



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs D Ashdown

v

Norfolk County Council

Heard at: Norwich

On: 23, 24, 25, 26, 27 July 2018

Before: Employment Judge Postle

Members: Mrs B Handley-Howarth, Mr V Brazkiewicz

Appearances

For the Claimant: Mr C Khan, Counsel

For the Respondent: Mr A Brett, Solicitor

RESERVED JUDGMENT

1. The claimant's claim she was constructively dismissed is not well founded.
2. The claimant's claims under the Equality Act 2010, for the protected characteristic of disability, are not well founded.

RESERVED REASONS

1. The claimant brings claims to the tribunal of constructive dismissal (s.98 of the Employment Rights Act 1996) and claims under the Equality Act 2010, for the protected characteristic of disability. The disability is lymphoedema arising from breast cancer. That disability is accepted by the respondents as satisfying the s.6 definition under the Equality Act 2010.
2. The particular claims are: s.13 direct, s.15 discrimination arising from disability, s.19 indirect, and the failure to make reasonable adjustments s.20-22.

3. The detailed specifics of each claim were identified and agreed at the case management hearing of January 2017, and can be found at pages 69-74 of the joint bundle. In closing, counsel for the claimant confirmed the original claim for harassment was no longer pursued.
4. In this tribunal we heard evidence from: the claimant and on her behalf Miss Palmer, (former employee of the respondent); Mr D Lambert, TU representative; and Mrs Dyde, (former employee of the respondent); all giving evidence through prepared witness statements.
5. For the respondent Ms Corey-Cake; Mrs A Sharp (former head of HR), again all giving evidence through prepared witness statements.
6. The tribunal also had the benefit of a bundle of documents consisting of 957 pages.
7. Further, the tribunal had also the benefit of written closing submissions from the respondent's solicitor and the claimant's counsel, which were amplified orally before the tribunal.

Constructive dismissal

1. Section 95(1)(c) of the Employment Rights Act 1996, states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he, or she, is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as constructive dismissal.
2. In the leading case on the subject, Western Excavating (DCC) Ltd v Sharpe 1978 ICR 221, CA, the court ruled, that the employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract. As Lord Denning MR put it:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."
3. Therefore, in order to claim constructive dismissal, an employee must establish:
 - 3.1 That there was a fundamental breach of contract on the part of the employer.
 - 3.2 That the employer's breach caused the employee to resign.

- 3.3 That the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
4. Where the basis of the claim as in this case is the breach of the implied term of trust and confidence, the tribunal will look at whether the respondents without reasonable and proper cause conducted itself in a manner likely to destroy or seriously damage a relationship of confidence and trust between employer and employees.

Section 13 – Direct discrimination

5. The claimant has to establish the detrimental action relied upon, that is has the claimant been treated less favourably than the respondent would treat others, (the comparator), actual or hypothetical.
6. On such a comparison of cases there must be no material difference between the circumstances relating to each case. Does the tribunal find that the less favourable treatment is because of a protected characteristic?

Section 19 – Indirect discrimination

7. Again, the claimant must show detrimental action relied upon.
8. In particular, has the respondent applied a provision criterion or practice, (the PCP), to persons with whom the claimant does not share the claimant's disability and that PCP puts, or would put persons with whom the claimant shares the disability at a particular disadvantage when compared with persons with whom the claimant does not share it. Further, that the PCP puts or would put the claimant at that disadvantage and the respondent cannot show the PCP is a proportionate means of achieving a legitimate aim.

Section 15 - discrimination arising from disability

9. Once again, the claimant has to establish some detrimental action. In particular, if the tribunal found that the respondent has treated the claimant unfavourably because of something arising in consequence of the claimant's disability. Here no comparator is required, and the respondent again cannot show that the treatment is a proportionate means of achieving a legitimate aim the claimant will succeed.

Section 20 – reasonable adjustments

10. Once again, the claimant has to establish detrimental acts.
11. The respondent will discriminate if they fail to comply with their duty to make reasonable adjustments.

12. Again, similar to indirect discrimination, if the respondent applies a provision criterion or practice, (the PCP), that puts a disabled person at a substantial disadvantage in relation to a relevant matter compared with a non-disabled person, the employer is required to take such steps as it is reasonable to have to avoid the disadvantage in question.

