EMPLOYMENT TRIBUNALS

Claimant: **Miss Patricia Murphy**

Respondent: **Northumberland County Council**

Heard at: **North Shields** **On:** **25-29 June and 2 July 2018**

Before: **Employment Judge A M Buchanan**

Non-Legal Members: **Mr S Hunter**
Mr E A Euers

Representation:

Claimant: **Mr J Anderson of Counsel**
Respondent: **Ms K Jeram of Counsel**

JUDGMENT having been sent to the parties on 3 July 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preliminary matters

1. The claimant instituted proceedings on 19 December 2017 relying on an early conciliation certificate on which Day A was 19 October 2017 and Day B 19 November 2017. A response was filed on 27 January 2018. Further Particulars ("the Particulars") were filed in February 2018 (pages 48-66). At a Private Preliminary Hearing on 14 February 2018 the issues in the various claims were defined. An amended response was filed on 7 March 2018.

The claims

2 The claimant advances various claims to the Tribunal namely:-

2.1 A claim of discrimination arising from disability pursuant to sections 6, 15 and 39(2)(c) and (d) of the Equality Act 2010 ("the 2010 Act").

2.2 A claim of disability discrimination by failure to make reasonable adjustments pursuant to sections 20 and 21 and Schedule 8 and section 39(5) of the 2010 Act.

2.3 A claim of harassment pursuant to sections 26 and 40 of the 2010 Act.

2.4 A claim of victimisation pursuant to sections 27 and section 39(4) of the 2010 Act.

2.5 A claim of ordinary unfair constructive dismissal advanced pursuant to sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act") and in particular section 95(1)(c) of the 1996 Act.

The Issues

Disability Discrimination

3.1 The claimant relies on the protected characteristic of disability. She suffered from a physical impairment to her feet – she having a history of hypermobility. The impairment manifested itself first to her left foot and then to her right foot at the material time. The material time for the purposes of the claims of discrimination is February 2016 onwards. The respondent concedes disability. There is no issue in respect of knowledge of the disability or its effects.

Discrimination Arising from Disability - Section 15 of the 2010 Act

3.2 Whether the claimant has established the detrimental acts upon which she relies (the unfavourable treatment, summarised in paragraph 35 of the Particulars : the numbers in brackets in the undermentioned sub paragraphs relate to the relevant paragraphs in the Particulars) as follows:

3.2.1 The respondent's delays in acting upon Occupational Health advice in securing a return to work for claimant in 2016 (10-11), and between end July 2017 and 21 August 2017 (13, 16).

3.2.2 The respondent's refusal/failure to allow an extended phased return to work in September 2017 (17).

3.2.3 Subjecting the claimant to a sickness investigation commencing in March 2017 and continuing, even after she had returned to work, up to 29 September 2017.

3.2.4 The hostile and discriminatory behaviour and comments of Ms MacDonald at the series of meetings between June and September 2017 including the threats of dismissal and that she wanted to "*poke out*" the claimant's eyes (15-25).

3.2.5 The decision of the respondent to dismiss the claimant on 29 September 2017 following its 'sickness investigation' despite the advice of its own Occupational Health that she would be fit to resume her full duties within six months of her return and despite the fact that the claimant had already resigned her employment, which was due to terminate on 20 October 2017 (25).

3.2.6 The respondent's refusal to allow the claimant to take annual leave in September 2017 to enable her to extend the planned phased return to work and aid her recovery (17).

3.2.7 The adverse reference provided by Ms MacDonald and Ms Atkinson and the refusal to amend that reference (26-29 and 31).

3.2.8 The claimant's constructive dismissal (see below).

3.3 If so, whether the unfavourable treatment was because of something arising from her disability (i.e. her absence and lack of mobility); and if so

3.4 whether the respondent can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

Failure to Make Reasonable Adjustments – Sections 20-21 and Schedule 8 of the 2010 Act

4.1 Whether the respondent applied provisions, criteria or practices under section 20(3) which placed the claimant at a substantial disadvantage in comparison with persons who are not disabled. The claimant relies upon the following 'PCP's':

4.1.1 The requirement to work in a "mobile" (non-desk based) role, specifically the IRO post;

4.1.2 The requirement to work at a desk without a foot stool.

4.1.3 The requirement to remain on sick leave despite being able to return to work based upon medical and Occupational Health Advice in 2016 and between end of July 2017 and 21 August 2017.

4.1.4 The requirement to return to work full-time from September 2017.

4.1.5 The requirement to work without taking annual leave.

4.2 Whether the respondent failed to take such steps as were reasonable to avoid the disadvantage. The Claimant asserts that reasonable adjustments would have included:

4.2.1 Providing the claimant with a team manager role, or other desk based role, in 30 September 2016 and 20 October 2017.

