What steps, if any, was it reasonable for the respondent to have to take to avoid that disadvantage?

Constructive Unfair Dismissal

1.4.13 Did the respondent act so as fundamentally to breach the terms of the claimants Contract of Employment?

1.4.14 Did the claimant resign in response to such fundamental breach?

1.4.15 Did the claimant resign in a timely manner?

1.5 At the hearing the respondent acknowledged that the respondent had knowledge of the claimant's ulcerative colitis from 2009. The management were aware of the condition in 2012. They were appraised of the disadvantage suffered by the claimant as a result of the colitis in October 2014.

2 The Facts

2.1 The claimant began employment with County Durham and Darlington NHS Trust as a Band 6 Specialist Stop Smoking Adviser in April 2009.

2.2 Between 12 October 2009 and 30 November 2009 the claimant was absent from work. She was hospitalised and diagnosed with ulcerative colitis. There was a sick note with this diagnosis dated 25 November 2009.

2.3 The claimant had been based in Annfield Plain a distance of 23 miles from her home in Peterlee. She applied for a Band 5 post so that she could work in the Peterlee area. She was interviewed in January 2012 and started in the Band 5 role on 30 July 2012.

2.4 In August 2012 the claimant was assigned to Annie Pluse as her line manager. In 2013 she was assigned to Tina Weatherill. Ms Pluse and Ms Weatherill do a job share.

2.5 There was a meeting between the claimant and Annie Pluse on 22 October 2012 which included a discussion about the effect of her *colitis* on her driving. There was an agreement that if the claimant was concerned she would ring Occupational Health.

2.6 By 2014 the claimant reports that she felt she was being bullied by Annie Pluse. She complained to a Band 8 supervisor, Claire Matthews. A mediation was arranged, but the claimant describes this as a failure. She referred herself to the Occupational Health Service and a report was produced dated 22 December 2014.

2.7 That confirmed that the claimant had been diagnosed with ulcerative colitis in 2009 which was causing bowel urgency, especially when having to travel long distances. The Occupational Health Nurse adviser recommended that the claimant's travelling be restricted to a 15-17 mile radius. She advised that the condition was likely to be permanent and that travelling more than 20 miles could be a problem due to the urgency of the bowel.

2.8 There is no doubt that from October 2014 the respondent was aware not only of the claimant's disability, but the disadvantage the claimant suffered as a result of it, both in terms of bowel urgency and that stress exacerbated it.

2.9 In October 2014 the claimant had failed to ask a client whether she was breast feeding. She recommended to the GP that he prescribe a drug called Champix. The drug is not normally prescribed for women who are breast feeding. The claimant was told that there would be an investigation in accordance with the disciplinary procedure. The claimant's trade union were of the view that the Trust's Incident Management Policy applied, which recommends that incident reporting such as this should be outside the disciplinary procedure unless the incidents are malicious, criminal or repeated by the individual. Appendix A of the policy refers to a Medication Error tree which is essentially a flow chart. Depending on the judgments formed as to the appropriate answers to the questions on the chart, the outcome could be; support, retraining, disciplinary investigation, referral to Occupational Health or a review of policies. Applying the chart to the claimant's circumstances, one of the possible options was that there should be a disciplinary investigation.

2.10 The outcome of the investigation by Eve Wouldhave was that the matter would not proceed to a disciplinary hearing, but that there would be a formal discussion between the claimant and Claire Matthews.

2.11 On 3 March 2015 the claimant had a meeting with her line manager Carol Moody, who on Ms Wouldhave's instruction, asked the claimant to complete a document which she referred to as a risk assessment template and which the claimant referred to throughout as a bowel monitoring form. The form contained columns headed; Date, Purpose of Journey, Miles travelled, Time Taken and

Symptoms (including stops taken etc). An email sent to the claimant by Carol Moody contained the following:

> "Please find attached a risk assessment template that can be used to record how your condition is responding to only working within a 17 mile radius of your base, the Whitehouse. Please add as much information as possible so that we can use it as a baseline. Following the initial 8 week period of your recording we will need to monitor if travelling further than this negatively affects your condition. My understanding is that after this initial 8 week period you will be required to attend any mandatory training or service meetings outside of this radius as all other staff are expected to do. Due to your condition we will always endeavour to implement reasonable measures such as extended travel time starting later to allow toilet stops or to avoid rush hour traffic."