The facts

13. The claimant's employment with the respondent commenced on 7 March 2005, and from the 1 December 2015 she had been employed by the respondent as head of Social Work Operations in Children's Services.
14. In 2001, the claimant underwent treatment for breast cancer. She had surgery followed by chemotherapy and radiotherapy. As a result of this treatment the claimant has lymphedema to her right arm and suffers with pains to her wrist. Lymphedema is a condition that causes swelling when the lymphatic system is unable to properly drain fluid. As a result of this condition the claimant has some problems moving her right arm freely and apparently driving for long periods of time will aggravate the condition.
15. The claimant's position was clearly a senior position involving being a member of the social work service senior management team, managing and developing social work services for children and young people within the south Norfolk area and this involved a certain amount of travel within Norfolk. It was a demanding role. However, the claimant was able to manage her own time, diary, meetings and there was no evidence before this tribunal that the claimant was expected to work excessive hours, or indeed 70 hours per week. Contractually the working week was 37 hours, Monday to Friday, except from time to time those hours may have been exceeded as one would expect in a senior role. Previously the claimant had been an independent child protection chair person, (IC), which also required some travel and prior to the claimant's promotion, there is no evidence the claimant was finding travelling distances a problem, either with her lymphedema or stamina that the respondent were then made aware of. Indeed, the claimant's sickness record (471), reflects the fact that she had no absences between 30 June 2011 until 21 January 2016 when the claimant took up her new post.
16. Shortly after the claimant's promotion, she did commence a period of sick leave from 21 January 2016, having had two weeks leave in December 2016. The claimant then remained absent until 4 March. The claimant was then placed on a phased return to work with reduced number of days per week, (429). The claimant's work while she was absent was covered by colleagues. Prior to the claimant's sick absence there appears to have been a supervision meeting between the claimant and her line manager, Cathy Mouser, at which the claimant was informed:

*"Donna to ensure she has time to do her exercises in the morning.
Later start times on days in the week.
Weekly catch up meetings.*

*Diary management.
Clear understanding of no weekend working.”*

17. Furthermore, during February, Miss Mouser notes a discussion, between her and the claimant, recording the fact that the demands of her new job caused her to be ill. At that stage the claimant indicated she might resign. Miss Mouser recorded at that stage it was not appropriate to discuss resignation whilst the claimant was off sick. The claimant needed to get better and then she should consider her future.
18. When the claimant returned to work on 4 March, there was a phased return with half days working from home. A supervision session on 11 March discussed boundaries of hours of work, including the team. Self-managing, the fact that the post was busy and Cathy Mouser discouraged the claimant from working any long hours. Miss Mouser was keen to ensure that work was done within reasonable hours. The discussion appeared to centre around the claimant's hours and diary management and not about her disability. It would appear, (431), the claimant and Miss Mouser were having discussions over the subsequent period about whether the claimant felt the post was right for her and again the claimant talked about resigning.
19. On 29 March, there is a record of supervision between the claimant and Miss Mouser, (112a), the claimant was advised:
 - 19.1 Need to continue to keep an eye on health and well-being.
 - 19.2 Monitor hours.
 - 19.3 Diary management.
 - 19.4 Working at home as appropriate.
20. There appears to be no discussion at the meeting about difficulties with the claimant's travel or the claimant's stamina. The claimant has a further annual leave period between 9 – 11 May and 16 and 18 May.
21. The claimant's own chronology, (at 475), records various discussions taking place between the claimant and Miss Mouser about her workload and solutions at this time, (April and May). The claimant also appears to have approached Mrs Carey Cake, (head of independent statutory service), regarding a possible transfer to the position of an independent reviewing officer, (IRO). At that stage there were no permanent posts available, but there was a sessional, (as and when), work available in Norwich south. Mrs Carey Cake, having been the claimant's previous line manager, working together for some 18 months.

22. On 23 May, there was an appraisal of the claimant by Miss Mouser, (113 – 115), a discussion about the new posts centred around:
- 22.1 Learning new role.
 - 22.2 Clear claimant has skills to effectively perform role.
 - 22.3 Achieving progress in the post.
 - 22.4 Good vision.
 - 22.5 Still discussing time management.
 - 22.6 Need to establish better work life balance.
23. The claimant records on 31 May, she was in agreement with the comments on the appraisal. There is no reference to problems with the claimant's health at the appraisal, or any difficulties with the claimant travelling by car or otherwise. However, it would appear at the time, the claimant was questioning whether the post was best for her in the long run. The claimant also appears to have suggested whether it would be possible to remain in the post, whilst waiting for a permanent IRO vacancy to arrive and then transfer across.
24. Miss Mouser was not willing to agree to this temporary arrangement as the claimant's post was not only an important senior post, but was clearly requiring commitment and a permanent post holder. Miss Mouser indicated that if the claimant wanted to leave the post, the respondent would want to advertise it as soon as possible, and not unreasonably asked the claimant to clarify her position after reflection the next day.
25. On 24 May, late, (125), Miss Mouser emailed the claimant,
- "I think you were going to let me know today where you were with the post? Could you let me know so I can take action if I need to? Many thanks, Cathy Mouser."*
26. On 24 May, the claimant responds, (128),
- "Dear Cathy, following our discussion yesterday, this is to confirm my resignation to leave the head of social work post.*
- I apologise for any inconvenience this may cause, but in order to prioritise my health and well-being I think this is the right decision for me.*
- Thank you for your support during this difficult period, it is much appreciated.*
- Donna"*

