EMPLOYMENT TRIBUNALS

Claimant:	**Ms S Callender**
Respondent:	**South London and Maudsley NHS Foundation Trust**
Heard at:	**London South**
On:	**26th, 27th and 28th June 2017**
Before:	**Employment Judge Pritchard**
Members:	**Ms S Campbell**
	Ms T Williams
Representation	
Claimant:	**In person**
Respondent:	**Mr R Morretto, counsel**

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1 The Claimant's claim that the Respondent treated her unfavourably because of something arising in consequence of her disability is dismissed.

2 The Claimant's claim that the Respondent failed to make reasonable adjustments is dismissed.

3 The Claimant's claim that she was constructively and unfairly dismissed is not well-founded and is accordingly dismissed.

REASONS

1. The Claimant claimed she had been discriminated against because of something arising in consequence of her disability, that the Respondent had failed to make reasonable adjustments, and that she had been constructively and unfairly dismissed. The Respondent resisted the claims.

2. The Tribunal heard evidence from the Claimant on her own behalf. The Tribunal also heard evidence from the Respondent's witnesses: Bernadette Crosby (Team Manager for a Community Mental Health Team); Ann Witham (Clinical Service Lead); and Sally Dibben (Head of Employee Relations). At the conclusion of the hearing the parties made oral submissions, Mr Morretto adding commentary to his written submissions.

Issues

3. The issues had been identified at preliminary hearings held on 28 February 2017 and 8 May 2017 (when the Claimant was granted her application to amend her claim to add a complaint of constructive unfair dismissal). Following discussion with the parties at the commencement of the hearing, the issues can be described as follows:

Jurisdiction/time limit

3.1. The claim form was presented on 15 November 2016. An early conciliation certificate was issued on 16 October 2016. Accordingly, any discriminatory act or omission which took place before 17 June 2016 is potentially out of time, so that the Tribunal may not have jurisdiction.

3.2. Does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

3.3. Was any complaint presented within such other period as the Tribunal considers just and equitable?

Disability

3.4. The Claimant suffers from cervical spondylosis and osteoarthritis. The Respondent admits that the Claimant was a disabled person at material times.

Discrimination arising from disability – Section 15 of the Equality Act 2010

3.5. The Respondent conceded on the second day of the hearing that issuing the Claimant with a final written warning was unfavourable treatment which was something arising in consequence of the Claimant's disability.

3.6. Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? Mr Morretto told the Tribunal that the legitimate aim relied on was to improve attendance and ensure that the Respondent can provide service to its clients to the best of its abilities.

3.7. Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Reasonable adjustments – sections 20 and 21 of the Equality Act 2010

3.8. Did the Respondent apply the following provision, criteria and/or practice ("the provision"), namely requiring the Claimant to sit at a desk to work? The Respondent's case was that the Claimant was not required to sit for long periods. The Claimant told the Tribunal that she did sit for long periods, for example, when writing a report.

3.9. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that the Claimant could not sit for prolonged periods due to her medical conditions?

3.10. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant, however, it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

3.10.1. The provision of equipment such as an ergonomically designed chair, a tablet/IPad, document holder – the Claimant told the Tribunal at the first preliminary hearing that this request was made on 2 June 2016 (as was the request in the paragraph below);

3.10.2. Changing the location of her desk away from the air conditioning unit;

3.10.3. Reduced hours – this application was made on 23 June 2016 as part of the Claimant's OHS consultation and was discussed with Ms Crosby

3.11. The Respondent conceded that it knew the Claimant had a disability from 16 June 2016 but the Tribunal would have to determine if the Respondent knew or could be reasonably expected to have known that the Claimant was likely to be placed at the disadvantage set out above.

Constructive unfair dismissal

3.12. The Claimant alleges the Respondent breached the implied term of trust and confidence implied into her contract of employment by making false allegations in a letter dated 2 December 2016 (which she received from Mrs Witham on 7 December 2016). Specifically, the sentence on the fourth page of that letter that reads: "You had not shared with anyone any of the discussions that you had with Joan Collins or any of her recommendations". The Respondent admits that

the sentence was a mistake but denied that it amounted to a fundamental breach of contract.