Miss Wouldhave told us that this instruction came from higher management.

2.12 The claimant never filled the form in. She understandably regarded it as an affront on her dignity. It was not satisfactorily explained to us why the exercise was thought to be appropriate. The Occupational Health report was clear. The condition was permanent and a car journey of more than around 17 miles could result in the claimant soiling herself. The only construction that can be put on these events is that the respondent wanted the claimant to travel more than 17 miles and wanted to test whether on such longer journeys she did indeed soil herself.

2.13 A decision had been taken to rotate venues for training and team meetings. Annfield Plain was outside the radius of 15 to 17 miles. Although other premises were within the radius, the routes the claimant might have to take could involve delays in journey times and cause her difficulties.

2.14 Carol Moody referred the claimant again to the Occupational Health Service for clarification. On 5 May 2015, the Specialist Practitioner in Occupational Health reiterated that the condition was permanent. The 17-mile radius was a guide to give the respondent an indication of how to limit her car journeys. Keeping her travel to a minimum and avoiding unnecessary journey would be considered a reasonable adjustment to her chronic problem in line with the EqA. The longer the claimant was undertaking a car journey, the greater the chance of her having the potential to have faecal incontinence.

2.15 There was a further referral to Occupational Health on 29 July 2015. The report records that Tina Weatherill wanted to know when the travel restriction had to be reviewed. The Occupational Health adviser said that there would be no time limit to the driving restriction.

2.16 The claimant complained with the help of her Union. There was a meeting on 21 September 2015 described as a long term sickness absence review meeting. The respondent acknowledged that the claimant should not have been asked to fill in the form. It was recorded that the claimant wanted to draw a line under things and move forward and she agreed to do so.

2.17 The Stop Smoking service transferred under TUPE to the respondent on 1 April 2016.

2.18 On 5 April 2016 Ms Weatherill had been told that Ms Harrison had moved office after being part of a conversation between the claimant and another colleague. The claimant had been talking about other managers allegedly in an aggressive an unprofessional manner. At a meeting with her line manager on 19 April 2016, the claimant agreed that such conversations were not appropriate and that she would continue to work in a professional manner. The claimant says she was not asked for her side of the story; she did not agree she had been unprofessional but nevertheless signed a record of this meeting, in her words, to keep the peace.

2.19 Shortly after this incident the claimant complained that another colleague, Ms Cockburn, had made a visit to one of her clients when the claimant was on sick leave. Ms Cockburn had typed in capitals on the patient's notes NO APPOINTMENT MADE FOR THIS CLIENT. The claimant regarded this as unnecessary criticism of her. Her supervisor, Ms Weatherill said that if she wanted to complain she should follow the appropriate procedures using an electronic system. The claimant told us that she could not access the system, but it is not clear why that was.

2.20 There had been an induction meeting at Redworth Hall in late March 2016 which the claimant was unable to attend. An information pack was delivered to her by Christina Weatherill. Amongst this pack was a form which explained that it would be a criminal offence for the respondent to employ anyone not entitled to work in the UK. It asked for original documentation to be sent to prove eligibility. The claimant believed that the relevant documents were on her personnel file. When the respondent checked these, they discovered that the claimant was born of British parents in Hobart, Tasmania. The document was a copy of an Australian Birth Certificate and this was not an acceptable proof of eligibility to work in the UK.

2.21 Of all the documents of proof prescribed by the UK Border Agency the most suitable was a British Passport. Unfortunately, the claimant did not have one. Ms R Exeter, the respondent's HR Manager, told us that the UK Border Agency had said that no action would be taken against them so long as the relevant documents were received by the respondent within 60 days. This was referred to as an excuse period for those to whom an undertaking had transferred by virtue of TUPE.