27. It is clear, the claimant at this stage had no issues with Miss Mouser or the respondent, indeed thanking her for support during the difficult period.

28. On 24 May, Miss Mouser responds, (125),

“Thanks Donna

With regret I accept.

I will be moving on the advert quickly; will you tell your teams and SWMT?

Thanks Cathy.”

29. The situation hereafter, the tribunal found confusing, in that the claimant having resigned appears to be working out her notice, but at the same time appears in discussions, initially with Miss Carey Cake, over the position as an independent reviewing officer. In relation to Miss Carey Cake’s evidence, perhaps it is important to note at this stage the tribunal were informed this witness had difficulties with her short-term memory and dyslexia. The tribunal found her evidence difficult in the sense many answers to cross examination were met with simply she could not recall, set against her witness statement where certain conversations dating back were clearly recalled.

30. Doing the best, the tribunal can piece together, there appears to have been a discussion around or on, 27 May, between Miss Carey Cake and the Claimant, in which the claimant confirmed she had resigned and there was then a discussion about the claimant undertaking sessional work.

31. We then have an email exchange starting at 138:

31.1 Donna to Miss Carey Cake,

“Hi Carey

I saw Jackie today at SOS meeting and she said there may now be a permanent IRO post available. If that’s right can I request a transfer due to exceptional circumstances of health grounds please? Full time or part time, whatever suits you, permanent contract would be great if possible?

*Many thanks
Donna”*

31.2 Carey Cake email, 6 June, to claimant,

“Hi Donna

Thanks for getting in touch, I am not sure how we do this if you have handed in your notice? I think you need to ask for a

redeployment before handing in your notice? Have you seen OH lately? I also need to check as I have advertised the post as I thought you wanted sessional. Let me take advice and I will call you."

31.3 Claimant to Carey Cake, email 6 June,

"Thanks Carey

Sessional is fine and I am happy with that. Just thought I'd ask if there is a chance of permanent. No probs though thank you."

31.4 Carey Cake's email, 7 June, to claimant,

"Hi Donna

I have had some discussions with HR today, it does appear that the discussion re redeployment in the first instant needs to go back to Cathy (Mouser) you need to ask her if this is possible for you to be eligible for redeployment, if it is on health grounds we need to take a view from OH or Cathy needs to sign off the exceptional circumstances and agree the way forward with HR, yourself and then me.

Other options apply for one of the posts when I advertise them, or apply to go on temp register through Chantel prior the IRO, I suppose an advantage of this is that if other bits of work came up you could put forward for them through the temp register.

I am free now if you want to chat or tomorrow should be free from 12 to 1.

Carey Cake"

31.5 The claimant emailed Carey Cake, 8 June,

"Hi Carey

Many thanks for this you're a star.

I will ring you when you're free and then make a request to Cathy.

Many thanks for this much appreciated.

Donna"

31.6 Claimant to Cathy Mouser, 9 June,

"Dear Cathy

I understand from Carey that there are now permanent IRO posts available within the service. You may recall this was not the case when I resigned from the head of social work post, but I resigned in order for post to be advertised swiftly. In view of the change of circumstances, I'm writing to request a transfer to the IRO service as this would enable me to remain as a permanent employee. I would be grateful if you would give this your consideration please due to exceptional circumstances of my position.

*Thank you
Donna"*

31.7 Cathy Mouser email, 9 June, to claimant,

"Hi Donna

That makes perfect sense to me and I would be more than happy to support this but I would very much appreciate it if you are able to stick with the current post for your notice period?

*Many thanks
Cathy Mouser"*

31.8 Claimant's email to Cathy Mouser, 9 June,

"Many thanks Cathy that's great and very much appreciated.