3.13. The issues for the Tribunal are accordingly, whether the Claimant can show:

3.13.1. That objectively viewed, there was a fundamental breach of contract on the part of the Respondent which entitled her to resign;

3.13.2. If so, whether that the breach caused the Claimant, or partially caused the Claimant, to resign;

3.14. The Respondent conceded that if the Claimant resigned in response to a fundamental breach of contract, she did not delay in doing so such that she lost the right to claim constructive dismissal.

3.15. The Respondent also conceded that if the Tribunal were to conclude that the Claimant had been constructively dismissed, the Respondent would not seek to show a potentially fair reason for the dismissal. In other words, if the Claimant had been constructively dismissed, the dismissal would be unfair.

Remedy

3.16. The Tribunal proceeded on the basis that liability only would be considered at this hearing and that if the Claimant were to succeed in all or any of her claims a further hearing would take place to consider the question of remedy.

Findings of fact

4. The Claimant was employed by the Respondent from July 2007 to 4 January 2017 as a Community Occupational Therapist. In February 2014, the Claimant transferred from Croydon to the St Giles Resource Centre in the London Borough of Southwark and worked within the St Giles Adult Community Mental Health Team.

5. The Claimant worked with clients with severe and enduring mental illnesses who had a range of social problems; she managed a caseload of approximately 30 clients. The Claimant's key responsibilities were clinical case management, working as part of a multi-disciplinary team, communication and documentation. The Claimant was required to visit clients in their own homes. The Respondent provided the Claimant with the benefit of a lease car. The Claimant might visit 4 or 5 clients three out of five days each week following which she would update her notes, in each case taking about 15 minutes to do so. From 2013, the Claimant was provided with a Samsung tablet to enable her to update her notes electronically; she usually did this sitting her car. The Claimant's contracted hours were 37.5 hours a week.

6. The Claimant would also work in the office where she would attend meetings or write up notes following a hospital visit. The Claimant confirmed during cross examination that she had the opportunity to walk around when carrying out work in the office. She told the Tribunal that she might of her own volition

sit for prolonged periods, for example in order to complete a report. The Claimant made clear when giving evidence that she could relieve discomfort by walking around the building and did so by going to reception or the lavatory; she said she was not "chained to the desk". In a display screen self-assessment form completed by the Claimant, referred to below, she confirmed that she was able to arrange her work so that around 10 minutes in every hour was spent doing non-computer based work.

7. Based on the evidence, the Tribunal finds that although the Claimant was required to sit at a desk for short periods before a computer, her job was predominantly mobile in nature. When she was working in the office she was not required to sit for long or prolonged periods and there was no evidence to suggest that there was an expectation that she should or would do so.

8. When working in the office, the Claimant would usually sit at the same desk on a chair with adjustable height but with a fixed back angle and no headrest.

9. The Respondent has in place a Sickness Policy which states, among other things:

> *While the Trust understands that there will inevitably be some sickness absence among employees, it must also pay due regard to its business needs. If an employee is frequently and persistently absent from work, this can damage efficiency and productivity, and place an additional burden of work on the employee's colleagues. By implementing this policy, the Trust aims to strike a reasonable balance between the pursuit of its business needs and the genuine needs of employees to take periods of time off work because of sickness*

The policy makes provision for the management of both short-term and long-term sickness absence. Employees may appeal against formal actions taken under the policy.

10. In February 2015, following a number of sickness absences for various sickness reasons, the Claimant was issued with an Attendance Improvement Plan to be in place for a 6 month period.

11. In early September 2015, the Claimant requested an IPad to replace her Samsung tablet which was not working well. The Respondent agreed to authorise the Claimant's request. There was initial confusion as to whether the Respondent could provide an IPad or whether it only provided Samsung tablets. Nevertheless, it was clear that the Respondent remained willing to fund an IPad for the Claimant's use and that the Claimant should complete a form on the Respondent's intranet in order to obtain one. The Claimant did not complete such a form.