4.2.2 Providing a footstool for the claimant between 7 November and 19 December 2016 (paragraph 11).

4.2.3 Acting on Occupational Health advice in securing an earlier return to work in 2016 (paragraphs 10-11), and between end July 2017 and 21 August 2017 (13, 16).

4.2.4 Allowing an extended phased return to work in September 2017 (17).

4.2.5 Allowing the claimant to take annual leave in September 2017 to enable her to extend the planned phased return to work and aid her recovery (17).

Harassment - section 26 of the 2010 Act.

5.1 Whether the respondent engaged in unwanted conduct related to the claimant's disability which had the purpose or effect of:

5.1.2 violating the claimant's dignity; or

5.1.3 creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

5.2 In deciding whether the conduct had the effect referred to above (i.e. where it was the effect rather than the purpose of the conduct) the following must be taken in to account:

5.2.1 the perception of the claimant;

5.2.2 the other circumstances of the case; and

5.2.3 whether it is reasonable for the conduct to have that effect.

5.3 The claimant alleges that the following occurred and were incidents which constitute harassment: the hostile and demeaning comments made by Ms MacDonald at the meetings held between June and September 2017 including all those comments and actions specified at paragraphs 15-25 (inclusive).

Victimisation - section 27 of the 2010 Act

6.1 Whether the respondent subjected the claimant to a detriment because:

6.1.1 the claimant did a protected act, or

6.1.2 the respondent believed the claimant did a protected act

6.2 The claimant alleges that the following were "protected acts" under section 27 (2) (d) of the Equality Act 2010:

6.2.1 the raising of her grievance on 20 October 2017.

6.2.2 complaining of her treatment verbally at the meeting of 14 August 2017.

6.3 The claimant alleges that she suffered the following alleged detriments:

6.3.1 the inaccurate and unfavourable reference provided on 28 September 2017; and

6.3.2 the respondent's decision (7 November 2017) that it would not change the unfavourable reference, despite repeated requests made by the claimant.

Time Issues

7.1 Whether any complaints raised by the claimant are out of time, the claim form in this case having been submitted on 19 December 2017. It is for the Tribunal to determine:

7.1.1 whether any acts of discrimination took place before the relevant time limit; and if so

7.1.2 whether there were any discriminatory acts after the relevant time limit; and if so

7.1.3 whether those later acts were sufficiently linked to the earlier acts such that there was a continuing act (or *conduct extending over a period*) and therefore those earlier acts are deemed to be within time under section 123 (3) Equality Act 2010; or

7.1.2 if the Tribunal finds that there were no discriminatory acts within the relevant time limit (or that any acts after that date were not sufficiently linked to any earlier acts of discrimination to amount to an extending act), then it will determine whether it would be just and equitable to determine the matter under section 123 (1) (b) of the Act.

Constructive Unfair Dismissal – sections 94/98 of the 1996 Act

8.1 Whether the claimant resigned because of the actions of the respondent

8.2 If so, whether the respondent's actions amounted to a fundamental breach of contract such that she was constructively dismissed under section 95(1)(c) ERA 1996.

8.3 The claimant seeks to rely upon a beach of the implied term of mutual trust and confidence. The Tribunal will therefore determine first whether, ignoring their cause, there have been acts which are likely on their face to seriously damage or destroy the relationship of trust and confidence between employer and employee; and secondly whether there is no reasonable and proper cause for those acts.

8.4 Whether the final straw doctrine applies i.e. whether an act (which need not be of the same quality as the previous acts) can be relied on as cumulatively amounting to a breach of the implied term of trust and confidence when taken in conjunction with the earlier acts.

8.5 Whether the claimant resigned at least in part by reason of such acts on the part of the respondent.

8.6 Whether the claimant delayed in resigning and so affirmed her contract of employment and waived any breach.

Witnesses and comment

Claimant

9.1 The claimant – Patricia Murphy. The Tribunal was not particularly impressed with the claimant as a witness. She was clearly prone to exaggeration and her evidence was in certain respects not entirely convincing. The claimant was unable at times to give a straight answer to a simple question.

9.2. Michael Bowman ("MB") – trade union representative (Unison) of the claimant. The Tribunal found this witness to be entirely straightforward and credible.

Respondent

9.3 John Young – Head of Service Adult Care in the respondent council at the material time. This witness dealt with disciplinary proceedings involving the claimant in 2014. The Tribunal found this witness to be straight forward and credible in particular about what he said at the meeting with the claimant on 11 January 2016 in respect of the permanence of the transfer of the claimant to the IRO role effective from December 2015.