No problem at all about the notice period I am pleased to help.

*Thanks again
Donna"*

31.9 Claimant's email, 10 June, to Carey Cake,

"Hi Carey

Cathy has confirmed she is very happy to support my request to transfer to the IRO service as this enables me to remain as a permanent employee. Cathy asked if I could work my notice and I said there was no problem (August) is that all ok with you?

*Many thanks
Donna"*

31.10 Email, Stuart Shaddock (HR), to Miss Rye re IRO post,

"Draft words for response to Donna as promised,

Thanks Donna. This is really helpful in giving us the time to recruit a successor.

In relation to your request to transfer to an IRO post, there may need to be a bit more process involved, not least because as your current line manager I would want to reassure myself that you had explored and understood all the implications of such a move. It's not the same kind of situation as and when SW request a move to a similarly graded post role in another team.

I will ask Sue to set up a meeting with yourself and Carey to take this forward and invite someone from HR to cover the contractual technicalities. Cathy"

31.11 Then Miss Rye to Stuart Shaddock, the IRO post, 13 June,

"Ok it is also worth saying that "I understand also that you raised with Carey (Cake) some concerns regarding your health and we may also want to seek OH advise as to the suitability of this role and any impact it may have on your health."

Miss Rye"

31.12 Claimant email, 14 June, to Cathy Mouser,

"Hi Cathy

Following a conversation with Carey on Friday I understand that my request to transfer to an IRO post may now cause some difficulties. Can I please request that you have a conversation with Don / Carey as I am finding it increasingly difficult to concentrate while my position gets clarified.

*Many thanks
Donna"*

31.13 Cathy Mouser, email to claimant, 14 June,

"Thanks Donna this is really helpful in giving us more time to recruit a successor.

As regards your request to transfer to an IRO post, I have given that some further thought and there may need to be a bit more process involved, not least because as your current line manager I would want to reassure myself that you had explored and understood all the implications as such a move, the same kind of move an SW can

request to a similarly graded post or role in another team for which we have an agreed protocol. And as you mentioned in your resignation email health and well-being were your priority, I would want to make sure that any move to another role would support that priority and I will ask Sue to set up a meeting with yourself and Carey to take this forward and invite someone from HR to cover the contractual technicality.

Thanks
Cathy Mouser”

32. Those emails go all the way up to page (149). It is at that point that the claimant appears then to go off on sick absence.
33. There was a meeting arranged for 22 June to consider contractual technicalities given the claimant had resigned and now wanted a transfer. That meeting took place on 22 June, attended by the claimant, her trade union rep Mr Lambert, Miss Mouser, Miss Carey Cake and Miss Burrows from HR. That meeting, it is clear, was a difficult meeting and unfortunately there are no minutes from either side. It appears the conclusion of the meeting by the respondent was the claimant had the skills and experience for another role within the organisation, and whether the claimant could simply be moved into an IRO role or whether an occupational health referral should be made. It was therefore agreed Miss Mouser would hold a post for the claimant, pending a report from occupational health. This was confirmed by Miss Mouser on 29 June, (187).
34. We then have a referral to occupational health given the concern over the claimant’s health and well-being. The occupational health report, (203), dated 8 July, stated that the claimant was suitable for an IRO role, working from home, managed her time, she should not travel in the rush hour and suggested the following adjustment, *“Meetings to be held during the working day and held no more than 15 miles from base, avoid rush hour travel and not work outside 37 hours.”* The report confirmed underlying health problems, fatigue and swelling to her right arm.
35. Following the occupational health report, Miss Carey Cake, appears to have been requested to provide the details of the IRO role to Miss Mouser, (209), on 20 July. It is unclear whether at this point agreement has been reached about the claimant’s redeployment.
36. There then follows a meeting on 20 July, to consider the occupational health report and how these recommendations could be accommodated within an IRO role post. The meeting was attended by the claimant’s trade union representative, Miss S Rice, HR and Miss C Mouser. Again, there are no minutes of that meeting, there is a form of report of that meeting by letter of 22 July, (213 – 217), from Miss Mouser. Particularly, there is an acknowledgment of the recommendations from the occupational health report, supported by the respondent’s flexible working policies and

practice. An expectation the claimant attends the Whiting Road base as required, the respondents were happy to commence a six-month trial period of the claimant in an IRO post covering the West and the Breckland area, with a review after three months to assess on both sides whether the role was suitable. Originally Miss Carey Cake suggested a three-month trial period and was unable to explain why the period had been extended. Further, if it was decided by either party the role was not suitable then the claimant's employment would end without further notice as there was no substantive post to return to due to the claimant's previous resignation. The claimant was in agreement with the terms and the suggestion was she should return to work the following week.