12. By September 2015, the Claimant had taken a further 8 days sickness absence, the final day of sickness by reason of what was thought to be a trapped nerve in her shoulder causing numbness for which the Claimant sought attention at A & E. During a supervision meeting, the Claimant told her line manager, Bernadette Crosby, that she could not type fast because she was in pain. Although Bernadette Crosby offered support, the Claimant declined it.

13. The Claimant was invited to attend a sickness review meeting on 23 September 2015 at which Bernadette Crosby told the Claimant that she would be issued with a First Written Warning under the Sickness Policy (the letter notifying the Claimant of the First Written Warning not being received by her until November 2015). It was suggested that the Claimant should complete a display screen equipment self-assessment which could then be forwarded to Joan Collins, the Trust's Health and Safety Advisor. However, the Claimant did not complete the self-assessment. The Claimant was also referred to occupational health but she did not attend the appointment.

14. On 23 November 2015, the Claimant's GP certificated her as not fit for work because of "cervical spondylosis" The Claimant remained certificated as not fit for work until her return on 26 May 2016 as described below.

15. On 11 March 2016, the Claimant attended an occupational health appointment. Dr Haq's ensuing report noted, among other things:

    Underlying medical problem – yes Ms Callender is suffering from an underlying medical condition. She is also under investigation for other medical concerns and is waiting for a specialist assessment appointment. It is hoped that this will be within the next 4 weeks

    …

    Work contributing to health problems – no evidence at assessment to suggest that work is a contributory factor

    Restrictions/adjustments – to be advised at a later stage after review when fit to return to work. There are several barriers preventing return to work at this stage

    …

    The occupational health notes record, among other things, that the Claimant was unable to sit for more than 1 hour.

16. The Claimant attended a further occupational health appointment on 14 April 2016. The Claimant did not consent to Dr Haq's report being released to the Respondent until 20 May 2016. That report records, among other things:

    She tells me that she had had increased levels of sickness absence due to multiple factors, health and personal. She tells me that in September whilst working a late shift she developed acute neck symptoms. She was referred to physiotherapy but thereafter suffered a deterioration in her symptoms which rendered her unfit for work as of November 2015. She has been under the care of her GP and had also been referred to the musculoskeletal team from Charing Cross. She has had some preliminary investigations and no obvious cause of her symptoms have been identified so following an MRI scan (which showed no significant abnormalities) in February, has now been referred to the Rheumatologist for which she is awaiting an appointment.

> *… I would therefore advise a phased return to work programme whereby she works 50% of her usual hours for the first week and 75% for weeks 2 & 3. I would also recommend a work station assessment to ensure her chair and desk are set up correctly. Further she tells me that an IPAD was on order for her, so if this is available for her to use upon her return, this would also help minimise the amount of time she has to sit at her desk.*

17. In response to an email dated 26 April 2016 from the Claimant, Bernadette Crosby informed the Claimant that while the Respondent no longer provided IPads, her Samsung tablet should be taken to the IT department to be undated with software to enable better internet access. The Claimant informed Bernadette Crosby that she would ask IT to look at her Samsung tablet on her return to work.

18. On 26 May 2016, the Claimant returned to work on a phased basis. The notes of the return to work meeting record that prolonged sitting could aggravate the Claimant's symptoms.

19. Following her return to work, the Claimant took her Samsung tablet to the Respondent's IT department who said that it should be written off. During a supervision meeting held on 15 June 2016, Bernadette Crosby told the Claimant that she should complete the intranet form in order to obtain an IPad. By email dated 17 June 2016 to Bernadette Crosby, the Claimant stated, among other things:

> … *I have no inclination or motivation to complete an application form for an iPad. I will accept what I am given as long as it works.*

20. By email dated 2 June 2016, Bernadette Crosby caused an enquiry to be made of Dr Haq, as to whether the Claimant had a condition which could be classed as a disability. Dr Haq replied:

> *… Ms Callender appears to have had musculoskeletal issues for some time. Although she has not yet been fully diagnosed as to the cause of her symptoms, as she was waiting to see a specialist when I met her, I would determine in advance that, given her history of symptoms, she does have a long term condition which may require consideration as a disability under the Equality Act (DDA)*

21. Following her return to work, the Claimant was invited to attend a formal sickness review meeting with Bernadette Crosby on 16 June 2016. Because the Claimant had taken a further 187 days sickness absence, the Claimant was issued with a Final Written Warning. It is this Final Written Warning about which the Claimant complains to the Tribunal alleging that it amounts to discrimination under section 15 of the Equality Act.

22. In December 2015, while off sick, the Claimant had appealed against the Final Written Warning. Given that her appeal was pending, the Claimant communicated her unhappiness to the Respondent that the Final Written Warning had been imposed. The Claimant was informed that if her appeal was successful then the Final Written Warning would be reviewed.

23. The notes of a meeting held on 20 June 2016 between Bernadette Crosby, Ann Witham and the Claimant record, among other things, that Bernadette Crosby and Ann Witham would pursue the application for an iPad but that the Claimant did not mind which sort of tablet she had but would like one as soon as possible.

24. On 23 June 2016 the Claimant attended an occupational health appointment. Dr Haq reported, among other things:

    Ms Callender tells me that she was seen by a Rheumatologist on 15 June. He diagnosed that she has osteoarthritis. Her condition is likely to warrant consideration as a disability under the Equality Act. … Ms Callender tells me that she does experience symptoms of neck pain particularly after sitting for long periods of time on the computer despite taking micro breaks (1 – 2 minutes every 30 minutes or so to stretch out). I understand that she is due a workstation assessment which will be taking place on 5 July.

    Ms Callender informs me that her tablet was returned to the IT department in early June as it was not working and she is waiting for a replacement. She is finding that without it; she is having to sit more at her workstation which is compounding her symptoms.

    Hence, I would recommend a number of adjustments. I would suggest that any recommendations resulting from her workstation assessment are actioned as soon as possible. I would advise that she is provided with a replacement tablet as soon as possible. Lastly, to allow her to recuperate during the working week, I would support Ms Callender's request to reduce her hours to 4 days a week with preferably the Wednesday as the day off. This will give her time away from the computer mid-week and allow her symptoms to improve.

25. The Claimant completed a workstation self-assessment. Among other things, she noted that a document holder would be of benefit and that she would like a different chair with more back and neck support. On 5 July 2016, after receipt of the Claimant's self-assessment, Joan Collins carried out a workplace assessment with the Claimant. However, because Joan Collins went off sick very shortly thereafter, she did not produce a report recording her recommendations or inform Bernadette Crosby what she recommended.

26. The Claimant's appeal against the First Written Warning was scheduled to take place on 6 July 2016 chaired by Ann Witham. At the Claimant's request the appeal meeting was postponed and was re-arranged to take place on 25 July 2016. In the event, because of mix up with holiday dates, the appeal meeting was again re-arranged to take place on 25 August 2016.

27. By letter dated 14 July 2016 the Claimant reminded Bernadette Crosby, among other things, of Dr Haq's recommendations concerning a four day week and the provision of a tablet. The Claimant also informed Bernadette Crosby of recommendations which Joan Collins' had made, namely:

    - Changes to her office chair
    - Changes to her computer display screen

- Changes of the position of her chair near the air conditioning

28. Bernadette Crosby replied by email dated 25 July 2016 reminding the Claimant that she had a tablet on her return to work but because it was beyond repair she was awaiting a replacement and that efforts were being made to obtain a replacement. Bernadette Crosby also reminded the Claimant that she had the option of applying for an IPad and/or a VPN by completing the application form on the intranet. The Claimant did not complete the online application form. With regard to the 4 day week, Bernadette Crosby enquired whether the Claimant wanted this on a short-term or permanent basis and again sent the Claimant a flexible working request form which would start the process.