9.4 Caley Banks – Senior Manager to whom the claimant reported from June 2014. This witness was not called. We read her unchallenged statement.

9.5 Karen MacDonald ("KM") – Senior Manager and line manager of the claimant from March 2016. We found this witness to be defensive in the giving of her evidence and as a witness she was not impressive. Despite her senior role, this witness had received no training on disability or the duty to make reasonable adjustments. She could not take the Tribunal to a policy supporting her view that in order to access redeployment openings for the claimant, she must first be dismissed. Having assessed the evidence of this witness about the meeting on 14 August 2017, we decided that the version of the claimant should be accepted as she recorded in her contemporaneous note to MB on that day at 22:47 (page 375).

9.6 Amanda Atkinson ("AA") – HR Advisor. This witness gave evidence that she is "in and out of meetings" all day. Given that is so, we found the absence of any notes made by her at the meetings she and KM had with the claimant to be highly surprising and contrary to best practice. We infer that the absence of any notes of those meetings means that matters occurred which this witness did not wish to record. For future reference, the way to avoid such inferences being drawn is to take notes of meetings with employees and so be able to give evidence which might appear credible and convincing. We infer that this witness and KM did not enjoy a good relationship with the claimant. Given the way the claimant gave evidence before this Tribunal which evinced her inability or unwillingness at times to give a straight answer to a straight question, to some extent we can understand why frustration with the claimant might have occurred.

9.7 Angela Glenn - Senior Manager for Quality Improvements employed by the respondent. We found this witness to be hesitant and not convincing. She was guarded in her replies and defensive.

9.8 Sue Harvey – Registered Manager of Coanwood Children's Home. This witness produced an Investigation Report into sickness absence of the claimant. Her evidence was straight forward.

9.9 Karen Martin – Operational Manager with the respondent who at the material time was based at Foundry House. This witness investigated a grievance raised by the claimant. Her evidence was straight forward.

Documents

10. We had an agreed bundle before us running to 528 pages. Some pages were added during the hearing. Any reference to a page number in this Judgment is a reference to the corresponding page in the agreed trial bundle.

Findings of Fact

11. Having assessed all the evidence from the witnesses before us and from the documents to which we were referred, we make the following findings of fact on the balance of probabilities:

11.1 The claimant started work in 1999 for the respondent and became a social worker in 2001. She had an excellent attendance record over 15 years. She became a Team Manager in 2008 responsible for overseeing a team of 9/10 social workers.

11.2 Audrey Johnson was the line manager of the claimant until June 2014 when Caley Banks took over that responsibility.

11.3 In March 2015 complaints received by the respondent led to the suspension of the claimant and a disciplinary investigation. The complaints were investigated by Steve Day and then by Mary Connor who took over when Steve Day left the employment of the respondent. The suspension was long – lasting 9 months.

11.4 On 10 December 2015 a disciplinary hearing took place chaired by John Young. The outcome communicated on 17 December 2015 was that the claimant received a written warning for 12 months from 17 December 2015. She was to return to work in a different role namely as an Independent Reviewing Officer ("IRO") and not Team Manager. Her suspension was lifted that same day. The transfer to the role of IRO was permanent and everyone including the claimant knew that was so. Any doubt in the claimant's mind was removed at a meeting with John Young on 11 January 2016 which was a meeting at her request and at which the permanence of the transfer was re-iterated. The respondent failed to issue any paperwork evidencing the transfer and so it was that later in the chronology the claimant and MB sought to argue her substantive role remained that of Team Manager. It did not. The responsibility to issue that paperwork had fallen between several officers and it was not done. The result was the respondent was in breach of section 4 of the 1996 Act when these proceedings were begun and section 38(3) of the Employment Act 2002 is potentially engaged. The warning issued was for 12 months and KM was wrong in her view later expressed that it was for 2 years: that was a careless but genuine error. The IRO role required the claimant to be fully mobile and there was much travel involved to see children placed anywhere in the country.

11.5 In 2014 the claimant tripped and broke bones in left foot. She suffered discomfort but was not off work. In March 2015 after being suspended from work, she went for an x-ray. This showed nerve damage in her foot caused by broken bones which had become disconnected from the joints. The claimant was advised that she would need surgery to correct the condition and she knew of that by the time of her re-instatement on 17 December 2015.

11.6 In February 2016 the claimant had surgery on her left foot. She went off work in February 2016 and remained absent from the workplace until 7 November 2016 although she returned to the payroll from 1 November 2016 by use of annual leave for the week. KM became her line manager during that absence and refused to transfer the claimant back to her previous team manager role on 28 April 2016 whilst the warning was current (Page 167). This had been suggested by the claimant as a way of achieving a quicker return to work.