37. However, the claimant remained on sick leave from 20 July to 3 August, (219).
38. The claimant emailed the respondents on 29 July to accept the post, (249), but raises a grievance dated 27 July about the terms and conditions in offered of the post, (248a), site:
 - 38.1 Circumstances regarding my resignation.
 - 38.2 Discrimination in respect of my health and reasonable adjustment needs.
 - 38.3 Carey Cake's obstructive and unreasonable behaviour.
39. The grievance is also against her line manager, Miss Mouser. The grievance of the claimant sets out her desired outcome, (227), and that was a permanent position as an IRO officer with reasonable adjustments and the terms and conditions to be revised to reflect the claimant had been an employee for 11 years, and should not require a trial period and the fact that she should remain an employee should the grievance / tribunal process extend beyond the post leaving date, (ie notice period).
40. A grievance meeting took place on 10 August, Mr Rosen, an executive director of Children's Services was tasked with dealing with the grievance. The outcome was confirmed in writing on 12 August, (305 – 308). The suggestion was to withdraw the offer of the IRO post given Mr Rosen's concerns over the occupational health report, particularly travel and flexibility required to support young people, was a fundamental part of this role, ie the claimant's travel elements. He confirmed the IRO role was no longer on the table and the IC role considered similarly unsuitable. He made an offer of a LADO role and any further vacancies in adult's to be further explored. He explained that HR had confirmed it was normal practice under redeployment procedure for a trial period and confirmed this was not about the claimant's competency but about her health concerns and the ability to accommodate adjustments, a six-month period was offered to give the claimant more time to build up a full case load over that period. Finally, the claimant's resignation / notice was extended to 30 September.

41. The claimant was not satisfied with the outcome of her grievance and by letter of 22 August, (313 – 317), disputed Mr Rosen's findings and confirmed she was not interested in a post in Adult Services or the LADO post which had been offered. Mr Rosen's response on 1 September, (327), confirming again he did not feel it was appropriate to offer the IRO or IC role due to the travel requirements the post regularly required, with supporting evidence of mileage in the role from other employees. He further explained the rationale of an employee being moved from Breckland / West to Norwich south due to the respondent's need to make a reasonable adjustment in relation to the health and well-being of that employee, (which were appropriately confidential), and he was unable to elaborate because of the specific reasons for that transfer. This was a reference to employee AB whom had lost his driving licence and apparently had mental health issues, this employee was already in an IRO post.
42. Mr Rosen also confirmed, having reviewed the email exchange between the claimant, Miss Carey Cake (6 June), which confirmed the claimant was interested in sessional work and that there was clearly no implication at that stage from the claimant that she had been offered a permanent post by Miss Carey Cake, or indeed any other post until 20 July.
43. The claimant responds on 9 September, again disputing Mr Rosen's findings and his views, her intention to proceed to the next stage of the grievance process and she does so on 9 September, (367 – 371). The appeal hearing was set for 12 December, having been rearranged from 24 October, then 18 November. The appeal was to be heard by Miss A Sharp and Mr J Harries, Unison branch secretary, Mr Lambert representing the claimant, her trade union representative and Miss S Rice and Miss Thirlway in attendance from HR. The management case was set out, (423 – 527), and the claimant's case was set out, (531). The minutes of that hearing are, (551 – 569). By the hearing the claimant's extended notice period had come to an end.
44. On 14 December, Miss Sharp emails the claimant and her trade union representative with a possible solution. She explains the rationale for joining IRO and IC into one job description to ensure continuity of relationship with children, the move from child protection to a permanency arrangement where they become Looked After Children. This was the way the IC role can transition into the IRO role for children, thus maintaining a relationship and continuity for children. Miss Sharp confirms, that although posts were filled during the grievance period, some were in Norwich south. There was recruitment available at present time, but none in Norwich south, vacancies in Great Yarmouth and one in Breckland. Either of which could be adopted to be an independent chair activity, with reasonable adjustment. The claimant was asked whether she wishes to accept either role, if so, the respondents would need to ensure there was clarity about managing and any adjustments regarding travel. The respondent could not guarantee all cases would not require some travel. There is then a

number of emails exchanged between various parties throughout December, trying to find a solution and it would appear, whichever role the respondents looked at, travel was inevitably required outside the occupational health report recommendations. The claimant still maintained there should be reasonable adjustments in these posts limiting any travel. In particular note was the claimant's email of 22 December, (611),

"I am writing in response to Sal's (HR) email dated 20 December clarifying the offer that is being made to me. Unfortunately, the offer of a post either in Breckland or Great Yarmouth does not fulfil the requirements of my medical condition and does not make the adjustments proposed by occupational health..."