29. The Claimant again went sick because of osteoarthritis on 20 August 2016. In the event, she did not return to work thereafter. The Claimant's GP advised on the medical certificate that the Claimant may be fit for work on amended duties and with workplace adaptions as assessed and recommended by Dr Haq.

30. On 25 August 2016, Bernadette Crosby learned that Joan Collins had gone sick after having carried out the workplace assessment. Bernadette Crosby immediately pressed for a copy of Joan Collins' report; or a second assessment if the report was unavailable.

31. By the beginning of September 2016, the Respondent had an iPad ready for collection for the Claimant's use when she returned to work. It is clear from the documents in the hearing bundle that any delay in providing the Claimant with a replacement tablet or an iPad was in no way because of inaction on the part of Bernadette Crosby or Ann Witham; the documentation makes it clear that the Respondent's IT department were chased on several occasions.

32. Because the Claimant was not well enough to attend the appeal meeting on 25 August 2016, it was re-arranged and took place on 14 September 2016 although the Claimant remained off work at the time. Ann Witham chaired the appeal meeting; she concluded that the Written Warning was fair in the circumstances and that appropriate procedures had been followed in line with the Respondent's Sickness Absence Policy. Ann Witham clarified that the Written Warning had been issued before the Claimant's more recent diagnosis.

33. On 15 September 2016, the Claimant raised concerns with the HSE about her situation at work. Among other things, she stated that the risk activity complained of was sitting at her desk for prolonged periods. The HSE were unable to assist and suggested the Claimant might wish to contact ACAS.

34. On 16 September 2016, the Claimant raised a formal grievance in which she complained that the Respondent had failed to make the reasonable adjustments recommended by the Dr Haq and by Joan Collins. Sally Dibben emailed the Claimant asking what recommendations Joan Collins had made because no report had been received.

35. The Claimant attended an occupational health appointment on 29 September 2016. It was noted that there was little to add to Dr Haq's report of 23 June

2016 and that the Claimant's GP had stated that the Claimant was not fit for work. The report also notes that Joan Collins had carried out a workplace assessment and had made some physical changes to her workstation and that Joan Collins had made further verbal recommendations regarding the Claimant's computer set up/obtaining a chair with a neck support. The occupational health adviser recommended that a meeting should take place to discuss the adjustments listed by Dr Haq in readiness for the Claimant's potential return to work in October. The Claimant wrote to the Respondent informing them that she had had a fall at home, that her condition was aggravated by sitting at a chair for long periods, and that the following adjustments had not been made: IPad, chair, VDU, and four day week. By email dated 21 October 2016, Sally Dibben asked the Claimant when she would be ready to meet.

36. As evidenced by an email dated 3 November 2016 to Paul Maskell, it is clear that by then the Claimant had informed Bernadette Crosby that Joan Collins had recommended a chair and VDU and a seat away from the air conditioning.

37. On 15 November 2016, the Claimant presented her ET1 Claim Form to the Employment Tribunal in which she claimed disability discrimination and unfair dismissal. Because the Claimant had neither been dismissed nor tendered her resignation, the Claimant's claim of unfair dismissal could not be accepted.

38. Ann Withham, together with Sally Dibben, met with the Claimant on 22 November 2016 to consider her grievance. The following matters were noted:

- That the Claimant had formally requested to reduce her working hours to two days each week and that it was being considered;
- That the Claimant would provide dates when she would attend a further workplace assessment;
- That a new IPad could be collected upon the Claimant's return to work;
- That arrangements were being made for Dragon Software;
- That the Claimant's desk would be moved away from the air conditioning;
- That a date would be confirmed for the Claimant's appeal against the Final Written Warning to be held;
- That the Claimant would complete a reasonable adjustment agreement upon her return to work;
- That mediation could be arranged between the Claimant and Bernadette Crosby upon the Claimant completing the relevant documentation.

39. By email dated 25 November 2016, Sally Dibben informed the Claimant that whilst it was thought that the Final Written Warning had been issued appropriately at the time, because the Claimant's disability was notified shortly afterwards the Final Written Warning would be removed from the Claimant's file as a reasonable gesture.