2.22 There was a conversation between the claimant and Ms Exeter on 13 May 2016 when Ms Exeter told the claimant that if the respondent did not receive the documentation to prove that she was eligible to work in the UK by 23 June 2016 (the end of the excuse period), they may have to suspend her without pay or terminate her employment. Miss Exeter told us that the UK Border agency had made no mention of suspension without pay. There was no evidence before us that the claimant's contract contained a right to suspend the claimant without pay. In normal circumstances the 60 day excuse period runs from the TUPE transfer, but the UK Border agency had agreed the excuse period could be extended to run from the date the claimant was told that her foreign birth certificate was not sufficient evidence of her eligibility to work in the UK.

2.23 The claimant sent an email to Ms Exeter on 16 May 2016 asking her to remove the threat of suspension without pay. Ms Exeter, however, wrote to the claimant saying;

> "If we do not receive your documents by 23 June 2016, we will suspend your employment with us without pay for one week, providing that that you can give us the documents by 30 June 2016. Failure to do so will unfortunately end with us having no choice but to terminate your employment."

2.24 The letter explained that the 60 day excuse period ran from 25 April 2016 when the claimant had produced her inadequate documents. It was on that basis that she calculated the excuse period expired on 23 June 2016. The respondent was intending to convey that rather than dismiss on that date they would extend her employment by one week by suspending her without any pay. In the event the claimant was able to obtain a British Passport in time and produce it to the respondent.

2.25 The respondent's witnesses told us that they understood the claimant had intended to retire in 2016. We were shown an appraisal carried out on 2 July 2014. To the question,

> "What aspirations do you have in terms of your career with the trust that you would like to discuss with your Manager/Appraiser?"

the claimant typed:

> "None, to try to remain in FT employment until my retirement date in 2016."

The claimant told us that she had made a typing error. She said she was prone to making errors because she is dyslexic. She said she intended to retire in 2018. She said she could not afford to leave. In her evidence she said her mortgage did not run out until 2017. In a letter to her Union dated 25 May 2015 she said she had only 3 years to work. In an email to her MP dated 21 May 2016 she said that she had always envisaged continuing to work "until her mortgage was paid off in two years time."

2.26 The claimant resigned with one month's notice with effect from 31 August 2016. She said that she had waived breaches of contract in the past, but was no longer willing to do so. She said that the bullying culture still existed. She referred to the incident where Ms Cockburn had written on the client record, the incident involving the inappropriate statements and conversations and the matters that had arisen as a result of having to establish her eligibility to work.

3 The Law

Constructive Unfair Dismissal

3.1 It is for the employee to satisfy the Tribunal that there was a fundamental breach of contract on the part of the employer going to the root of the contract of employment; that the employer's breach caused the employee to resign and that the employee did not affirm the contract by delaying for too long before resigning. A breach of contract by the employer will be regarded as fundamental if it is so bad and so significant that no reasonable employee could be expected to put up with it. Western Excavating (ECC) Ltd v Sharpe [1978] ICR 221.

3.2 There is an implied condition of mutual trust and confidence in a contract of employment. It would be a fundamental breach of contract for an employer, without

reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84.

3.3 It was held in Malik v BCCI [1997] IRLR 462 that an employer must not engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue. The conduct must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in the employer.

3.4 If a resignation is to be treated as a dismissal, the reason for the dismissal is the reason for the respondent's breach of contract. Berriman v Delabole Slate Ltd [1985] ICR 546.