45. The claimant's view appears to be her role would concentrate in chairing conferences at Whiting Road, this being a reasonable adjustment she wanted, but failed to recognise albeit, conferences held at Whiting Road, travel would still be required to accommodate the needs of the children.
46. It is clear that the service would be required to make changes to their service in order to improve the children's service experience and well-being following an unsatisfactory report by Ofsted. Clearly combining the two roles, (IC and IRO), and children having continuity of case worker was part of the response to the Ofsted concerns.
47. It would appear that even had the claimant received a case load in Norwich / south, if the children moved she would have been required to travel to see them.
48. The respondents also enquired if any staff covering Norwich south would relocate to accommodate the claimant, (681), none were forthcoming. Adjustments to the role was offered to the claimant on 20 January, (685), there were; adjusting the IRO job description with all key accountabilities but removed the elements of the IRO 'Looked After Children'. The role would still cover the Breckland area and additional child protection conferences will only be allocated in Norwich as and when required, agree the claimant was a home worker and would move the claimant to Norwich south when a vacancy occurs. Travel expectations were within OH recommendations. The claimant's response was...*"forwarded this to my solicitor whom will provide a more detailed response."*
49. The claimant's solicitor responded on 24 January at, (703 – 707). Amongst other things, the proposal put forwarded was rejected and subsequently confirmed by the claimant on 30 January, (711).
50. On 10 February, the joint secretary of the grievance appeal hearing, Mrs Sharp and Mr Harries, confirmed in writing the outcome of the grievance appeal, (807), concluding that as the claimant had declined the respondent's offer of employment they were unable to resolve the claimant's grievance, notwithstanding the respondent's various attempts to make adjustments to accommodate the claimant, the claimant was

unwilling to compromise in her expectations of a role within the respondent.

Conclusions

51. Indirect discrimination

51.1 The requirement to carry out excessive, poorly managed work load in the claimant's position as Head of Social Work.

51.2 The claimant's contract only required 37 hours per week, Monday to Friday. The claimant was able to self-manage and the tribunal accepts, during a number of conversations between the claimant and Miss Mouser, Line Manager, that it was not expected of the claimant to work excessive hours. The claimant was instructed on 29 March 2016, in a supervision session with Miss Mouser, (112a), "*hours - feels as though able to manage things more effectively*". Further, the claimant was allowed flexibility in the manner she performed her role, for example working from home. The claimant accepted the work was not an issue. The tribunal were not persuaded there was ever a provision criterion or practice requiring the claimant to work excessive, or 70 hours per week.

52. The requirement that the IRO post be commenced on a trial period only

52.1. Here the tribunal has the evidence of Miss L Burrows, (307 – 309), that it was standard policy / procedure on redeployment (trial period), that a person would move to that position to ensure it works for both parties. Even if it was a provision criterion or practice, the claimant was not at a disadvantage compared to others, and simply cannot make any connection between the trial period and her disability. It was an opportunity to build up a case load over a reasonable period. There is no evidence, that a trial period was not used with other employers not disabled who are offered redeployment. This claim is therefore not well founded.

53. Requiring the IRO post be carried out covering a fixed area and office based

53.1. IRO posts were set in regions for the benefit of running the children's services. The claimant could work in the Norwich office, or from home, the claimant was therefore not at a disadvantage. The position by necessity required some travel, and meetings could take place subject to availability, (office), anywhere. They would not necessarily have to take place, for example in Breckland area if a child lived in that location, it could take place in Norwich. It is therefore difficult to see how this provision criterion or practice is advanced, as the claimant could only be disadvantaged if driving was required over 15 miles. Furthermore, the claimant was not at a

disadvantage as the comparator advanced, (AB), was unable to drive, but was able to travel within his area and the county.

53.2. The tribunal also noted the claimant, prior to the occupational health report, never raised an issue with the respondent, whether in her current post, Head of Social Services, or her previous post, that travelling by car for any distance presented a problem at a time when the claimant must still have had the lymphedema condition. This claim is not well founded.