40. By letter dated 2 December 2016, received by the Claimant on 7 December 2016, Ann Witham informed the Claimant of the outcome of her grievance

following the meeting of 22 November 2016. The letter, which comprises no less than eight pages, includes the following sentence:

> *You had not shared with anyone any of the discussion that you had with Joan Collins or any or her recommendations.*

Ann Witham did not accept that the Respondent had failed to put in place reasonable adjustments.

41. In advance of her receipt of Ann Witham's letter, the Claimant had written to Sally Dibben on 6 December 2016 saying, among other things:

    > *How does my condition affect me? I find it difficult sitting down for long periods without experiencing fatigue pain e.g. tension in my shoulders. At my worst I experience pins and needles in my fingers, headaches increased pressure at the back of my neck sometimes with blurred vision and breathing difficulties.*

    The Claimant also stated that she felt it would be better to have a fresh start and that she had made a claim for constructive dismissal.

42. By letter emailed to the Respondent on 4 January 2017, the Claimant resigned with immediate effect. As stated above, the Claimant's application to amend her claim to include a claim of constructive unfair dismissal was granted at a preliminary hearing on 8 May 2017.

Applicable law

<u>Time limits under the Equality Act 2010</u>

43. Section 123(1) of the Equality Act 2010 provides that a complaint 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 Tribunal thinks just and equitable.

44. Under section 123(3)

    (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.

45. Under section 123(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.

46. The time limit set out above is extended in accordance with the ACAS Early Conciliation provisions under 140B of the Equality Act 2010.

47. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time (expressed in current legislation as conduct extending over a period) a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether the same or different individuals were involved; see: Aziz v FDA 2010 EWCA Civ 304 CA.

48. A failure to make reasonable adjustments is an omission and time begins to run when an employer decides not to make the adjustment; see Humphries v Chevlar Packaging Limited EAT 0224/06. If an employer has not deliberately or consciously failed to comply with the duty to make reasonable adjustments, and the omission due to lack of diligence or competence, in the absence of evidence as to when the omission was decided upon, there are two alternatives: (i) when did the person do an act inconsistent with doing the omitted act; or (ii) if the employer had been acting reasonably, when would it have made the reasonable adjustments? See: Kingston Upon Hull City Council v Matuszowicz 2009 ICR 1170.

49. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

50. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA.

51. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the

limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

52. Even if there is no good reason for the delay, it might still be just and equitable to extend time. See for example: Rathakrishnan v Pizza Express Restaurants Ltd UKEAT 0073/15.

53. Reasonable ignorance of time limits can be a relevant factor in deciding whether or not it is just and equitable to extend time. See: Director of Public Prosecutions v Marshall 1998 ICR 518 EAT. In such cases, the date from which a Claimant could have become aware of the right to present a worthwhile complaint is relevant.

Disability discrimination

Discrimination arising from disability

54. Section 39(2) of the Equality Act 2010 provides, amongst other things, that an employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment.

55. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

56. In General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 the Employment Appeal Tribunal considered the way in which section 15 would apply in circumstances in which a disabled employee was issued with a final written warning because of the employee's absence from work, mostly because of his disability. Judge David Richardson observed (at paragraph 47):

> *If the case had been put that way it would to my mind in any event be doomed to failure. It might have been established that the dismissal and the underlying written warning were "unfavourable treatment". But it was legitimate for an employer to aim for consistent attendance at work; and the carefully considered final written warning was plainly a proportionate means of achieving a legitimate aim*

Duty to make reasonable adjustments

57. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know, and could not reasonably be expected to

know that the employee has a disability and is likely to be placed at the disadvantage.