3.5 Section 98 Employment Rights Act 1996 provides

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

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

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

3.6 If an employer does not attempt to show a potentially fair reason in a constructive dismissal case relying on an argument that there was no dismissal, a tribunal is under no obligation to investigate the reason for the dismissal itself. The dismissal will be unfair because the employer has failed to show a potentially fair reason for it. Derby City Council v Marshall [1979] ICR 731

3.7 In Omilaju v Waltham Forest Borough Council [2005] IRLR 35 the court held that where the alleged incident that caused the claimant to leave may in itself be

insufficient to treat the resignation as a constructive dismissal, it may be the last straw that causes the claimant to terminate a deteriorating relationship. In such a case the test is to look at the series of events and ask whether together they amount to a breach of the implied term of mutual trust and confidence. The last act would have to be more than innocuous and it must contribute something to the breach, but it need not in itself amount to a fundamental breach. Lord Dyson in his judgment said:

> "20 I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.
>
> 21 If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.
>
> 22 Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective . . . "

3.8 In Addenbrooke v The Princess Alexandra Hospital NHS Trust UKEAT/0265/14 Lewis J says at paragraph 14 of his judgment,

> "There may have been an earlier fundamental breach which has been affirmed by the employee. If there is subsequently conduct which taken together with the employer's earlier fundamental breach causes the employee to resign or plays a part in the decision of the employee to resign the latter act effectively reactivates the earlier fundamental breach."

3.9 In Vairea v Reed Business Information Ltd UKEAT/0177/15, Judge Hand QC considered Addenbrooke and concluded at paragraph 84:

> "I think when a contract has been affirmed a previous breach cannot be "revived". The appearance of a "revival" no doubt arises when the breach is anticipatory or can be regarded as "continuous" or where the factual matrix of the earlier breach is repeated after affirmation but then the real analysis is not one of "revival" but of a new breach entitling the innocent party to make a second election. The same holds good in the context of the implied term as to mutual trust and confidence. There the scale does not remain loaded and ready to be tipped by adding another "straw"; it has been emptied by the affirmation and the new straw lands in an empty scale. In other words, there cannot be more than one "last straw". If a party affirms after the "last straw" then the breach as to mutual trust and confidence cannot be "revived" by a further "last straw".

3.10 There are, therefore, two divisions of the Employment Appeal Tribunal which differ on the interpretation of Omilaju. If Vairea is correct, an employee who affirms a contract following a fundamental breach of contract by the employer, can never have a resignation treated as a dismissal unless the post affirmation conduct of which he or she complains itself amounts to a fundamental breach of contract. However, neither Addenbrooke nor Vairea cast any doubt on paragraph 22 of the judgment in Omilaju. An entirely innocuous act can never amount to a final straw.

<u>Disability Discrimination</u>

3.11 Section 39 EqA provides:

(2) An employer (A) must not discriminate against an employee of A's (B)-
(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

<u>Discrimination arising from disability</u>

3.12 Section 15 EqA provides:

(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.

3.13 In Pnaiser v NHS England [2016] IRLR 170, the following guidance as to the correct approach to a claim under section 15 EqA was given:

'(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

3.14 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal. Hardys & Hansons plc v Lax [2005] IRLR 726

Duty to make reasonable adjustments

3.15 Section 39 (5) EqA imposes a duty to make reasonable adjustments on an employer.

3.16 Section 20 EqA provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(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.

3.17 Section 21 EqA states:

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

3.18 Part 3 of Schedule 8 EqA provides:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

3.19 Employers are expected to act positively and constructively. In the key case of Archibald v Fife Council, [2004] IRLR 651, HL the House of Lords said:

"The DDA does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination."

3.20 Environment Agency v Rowan 2008 IRLR 20 gave guidance for handling reasonable adjustment claims. As well as identifying the offending PCP the tribunal must establish the nature and extent of the substantial disadvantage suffered by the disabled employee in comparison with non-disabled people. Further, it must be clear

what 'step' the employer has allegedly failed to take to remedy that disadvantage and whether it was reasonable to take that step.

3.21 The test of what is a reasonable adjustment is an objective one Smith-v-Churchills Stairlifts.

3.22 Project Management Institute v Latif 2007 IRLR 579 concerned the burden of proof in relation to the duty to make reasonable adjustments. The EAT explained that, in order to shift the burden onto the employer, the claimant must not only establish that the duty has arisen, but that there are facts from which it can be reasonably inferred, absent an explanation, that it has been breached. Accordingly, by the time the case is heard, there must be evidence of some apparently reasonable adjustments that could be made. It would be an impossible burden to place on an employer to prove a negative – i.e. for the employer to show that no adjustment could reasonably have been made. If the claimant sets out the adjustments, the Tribunal must decide whether the respondent's given reasons for not doing them are objectively reasonable by critically evaluating them, weighing their importance to the employer against the discriminatory effect .