11.7 A referral to occupational Health ("OH") was made on 9 May 2016 (page 177). KM noted in that referral that an office based post could be made available for a time limited period. She asked if the claimant could be considered disabled for the purposes of the 2010 Act.

11.8 The resulting OH Report was dated 26 May 2016 (page 181). The view was expressed that the claimant was not a disabled person but *"a foot rest for under her desk would be helpful".* A follow up OH Report was dated 29 June 2016 (page 183). There was a reference to the claimant's right foot now being problematic and the report states: "*I feel that she could possibly return to work in a desk role if that could be arranged".* KM did not actively consider at any time after that if the claimant might be disabled for the purposes of the 2010 Act.

11.9 Despite the contents of that OH report, the claimant made clear in an email to KM on 2 July 2016 (page 184) that she was not ready to return and KM decided not to press that point.

11.10 A meeting took place on 13 July 2016 between the claimant and KM with a different HR representative in attendance as AA was on holiday. In contrast to the stated practice of AA, notes were kept of that meeting (page 195) and indeed of an earlier telephone conversation on 5 July 2016 (page 190). The claimant advised she was unable to return to work because of the condition of her right foot and KM did not press the question. OH wrote a further report on 2 August 2016 (page 196) to confirm that the claimant had some capacity for work but the claimant herself felt she was not ready for work and would meet KM when she was ready to return.

11.11 On 5 August 2016 (page 198) the claimant was told she would reduce to half pay from 25 August 2016. This was a letter written by a member of the Employee Services Department of the respondent and it described the claimant's role as that of "Team Manager".

11.12 On 10 August 2016 (page 200), by email to KM, the claimant advised she had had a setback in her recovery and was to revert to the use of two crutches. On 22 August 2016 the claimant advised OH (page 202) that she would like to return to work but would require prolonged adaptions which might be unacceptable to colleagues. She was to meet KM on 5 September 2016. At this point MB of Unison became involved at the request of the claimant.

11.13 On 6 October 2016 the claimant met KM and AA. This was the first occasion that the claimant and KM had met. KM still refused to allow the claimant to return to a Team Manager role. The claimant stated that she was still in pain and so a further referral to OH was made. The claimant stated that she could not return to a full IRO role but she could do some work. An email sent by the claimant to KM on 13

October 2016 (page 216) does suggest some level of disagreement/concern in respect of annual leave and a holiday having been raised with the claimant because of a post by the claimant on Facebook. The claimant commented on page 216 as to the absence of notes of meetings and expressed the view that she wished to be reassured that the issue of her holiday will "*not be raised again as a significant issue"* as the respondent had termed it. We infer relations between the claimant and KM and AA were already somewhat strained by that stage.

11.14 The OH referral resulted in a further report on 17 October 2016 (pages 217-218). We detect some measure of irritation by the OHP who reiterates what has been said previously namely "*This lady does have some capacity for work between surgeries but she will need some adaptations and a risk assessment. She is happy to do any work or project that would enable her to return to work even in a part time capacity.....I wondered if a contract for reduced hours or alternative working arrangements could be considered...".*

11.15 A meeting took place on 3 November 2016 between KM and AA and the claimant and MB. A role had been found for the claimant at County Hall Morpeth from 7 November 2016. This meeting should have taken place on 25 October 2016 but was moved at the request of MB. The claimant was to return to work on a phased return basis but was to be paid at full pay by the use of accrued annual leave entitlement. A letter confirming the contents of the meeting was sent by AA dated 3 November 2017 (page 222).

11.16 The claimant attended at County Hall on 7 November 2016. She was allowed to park at the front of the building by special arrangement. The claimant worked in a small office some way from the front door and had the use of a foot rest which had been provided for her. A return to work interview took place (page 223) between the claimant and KM on that same day and a risk assessment was completed (pages 224-227). The claimant was to work on reviewing policies. It was suitable work. Adjustments were agreed including regular short breaks. The claimant worked for five weeks part time and then had two full weeks leave from 9 December 2016 until 23 December 2016 when she underwent surgery on her right foot.

11.17 A foot stool was taken in for the claimant to use by AA on 7.11.16. Later that day, KM noticed that it seemed too low and she replaced it temporarily with a box of paper and a cushion. KM sought out a leg rest from HR but there were none and so she sourced one from IKEA and we find it was in place at the latest by the week commencing 21 November 2016 which was the start of the third week of her part time work. The claimant was very vague in her evidence on the matter of the footstool. We prefer the evidence of KM and AA on this point.