Burden of proof

58. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

59. Thus, the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will generally wish to hear all the evidence, including the Respondent's explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

Constructive unfair dismissal

60. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

61. The fundamental principles are set out in Western Excavating v Sharp [1978] ICR 221. In order to claim constructive dismissal an employee must establish:

    (i) That there was a fundamental breach of contract on the part of the employer entitling the employee to resign. Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1. In Tullett Prebon plc v BGC Brokers LP [2011] IRLR 420, the Court of Appeal confirmed that the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. Also see Leeds Dental Team Ltd v Rose [2014] IRLR8 in which the Employment Appeal Tribunal held that the Tribunal has to consider objectively whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. That test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant.

    (ii) that the breach caused the employee to resign (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to claim constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House

UKEAT/2012/0069). Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon. The Tribunal is not required to look for the effective cause of the employee's resignation; see: Wright v North Ayrshire Council [2014] IRLR 4; .and

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal. As stated above, this was not an issue to be determined in this case.

62. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

63. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

Conclusion

Time limits

64. The Claimant was issued with the Final Written Warning about which she complains on 16 June 2016. Any act of discrimination taking place before 17 June 2016 is outside the primary time limit. In the Tribunal's view, issuing this warning was an isolated, one-off specific act which cannot be considered conduct extending over a period, albeit one which might, arguably, have had continuing consequences.

65. The Claimant told the Tribunal that she took advice before commencing proceedings but had understood that she had 3 months in which to do so exclusive of the day on which she presented her claim. In the Tribunal's view, this amounts to reasonable ignorance of the applicable time limit. The claim was made just one day outside the primary time limit. There was no suggestion that the cogency of evidence was affected by the delay. Although the Respondent is prejudiced in having to meet a claim not otherwise defeated by a limitation defence, it cannot be said that the Respondent was prejudiced in being able to resist the claim which they did by calling evidence and making submissions. The Tribunal has had regard to Robertson but, having regard to the factors set out in British Coal, concludes that it is just and equitable for time to be extended such that the Tribunal has jurisdiction to consider the Claimant's complaint under section 15 of the Equality Act 2010.

66. With regard to the Claimant's claim that the Respondent failed to make reasonable adjustments, there was no credible evidence to suggest that the

Respondent took a conscious deliberate decision not to make the adjustments contended for. Nor was there any evidence from which the Tribunal could determine when the Respondent did an act inconsistent with making those adjustments. The Tribunal concludes that if the Respondent in this case had been acting reasonably (and to the extent that it was under a legal duty to do so), it would have made the adjustments recommended by Dr Haq following her report of 23 June 2016. The Tribunal concludes that it has jurisdiction to consider the Claimant's claim that the Respondent failed to make reasonable adjustments.

Unfavourable treatment under section 15 of the Equality Act 2010.

67. Given the Respondent's concession that by being issued with a Final Written Warning the Claimant was thereby treated unfavourably because of something arising as a consequence of her disability, the question for the Tribunal is whether the Respondent has shown that issuing the Final Written Warning was a proportionate means of achieving a legitimate aim.

68. The Final Written Warning was issued under the Respondent's Sickness Policy which makes it clear that the Respondent must pay due regard to its business needs. This is unsurprising, not least given the nature of the Respondent's duty to care for vulnerable individuals. Although the Claimant's appeal against the First Written Warning remained outstanding when the Final Written Warning was issued, there was no credible evidence to suggest the Final Written Warning was issued in bad faith or inappropriately or otherwise than in accordance with the Respondent's policy. The fact that the Claimant had an underlying medical condition did not preclude formal action under the Respondent's policy. Nor was there any credible evidence to suggest that the First Written warning was issued inappropriately (that first warning was issued in accordance with the Respondent's policy for various sickness related reasons unrelated to the trapped nerve injury as it was understood at the time). The Tribunal accepts Bernadette Crosby's unchallenged evidence that the Claimant's continued sickness absence was having a significant impact on the team, service users and overall service delivery.

69. The Tribunal has had regard to Carranza and finds a close analogy with that case and the present case. In Carranza the employee had been off work for 206 days; in the present case, the Claimant had been off work for a further 187 days in a six month period; both the employee in Carranza and the Claimant in the present case were issued with Final Written Warnings.