3.23 In Spence-v-Intype Libra Elias P. said:

> "The nature of the reasonable steps envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate or prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."

<u>Harassment</u>

3.24 Section 40 EqA provides:

> (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
>
> (a) who is an employee of A's;

3.25 Section 26 EqA provides:

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

Subsection (5) sets out the relevant protected characteristics and these include disability.

Time Limits (DIscrimination)

3.26 Section 123 EqA provides:

(1) [Subject to section 140A] Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

3.27 A failure to make a reasonable adjustment is an omission not an act. Matuszowicz v Kingston Upon Hull City Council [2009] IRLR 288 (CA). Time runs from when the respondent decided not to make the adjustment. Section 123 (4) applies.

3.28 In Commissioner of the Metropolitan Police v Hendricks [2003] ICR 530 it was established that when considering whether there is conduct extending over a period, the focus should be on whether there was an ongoing situation or a continuing discriminatory state of affairs.

3.29 There is no presumption that a tribunal should exercise its discretion to extend a time limit. Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable. Parthan v South London Islamic Centre EAT 0312/13.

3.30 In considering whether a claim has been brought in a period which is just and equitable it was suggested in British Coal v Keeble [1997] IRLR 336 by the EAT that tribunals would be assisted by the factors mentioned in section 33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases. This requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;
(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and
(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

4 Submissions

4.1 On behalf of the claimant, Mr Barker submitted that the respondent had not discharged a duty to adjust the reduction in travelling time because the respondent adhered to that adjustment reluctantly.

4.2 The claimant also submitted, without any clear analysis of the claim and without giving any prior indication that this would be in issue, that a duty to make adjustments arose in respect of the exercise carried out by the respondent to establish the claimant's eligibility to work in the United Kingdom. This was on the basis that the exercise caused the claimant stress and adjustments ought to have been made to avoid worsening the stress.

4.3 It was submitted that the Champix incident, the bowel monitoring form and the handling of the eligibility to work issue all amounted to harassment.

4.4 The claimant accepted that in September 2015 an accommodation had been reached with the respondent and an agreement had been reached to draw a line under previous conduct. The claimant argued that the incidents in 2016, culminating in the way in which the eligibility to work issue was handled, were matters constituting the final straw and that the claimant was entitled to resign on the basis that the respondent was in breach of the implied term of mutual trust and confidence. The claimant submitted in respect of the discrimination claim that there was an act extending over a period throughout her employment. Alternatively, it would be just and equitable to extend the time limit

4.5 The respondent argued that the travelling restriction was the only adjustment contended for and that it had been agreed and implemented. From December 2014 the claimant never travelled outside the 17 mile radius. The adjustment had been declared permanent in September 2015 and that defeated the claim.

4.6 The adjustment in respect of the eligibility to work had never been pleaded and the only adjustment that could have been made was for the respondent to ignore its legal obligations.

4.7 The respondent acknowledged the risk assessment form relating to car travelling was unwanted conduct and related to the claimant's disability. Its purpose was not to violate the claimant's dignity, nor create the proscribed environment. The tribunal would have to consider whether it was reasonable that it had that effect.

4.8 The Champix incident did not relate to the claimant's disability.

4.9 The respondent's Human Resources Manager was unaware of the claimant's disability and the issues concerning the eligibility to work could not have related to the claimant's disability.

4.10 There was no continuing discriminatory state of affairs. The discrimination claims were out of time unless the tribunal considered it just and equitable to extend the time limit. The claimant had given no reason for the delay.

4.11 There had been an affirmation of the contract of employment in September 2015. The events in 2016 were trivial in nature and none of them could amount to a final straw. There had been no dismissal.