11.18 The claimant was absent from work from 23 December 2016 until 21 August 2018 but returned to the payroll from 14 August 2018 with the use of accrued annual leave.

11.19 An OH report was obtained dated 20 February 2017 (page 237). The claimant remained unfit for work. The plaster was not removed from her right foot/leg until 14 March 2017.

11.20 A meeting at Costa Coffee in West Denton between KM and the claimant to monitor her absence was in the diary for 10 April 2017. KM attended and waited for an hour but the claimant did not appear. In reply to a message the claimant wrote she did not know of the meeting. We infer that KM was not pleased with the claimant (page 241).

11.21 A meeting between the claimant and KM and AA in Costa Coffee West Denton did take place on 25 April 2017 and the claimant was told there was to be a formal investigation into her absences. That meeting was arranged by letter dated 12 April 2017 (page 243). That letter enclosed a copy of the respondent's Absence Management Policy ("AMP"). The letter makes no reference to the meeting on 25 April 2017 being a stage 1 meeting as required by the policy. AA says this was the stage 1 meeting. KM saw the stage 1 meeting being the meeting in November 2016. We infer that KM and AA were exasperated by the claimant not appearing at the meeting on 12 April 2017 and so wrote the letter on 12 April 2017 to invoke the formal procedure - the trigger point for so doing having occurred many months earlier.

11.22 The AMP (pages 341-346) sets out at paragraph 1 the need to consider adjustments for a disabled employee. Stage 1 of the formal procedure is triggered after 3 absences in 12 months or an absence of over 28 days. Paragraph 9 speaks of a stage 1 meeting being arranged by the employee being invited to a formal meeting. When it has occurred the e-business record of the claimant should be so marked. If there is no acceptable improvement a formal investigation will be conducted by a nominated officer and an investigating officer appointed to conduct an investigation. That process can result in one of several outcomes including redeployment (paragraph 11). In this case the claimant was not aware of any stage 1 meeting having taken place and KM and AA could not agree on the date of it if indeed there was one.

11.23 Sue Harvey ("SH") was appointed as Investigating Officer into the sickness absences of the claimant and her terms of reference were set out (page 257): this included *"consideration of Trish's current absence and any other absences for the previous 2 years".* As part of the investigation SH met with the claimant on 25 May 2017. There is a note of this meeting at pages 276-279. The claimant confirmed she could not fulfil the duties of her IRO role at that time because of her mobility difficulties. The claimant made clear she was interested in redeployment. She stated that she could do a Team Manager type role or work in a MASH office or similar post where she would have more of a supervisory/delegative role. She referred to the foot stool issue from November 2016 and she referred to the delay in organising her return to work in November 2016 which by then had impacted on her ability to claim SSP in respect of her then current absence. The claimant stated that she wanted to return to work as soon as she could. On the same day the claimant received a fit note (page 274) indicating she was not fit for work for the period 25 May 2017 until 28 August 2017.

11.24 The Investigation report was completed (pages 288-97) on 8 June 2017 and the conclusion included the words: *"Trish is currently categorised as having a disability which needs to be taken into consideration".* The recommendation of SH was that a meeting be convened under the AMP. A letter dated 15 June 2017 was sent to the claimant by KM (pages 347-348) and a formal meeting (at stage 2

although it does not so state) set for 30 June 2018.The claimant was warned that dismissal could be an outcome and she was asked to put her mind to adjustments which could be made to facilitate her return to work. On 26 June 2017 MB on behalf the claimant wrote and asserted that consideration of reasonable adjustments should be considered in respect of her contracted role as Team Manager (page 349). This was not well received by KM and AA.

11.25 An OH report dated 28 June 2017 (pages 352-353) was received indicating the claimant may be able to return to work in the next 6-12 weeks. A phased paid return and a permanent location for first 3-6 months were recommended. A further OH report dated 26 July 2017 was received (pages 361-362) indicating the claimant could return to work if based at one specific location.

11.26 The stage 2 sickness absence meeting in fact took place on 27 July 2017 with the claimant and MB meeting with KM and AA. No formal notes of that important meeting were available – the handwritten notes of AA are at pages 363-365. The claimant indicated she was driving again for short distances and could do an office based role. The Team Manager role and the foot stool issue were again referred to. The meeting was adjourned in order to find a temporary role for the claimant who confirmed she was able to return to work from 14 August 2017.

11.27 KM and AA put together a short term support role for the claimant to commence on 21 August 2017 (pages 366-367). The email refers to 3 days work in weeks commencing 21 and 28 August 2017, 4 days in week commencing 4 September 2017 and 5 days in week commencing 11 September 2017. In week commencing 18 September 2017 "*Return to substantive IRO to cover duties as required or re-plan action based on OHP information. HR meeting".* The role was to be based at Foundry House in Bedlington and the line manager was to be Angela Glenn ("AG"). We do not accept that work was not available in week commencing 14 August 2017 for the claimant due to the absence of AG – she was not in fact absent but just unavailable.