70. The Tribunal, having had regard to paragraph 47 of Carranza, and the facts of this case, is perfectly satisfied that the Respondent has, and had at material times, a legitimate aim to improve attendance and ensure that it could provide service to its clients to the best of its abilities. In the circumstances of the case, issuing the Claimant with a Final Written Warning was a proportionate means of achieving that legitimate aim.

Failure to make reasonable adjustments

71. The PCP (or provision) identified at the Preliminary Hearing referred to above was requiring the Claimant to sit at a desk to work. The disadvantage was identified as the Claimant's inability to sit for long periods. The evidence showed that the Claimant would be disadvantaged if she was required to sit

for long or prolonged periods. However, the evidence was equally clear that the Respondent did not require or expect the Claimant to sit for long or prolonged periods. The Claimant could take breaks and walk around as she wished. Although the Claimant might sit for long periods, to write a report for example, that was not a requirement applied by the Respondent but a decision taken by the Claimant for her own reasons. Further, the Claimant's job was predominantly mobile in nature. Following a client visit, updating a client's notes might, according to the Claimant, take about 15 minutes; there was no credible evidence that sitting for 15 minutes would put the Claimant at a disadvantage. The Tribunal agrees with the Respondent's submission that, at its highest, the PCP is the requirement for the Claimant to sit at her desk for short periods. The Tribunal notes that the recommendations of Dr Haq and the adjustments contended for by the Claimant appear to be based on the incorrect assumption that Claimant was required to sit for long periods. The Tribunal concludes that, having had particular regard to the occupational health reports, the findings of fact referred to above, and the Claimant's own evidence, that by being required to sit for short periods, the Claimant was not put at a substantial disadvantage compared to persons who are not disabled.

72. In any event, even if that conclusion is wrong, the Tribunal concludes that the Respondent did not know, and could not reasonably have known, that the Claimant was likely to be placed at a disadvantage by sitting for short periods. There was no credible evidence to suggest otherwise.

73. The Tribunal notes that the Respondent in any event sought to support the Claimant in light of the information it had about her condition. This included: Bernadette Crosby advising the Claimant that she should plan her community tasks so as to break up the administrative tasks; Bernadette Crosby checking with the Claimant that she was taking short breaks every 30 minutes; offering support to carry out administrative tasks; providing a phased return to work; and seeking to facilitate a four day working week for the Claimant (which the Claimant did not progress because she could not decide whether or not she wanted to work a four day week).

Constructive unfair dismissal

74. The Claimant's claim is that, specifically, the erroneous sentence in Ann Witham's letter of 2 December 2016 amounted to a breach of the implied term of trust and confident amounting to a fundamental breach of contract. The Claimant confirmed in evidence that she resigned in response to that alleged breach. During submissions, the Claimant, for the first time, told the Tribunal that the content in the letter was the "last straw". The Tribunal informed the Claimant that in light of the issues identified at the preliminary hearing, her case had not been understood as one in which she was relying on a "last straw" or a series of events amounting to an alleged breach of contract but, rather, as a one-off discrete act. The Claimant confirmed that she was basing her claim on the sentence in the letter.

75. The Claimant first issued her claim to the Tribunal on 15 November 2016. She included a claim of unfair dismissal. In her letter of 6 December 2016, the Claimant states that feels it might be better to have a fresh start to improve her health and wellbeing and that she had therefore made a claim for constructive dismissal. The Tribunal concludes that the Claimant did not

therefore resign in response to the erroneous sentence in Ann Witham's letter which the Claimant only received on 7 December 2016.

76. In any event, given the overall context of a lengthy letter, and the circumstances leading up to it, the Claimant has not shown from the perspective of a reasonable person in the Claimant's position that the Respondent demonstrated an intention to abandon and altogether refuse to perform the contract. The tone of the letter was very much one of making concessions. It cannot sensibly be concluded that the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence between Claimant and the Respondent. The inclusion of such an erroneous sentence in the context of the case might be described as a "lesser blow" as described in Croft. It comes nowhere near establishing a fundamental breach of contract.

Employment Judge Pritchard
Dated 31 July 2017