54. Reasonable adjustment

54.1. The claimant seems to advance this as an excessive work load and hours.

54.2. The tribunal repeats its conclusion reached in respect of this issue, under indirect. Furthermore, allowing for periods of annual leave and sickness absence, phased return to work, the tribunal noted the claimant did not undertake this role for many weeks in its entirety and her role had in any event been covered while she was off sick. This claim is not well founded.

55. Requiring the IRO post to be commenced on the trial period only

55.1. Again, the tribunal repeats its conclusions under indirect discrimination. This claim is not well founded.

56. Requiring the IRO post to be carried out covering a fixed area and being office based

56.1. Again, the tribunal repeats its conclusions under indirect discrimination. The claim is not well founded.

57. Mr Rosen failing to make reasonable adjustment to the IRO and IC roles

57.1. The tribunal reminds itself such reasonable adjustments must be reasonable, not to change the relevance or central functions away from the job itself. There was a requirement to visit children in an area, whichever area that was. The tribunal noted that some meetings were driven by the needs of the child which is extremely important in this type of work. It is difficult to see how Mr Rosen could make adjustments to the IRO / IC role given the Ofsted judgments in that children had to be offered a choice where meetings are held, rather than require them to come to a central location. The respondent's hands were tied by external factors. Mr Rosen suggested an alternative post of Local Authority Department Officer, which would have accommodated the claimant's needs and removed any potential disadvantage the claimant would suffer in not being able to adjust to the IRO / IC roles. This claim is therefore not well founded.

- 57.2. What were the reasonable adjustments the respondents are said to have failed to make? Particularly, the suggestion put forward by the claimant regarding the head of Social Work Operations role, proactive approach to strategic planning, reduction in the number of strategic / planning meetings.
- 57.3. It is noted at the claimant's appraisal on 23 May, (the day before she resigned), (113), given the claimant was new in the post, and off with ill health, for six weeks absence and annual leave, the claimant was only really feeling her way in the new post and getting her head around the role since she returned in March.
- 57.4. It is clear the claimant had the skills and expertise to undertake the role effectively, albeit some areas of work needed improving in the new role. The overall performance score showed she was achieving in the requirements for the position. Furthermore, the claimant would have some autonomy over how to perform the role. The tribunal are therefore lost to understand as to how this issue is advanced, this claim therefore fails.
58. The failure to implement the occupational health report, including allowing the claimant to work from home and to reduce travel time
- 58.1. The occupational health report of 8 July 2016, the claimant was off sick in the middle of June and did not return during the notice period, including the extended period of notice, the job offer made allowed the possibility of working from home with reduced travel. The claimant never took up any of the opportunities offered, including the LADO position which would have accommodated all her needs. In fact, the respondent was so far as was reasonable in job offers, trying to abide by the occupational health recommendations in the hope of some flexibility on travel by the claimant. This claim therefore fails.
59. Section 15 – discrimination arising from
- 59.1 Failure to refer to occupational health and investigate concerns about work load and hours. The first point to make is the tribunal did not accept the claimant worked excessive hours, 70 per week, or was required to work excessive hours. Further, the tribunal saw no evidence of the claimant raising specific concern during the time she actually worked in the new role, that she was complaining of excessive work load or hours. The tribunal accept that at a meeting with Miss Mouser, the question of hours is raised, however, the claimant was informed she managed her hours and work load and was not required to work excessive hours and no weekend work. It was a senior role requiring self-management, the claimant was not being directed to work excessive hours. The claimant was head of a department and actually only worked actively in the role for a very short period of time. The claimant was not being treated

unfavourably because of her disability. It was also noted, when the claimant was off sick in January to March, the claimant signed off with stress, not in relation to her disability. In any event, the claimant was allowed to work from home and to start later each day on her phased return in March. This claim fails.

59.2 As to the failure to refer to occupational health, this falls as a reasonable adjustment claim. Furthermore, it was not an issue the claimant raised before her resignation or suggested there was some need to make a referral prior to her resignation. Upon her return to work it was phased return without complaint about her return to work or the need for an occupational health referral. When the claimant resigned in May and cited health concerns the respondent rightly requested an OH referral when the claimant wanted redeployment to another role. This claim fails.

59.3 In relation to the claim of failing to make reasonable adjustments to the head of Social Work Operations role, and / or any other alternative role, this appears to be a reasonable adjustment claim and has been addressed by the tribunal above. In relation to the assertion that Miss Mouser refused to allow the claimant to continue in the head of Social Work Operations role whilst exploring a new IRO position. The claimant did continue to work in that role and was asked specifically by Miss Mouser to continue in that role during her notice period. The claimant went off sick in June and did not return. There is therefore no unfavourable treatment.