11.28 A meeting took place on 14 August 2017 at County Hall Morpeth between the claimant and KM and AA. There is a clear evidential dispute in respect of what occurred at that meeting. The meeting took place in a small meeting room in the HR department. We find ourselves in the position of having doubts about the reliability of the evidence of all three witnesses present at that meeting. However, we do have the only almost contemporaneous note of the meeting in the form of the email from the claimant to MB dated 14 August 2017 at 22:47 (page 375). We find the lack of any note from the respondent highly unusual and conclude that we cannot rely on the evidence of either KM or AA in respect of this meeting. Both witnesses attend many meetings and indeed AA is "in and out of meetings" every day, as she said in evidence, and we conclude her recollection must be flawed without any note. We conclude we can rely on the claimant's note and so we find that the following things were said at that meeting:

11.28.1 The use of annual leave to extend a phased return to work after the fourth week of the return period was refused. The view of KM was clearly that the absence of the claimant had caused difficulties for the team in which the claimant worked. KM did use the words that a job for the claimant could not be made to "magically appear".

11.28.2. The claimant was given the clearest indication that KM and AA expected her back in the IRO role after the fourth week with a full case load.

11.28.3 The claimant was told that if that was not the case she would be dismissed.

11.28.4 KM did challenge the claimant about her attitude and manner of address in emails and did liken her behaviour to that of an angry stroppy teenager.

11.28.5 KM did challenge the behaviour of the claimant on her last return to work in November 2016 and did say she felt like she wanted to poke the claimant's eyes out.

11.28.6 The claimant was told to stop raising the issue of the Team Manager post. KM did say she was sick of the claimant bringing up the point.

11.28.7 A suggestion was made that the claimant needed counselling in respect of her anger issues so that she could return to work in a better frame of mind.

11.28.8 KM did indicate that she had been busy and that work was not available until 21 August 2017.

11.28.9 AA did advise the claimant that she would return to work for four weeks at Foundry House completing audits and doing child in need reviews.

11.28.10 The claimant was given the impression she was a nuisance to both KM and AA

11.28.11 It was agreed that the claimant would start work at Foundry House on 21 August 2017 and use accrued annual leave to be back on payroll from 14 August 2017.

11.28.12 KM was not as measured in that meeting as she presented to us. We see a history of KM's frustration with the claimant. We see a history of a poor relationship having developed. KM was challenged by the claimant and she did not like it and said so.

11.29 We do NOT accept:

11.29.1 That KM raised her voice and hit her hand on the table.

11.29.2 That KM exhaled loudly when the claimant knocked over one of her crutches.

11.29.3 That KM said "that's what I mean" in respect of the claimant's comment about finding her way to Foundry House

11.29.4 That KM made any comment herself about the claimant finding her way to Foundry House.

11.29.5 That there were raised voices and those working outside the office in the HR Department were embarrassed.

11.29.6 That KM referred the claimant to job websites for posts outside the respondent council.

11.30 The claimant attended Foundry House and met KM and AG on 21 August 2017. The claimant was introduced and a work station was found for her. The claimant was given audit work to carry out and it was suitable work for her.

11.31 There was an OH report on the claimant on 5 September 2017 (page 385). It is illuminating:

"*Mrs Murphy advises me that she has now returned to work on a phased return: she has been working within Foundry House and she has continued to feel pain and discomfort in her foot. I would therefore suggest that it may benefit her physically to increase her phased return through the use of annual leave.*

From a work perspective she is coping with working within Foundry House however at present she still does not have the health capacity to return to her substantive role. I consider that this adjustment is likely to remain in place for at least the next six months and even at that point she still may not be able to cope with all aspects of her substantive position. Due to this I do feel that it will be beneficial to arrange a case conference to discuss how to proceed.

I feel that it will be appropriate for Mrs Murphy to start to introduce elements of her substantive role in the next 5 to 6 weeks to identify if she can cope with some aspects of that role. However as indicated it may take up to 6 months for her to fully recover and therefore she may not be able to undertake all aspects of the post until that time".