5 Analysis

The reasonable adjustments claim

5.1 The respondent had required the claimant to travel to various parts of County Durham. This put the claimant at a substantial disadvantage compared with persons without her disability because the longer the claimant was in her car without toilet facilities the greater was the risk that she might soil herself. The adjustment suggested by the Occupational Health Service to restrict her car journeys to a 17 mile radius was one that it was reasonable for the employer to have to make. It was based on what the claimant had told Occupational Health she could normally manage to do. There was an attempt made by the respondent to limit this adjustment to a temporary period and an intention evinced by the respondent that it would try to extend the range of travel. When the claimant complained in September 2015, those proposals were rescinded and the adjustment was made permanent. In these circumstances, the respondent had fully complied with its duty to make this adjustment by September 2015.

5.2 The adjustment contended for in respect of the eligibility to work exercise is misconceived. It was first raised as an issue during the claimant's submissions and had not been pleaded or previously identified as an issue. No application to amend was made by the claimant. More fundamentally, section 20 refers to a provision criterion or practice (PCP) of A's (A being the respondent). The requirement to establish the eligibility of the claimant to work in the UK was not a PCP of the respondent. It was a legal requirement imposed upon them by statute. There is no duty or scope on the respondent to make adjustments. The claimant had to establish her entitlement to work within the period of grace allowed by the UK Border Agency, if she wished her employment with the respondent to continue.

5.3 For the above reasons the reasonable adjustments claim fails.

Discrimination arising from disability

5.4 The claimant argued that the respondent's attempt to limit and undermine the travel restriction was unfavourable treatment because of something arising from her disability. The treatment was unfavourable. It was done because the claimant was not travelling to other centres and the reason for that was her disability. The respondent had the requisite knowledge of the disability and the disadvantage. The

respondent accepted that its actions were inappropriate and did not seek to justify them. In September 2015, the claimant agreed to draw a line under the event and made no claim in respect of it. The claimant presented prescribed early conciliation particulars to ACAS on 4 October 2016 and presented her claim to the tribunal on 2 December 2016. It follows that any discrete acts of discrimination occurring prior to 5 July 2016 are out of time unless there was a continuing discriminatory state of affairs lasting until then or unless the tribunal extends the time limit. We deal with this separately.

5.5 It was suggested that the proof of right to work incident was also section 15 discrimination. We cannot categorise the respondent's actions as unfavourable treatment done because of something arising from her disability. That aspect of the claim fails.

Harassment

5.6 The disciplinary investigation of the claimant in relation to the Champix incident was regarded by her as unwanted. The claimant had made a mistake and clearly that had to be investigated. The issue taken by the claimant was that there was no need for it to have been a disciplinary investigation. This claim is misconceived. Any unwanted conduct must be related to a relevant protected characteristic if it is to be regarded as unlawful harassment. Carrying out the disciplinary investigation was not related to the claimant's disability.

5.7 It was argued by the respondent's witnesses that the risk assessment form sent to the claimant in respect of her travelling was for her benefit. It was no such thing. The covering note makes clear the respondent's motives. They wanted to restrict the adjustment for a trial period, during which time they wanted the claimant to record the number of times she had bowel movements when driving or had needed to find a toilet. The intention was then to require her to travel further and continue monitoring whether and to what extent she had bowel movements when driving. This was unwanted by the claimant. It related to her disability. It had the effect of violating her dignity. It was reasonable that the conduct did have that effect. This was an act of harassment. It occurred in March 2015. The claimant with the help of her trade union complained to the respondent's predecessor. There was an acknowledgement that she should not have been asked to complete the form. In September 2015, the claimant agreed to draw a line under the event and made no claim in respect of it then. For the reasons set out in respect of the section 15 claim, this claim is also prima facie out of time, unless there was a continuing discriminatory state of affairs lasting until then. We deal with this separately.

5.8 We are not satisfied that there was any other conduct by the respondent relating to the claimant's disability that violated the claimant's dignity or which had the purpose or effect of creating the proscribed environment.