60. In relation to the assertion requiring the claimant to make a quick decision about her resignation from the head of Social Work operations role by 24 May.

60.1 The claimant had mentioned the possibility of resigning while she was off sick. Miss Mouser informed her that was not the time to consider such a decision. On her return to work later in May, in a supervision appraisal, the claimant announces, (115 – 117), words to the effect she is trying to work out if the job is right for her and during this meeting it is recorded, *“Donna has decided to resign from her role after a great deal of deliberation”*. Not surprisingly, Miss Mouser asked the claimant to make her position clear, given the seniority of her role. Miss Mouser would need to advertise the role as soon as possible given the seniority of the role and its importance. It is therefore not unreasonable to ask the claimant to make it quite clear and give a final decision that she intended to resign from the role, it had nothing to do with something arising from the claimant’s disability. It was not unfavourable treatment.

61. The claimant asserts that the respondents, via Miss Carey Cake, changed their approach and became hostile to the claimant and withdrew support for the claimant to take up an IRO role. It is clear, absolutely, that Miss Carey Cake never offered the claimant a post of an IRO role. Miss Carey

Cake, as confirmed by emails was under the impression the claimant only wanted sessional work. When it became apparent the claimant was looking for a permanent role, she investigated what was possible and how it could be achieved given the fact that the claimant had already resigned. There was some confusion as to how the process should be adopted in those circumstances. There was, therefore, no unfavourable treatment. In relation to the claims, again under section 15, set out at 7(1)(1) G, H and R the tribunal relies on the conclusions referred to above.

62. Direct discrimination

62.1. It is noted the claimant has not pleaded a comparator.

62.2. Clearly there was extensive and thorough, albeit with some misunderstanding, attempts to place the claimant in an IRO / IC role to accommodate as far as possible the claimant's disability subject to the needs of the specific roles. Offering her roles in Broadland West or Great Yarmouth, part time and with some flexibility, working at times from home and given the Ofsted reports and recommendations, ie the needs of the children come first, the role would inevitably require some travel irrespective of where it was based.

62.3. If the employee AB is used as a comparator, losing his licence to drive, he fell into the category of non-disabled, he still had to cover children in the west after his move to Norwich.

62.4. In relation to the trial period, again this has been covered and is a requirement under the respondent's practice and procedures in redeployment.

62.5 The claim for harassment, of course, has been withdrawn.

63. Constructive dismissal

63.1 The last straw relied upon by the claimant was the email sent by Miss Mouser, (125).

63.2 Again the tribunal reminds itself, the claimant had said whilst off sick she was thinking of resigning and was told by Miss Mouser that was not the time to consider it. In May, at the appraisal, the claimant said words to the effect, she didn't think the job was right for her and was going to resign. Given it was a senior post, it was not unreasonable to request the claimant to make a clear decision one way or another whether she was resigning or staying. This cannot be a fundamental breach. Furthermore, the claimant did not see it as one at the time, given her response on 24 May at (128), and,

"following our discussions, yesterday, this is to confirm my resignation to leave the Head of Social Work post.

I apologise for any inconvenience this may cause, but in order to prioritise my health and well-being I think this is the right decision for me.

Thank you for your support during this difficult period, it is much appreciated.

Donna”

- 64. As to the other matters relied upon, leading up to the last straw. There is no evidence that Miss Mouser failed to address the claimant’s concern about work load, it appears there was discussion over hours, self management, no need to work excessive hours, no week end working ensuring a good work life balance. The issue of a referral to occupational health prior to resignation, simply cannot be a factor. The claimant was off for a period of time, her work was covered in her absence, on her return it was a phased return with reduced hours, later start time and working from home. At the time of her resignation, the claimant appeared to be getting to grips with role, as confirmed by her appraisal on 23 May.
- 65. Furthermore, the claimant was making positive progress in achieving the service improvement requirements. There was no attempt by Miss Mouser to stop the claimant remaining in her role during her notice period, it was specifically agreed that she would.
- 66. The tribunal simply do not accept the claimant resigned as a result of any breach on behalf of the respondent, she resigned because she felt the job in the end simply was not right for her.
- 67. The claimant, for the avoidance of doubt did not resign because of factors relating to her disability.

Employment Judge Postle

Date: ...18/10/2018.....

Sent to the parties on:

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For the Tribunal Office