11.32 On 8 September 2017 there was a review meeting at Foundry House between KM and the claimant. No-one else was there. There are no notes from either side of that meeting. We broadly accept the claimant's version of this meeting given that it is corroborated in no small measure by the email sent by KM to AA after that meeting (page 387). We accept that in the course of a conversation about her feet, the claimant asked if there were roles she could move to whilst her feet improved and KM did in response indicate towards the claimant's feet and ask her how long was "*this disabled thing*" going to go on. We reach this conclusion because KM has not had any training about disability or her duty to make reasonable adjustments. She did not consider that the claimant was or might be disabled for the purposes of the 2010 Act at any time as she saw the claimant's condition was to improve. That is clear evidence of a training need if ever there was one. In the course of the conversation about what would happen at the end of the phased return to work, KM told the claimant that she would be dismissed. The claimant made the point that her need for other duties was for up to six months but KM made it plain that she would be dismissed at the end of the phased return as that was the way to open the door to redeployment opportunities within the respondent council. We accept that this was the misguided view of the position by both KM and AA.

11.33 On 8 September 2017 after the meeting KM wrote to AA (page 387). She referred wrongly to the OH opinion being that the claimant would need at least six months whereas the view was more accurately expressed as "*up to*" six months.

There is a reference to "a*t least six months"* in the OH report (page 385) but in relation to the duration of likely adjustments. If KM saw a conflict in the letter then clarification was required but none was sought. There was reference made to the claimant's disciplinary caution still standing. That was another misreading of policy by KM. KM was to be away for two weeks. The email concludes:
"I think we need to dismiss Trish from the IRO role and look at redeployment to move things forward". AA did not respond to this email. We do not accept she challenged KM about that final sentence in respect of dismissal. Rather she wrote to the claimant to reconvene the postposed sickness absence management meeting for it to resume on 29 September 2017 at 1pm at County Hall Morpeth (page388/389). That letter includes the following:
"At the hearing we will be considering how you feel you have coped in the workplace, any updated medical advice that may be available and any reasonable adjustments that can be made to assist you in returning to your substantive post". Whilst that is what should have been considered, everything pointed to the fact that it would not be and that the claimant would be dismissed. KM had so resolved and had said as much in writing in her email on 8 September 2017.

11.34 Seeing the writing on the wall, the claimant had registered with various agencies with a view to finding another post as a social worker and on 20 September 2017 was made a conditional offer of a post by Darlington Council. The offer was subject to a satisfactory reference (page 390).

11.35 On 22 September 2017 the claimant sent an email (page 393) to KM with her resignation. She gave four weeks' notice to leave on Friday 20 October 2017 indicating that she would leave work on Wednesday 27 September 2017 using leave to take her to 20 October 2017. She indicated that she was seeking alternative employment and would be putting KM forward as referee. Her plan was to begin work on 2 October 2017 at Darlington (page 397).

11.36 On Monday 25 September 2017 KM and AA went to see the claimant to understand why she had resigned. We infer there was some measure of concern at the resignation and they wished to ensure the claimant understood that if she was dismissed, it would be with 12 weeks' notice which would be paid. The claimant said she had resigned because she had been told she was to be dismissed but did not say she had an offer of employment elsewhere. The request for a reference was discussed. The claimant asked if the Sickness Absence Management Meeting needed to go ahead and was told that it did. The claimant's last day at work was Wednesday 27 September 2017 and on that day AG made a presentation to her and she left.

11.37 On 25 September 2017 a reference request for the claimant was sent to KM by George Goodier ("GG") of Liquid Personnel – an agency. She was chased for it on 25 September 2017 (page 399) and she told GG it had to be checked by HR.

11.38 On 28 September 2017 the claimant was sent a copy of the reference KM had prepared (pages 402-404 - this being the first amended version). She was not happy with the contents and MB was also unhappy with it describing it as one of the worst reference he had ever seen. We conclude that by this point KM was at the end of her tether with the claimant and was not prepared to spend any time on the reference.

11.39 On Friday 29 September 2017 the reconvened Sickness Absence Management Meeting took place at County Hall. The claimant had been told the meeting would go ahead whether she was there or not. The claimant attended supported by MB. KM was the decision maker supported by AA and SH was also in attendance to present her report. The opportunity was taken to discuss the contents of the reference and KM agreed to look at some aspects of the reference. The points at issue included the length of absences through illness, the reason for leaving and the comments about the disciplinary issues in 2015.

11.40 By a letter dated 2 October 2017 (pages 411-412) KM conveyed the result of the hearing which was that the claimant be dismissed. The letter continued: *"as you are aware the work trial that you have been undertaking was for a short term... It is not a permanent role... and is only sustainable for a short time to assist you in return to work. You have stated that you are very keen to be at work but are limited in the work that you can do as a result of your ongoing mobility concerns. Taking all the information presented to me into consideration and the fact that you are unable to return to work in your role of IRO I am writing to confirm my decision to dismiss you from your post on the grounds of ill-health capability in your ongoing health... During your notice period we will support you in your search for suitable alternative employment within the council and will ensure that we share any appropriate vacancies with you over the period of your notice".* An appeal was offered but was not taken up.