Constructive unfair dismissal

5.9 The reaction to the Occupational Health's recommendation that the claimant's travelling should be restricted and the request to her to fill in the so-called risk assessment form was conduct likely to destroy or seriously damage the relationship

of trust and confidence between the parties. The breach was repudiatory. Had the claimant immediately resigned in response to it, we would have considered that she had been dismissed. But she did not resign. She agreed to draw a line under the conduct. She affirmed the contract.

5.10 We have looked at what has happened since September 2015. The claimant complains that when she was off work on sickness absence (not related to her disability) one of her colleagues wrote in capital letters on one of the client records that an appointment had not been made. Whatever interpretation the claimant put on this, the incident can only be objectively regarded as innocuous.

5.11 The claimant accepted that her behaviour in the office in April 2016 had been inappropriate and had signed a record of the meeting confirming this. She says now that it was unfair because she was not asked for her side of the story and that she only signed the record to keep the peace. However, we believe that the signed record reflects her sentiments at the time. Looked at objectively it would not be reasonable to link this incident with the events prior to September 2015. This incident was also innocuous.

5.12 The respondent was legally obliged to ensure that the claimant was eligible to work in the UK and it was her responsibility to produce documents acceptable to the UK Border Agency. The claimant knew very shortly after the induction meeting that she had to produce these documents. The information pack had been hand delivered to her by her at home by her manager and the claimant had signed a document saying that original documents verifying her entitlement to work were enclosed when they were not. Our concern was what appeared at first sight to be a threat to the claimant to suspend her without pay if she did not produce them. Since there was no right to suspend without pay in the claimant's contract, such a threat might be regarded as an anticipatory breach of contract. However, on closer scrutiny that is not the case. The start of the 60 day period of grace was delayed to run from the date the respondent discovered the claimant's birth certificate was Australian. They also in effect extended the 60 day limit by saying that if at the end of that time the claimant had not produced the required documents, rather than dismiss her straight away they would suspend her for a week without pay. Far from being an anticipatory breach of contract, the suspension would have worked in her favour. In these circumstances the events surrounding the eligibility to work incident do not add anything to the 2015 conduct. In this context it was an innocuous event.

5.13 Our conclusion, therefore, in respect of the 2016 events is that they were, taken individually and together, innocuous and could, therefore, not have amounted to a final straw.

5.14 Had we not found them to be innocuous, we would have said that individually and taken together they did not add anything to the 2015 conduct.

5.15 We formally record that the events of 2016 either individually or together do not amount to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

<u>Extension of Time</u>

5.16 We found that the events in 2015 concerning the respondent's restriction on travelling amounted to section 15 discrimination and harassment, but to the extent that the events were discrete acts the claims had prima facie been presented out of time.

5.17 It was suggested to us that there was a discriminatory state of affairs persisting throughout the claimant's employment and that the limitation period should, therefore, be a three month period starting with the termination of her employment, extended to cater for early conciliation. There was no evidence of any discrimination occurring after September 2015 when both parties agreed to draw a line under the previous conduct.

5.18 The question, therefore is whether it would be just and equitable to extend the time limit. This involves balancing the prejudice the claimant will suffer if the time limit is not extended against the prejudice the respondent will suffer if it is.

5.19 The claimant acknowledged that she had drawn a line under previous conduct in September 2015. That was her reason for not bringing the proceedings within three months of their occurring. We have found that there was no further discrimination. The respondent having apologised for its actions and the claimant having agreed to let bygones be bygones, it would be unjust to allow the claimant to resurrect a claim in the absence of further discrimination, especially since the identity of the respondent has changed. We also bear in mind that the cogency of the evidence was inevitably affected by the passage of time. For these reasons we think that the respondent would suffer greater prejudice if we extended the time limit than the claimant does by our refusing to do so. The discrimination claims were, therefore, presented out of time and are dismissed.

JOHN HUNTER EMPLOYMENT JUDGE
RESERVED JUDGMENT SIGNED BY THE
EMPLOYMENT JUDGE ON
26 May 2017
JUDGMENT SENT TO THE PARTIES ON
30 May 2017
AND ENTERED IN THE REGISTER
G Palmer
FOR THE TRIBUNAL