11.41 In all versions of the reference all competencies were marked "*satisfactory".* KM who completed the reference made no attempt to check for evidence of the skills she was assessing. KM asked the Principal Social Worker to add a statement about the claimant given she could not comment in detail herself. The final version of the reference is at pages 437-440. Discussions about the reference were ongoing throughout October 2017 and on 7 November 2017 AA sent the final version and commented that this was the "final version" and that she was unable to make any further amendments or alterations.

11.42 On 20 October 2017 the claimant submitted a lengthy grievance – pages 427-436. Karen Martin was appointed to deal with the grievance. In the course of her investigation, she saw the claimant on 20 November 2017 (page 445I), AA on 30 December 2017 (page 455A), KM on 30 December 2017 (page 455F). On page 455G KM was asked about the alleged remark about wanting to poke out the claimant's eyes and she is reported as replying: *"I do not recall saying poke eyes out, not a term I would use but I did say I would not tolerate her behaviour. I explained that she had a flippant attitude".*

11.43 The grievance outcome was sent out on 22 February 2018. The claimant had raised 17 grievances points. All were dismissed save one which was partially upheld – that point being it was agreed there was a delay from 14 August 2017 until 21 August 2017 in returning the claimant to work after her second period of sickness absence.

11.44 The claimant appealed the outcome but subsequently withdrew the appeal.

11.45 There is a national shortage of social workers. The officers of the respondent chiefly involved in this matter namely KM and AA have not received training in disability issues or in the duty to make reasonable adjustments.

Submissions

Respondent

12.1 For the respondent Miss Jeram filed written submissions extending to 95 paragraphs which were supplemented orally. We have given detailed consideration to those submissions. We summarise the submissions very briefly.

12.2 Detailed submissions were made on the factual background to the claims of discrimination arising from disability .No adjustment that was reasonable could be made to the IRP role of the claimant given that all agreed the duties of that role were not achievable by the claimant. No duty arises – **Higgins -v- Secretary of State for Work and Pensions 2014 ICR 341.**

12.3 The respondent took all reasonable steps to provide a foot stool to the claimant. The respondent is not required to answer the changing case now advanced by the claimant – **Chandhok -v- Tirkey 2015 IRLR 195.**

12.4 Certain of the PCP's contended for by the claimant cannot amount to such in law – **Nottingham City Transport -v- Harvey UKEAT/0032/12.** In particular there was no practice that the claimant be required to remain on sick leave or to work without taking annual leave.

12.5 The contended adjustment of allowing a phased return to work in September 2017 to the IFRO role would not have had the effect of removing the disadvantage to the claimant.

12.6 Detailed submissions were made in relation to the allegations of harassment by reference to the decision in **Nazir and another -v- Aslam 2010 UKEAT/0332/09**.

12.7 It was submitted that the required causal link between the making of the protected acts claimed by the claimant in respect of the victimisation claim and the claimed detriment was not present. There was no evidence that KM or AA knew anything about the claimant having raised a grievance at the material time.

12.8 It was denied that the acts relied on to establish a constructive dismissal occurred or were without reasonable or proper cause. There was no final straw. In any event the claimant did not resign in response to the alleged breach.

Claimant

13.1 For the claimant Mr Anderson filed written submissions extending to 97 paragraphs which were supplemented orally. We have given detailed consideration to those submissions. We summarise the submissions very briefly.

13.2 The burden of proof in relation to the legitimate aim defence in respect of the claims under section 125 of the 2010 Act lies with the respondent. The respondent

was vague in respect of the particulars of any such defence. Reference was made to **Hardys and Hansons plc -v- Lax 2005 IRLR 726**. It was submitted that there was a national shortage of social workers with the skills held by the claimant and that as a result the respondent faced an uphill battle in respect of any claim of justification. Detailed submissions were made in respect of each alleged act of discrimination arising from disability.

13.3 In respect of the reasonable adjustment claims, reference was made to **HM Prison Service -v- Johnson 2007 IRLR 951**.

13.4 Detailed submissions were made on the details of the reasonable adjustment claims and the harassment claims.

13.5 In respect of the unfair constructive dismissal claim, if the Tribunal find that KM made the comments alleged by the claimant on 14 August 2017 and 8 September 2017 then they were made without reasonable and proper cause and breach the implied term of trust and confidence. No question of affirmation can arise given the decision of Underhill LJ in **Kaur -v- Leeds Hospital NHS Trust 2018 EWCA Civ 978.**

13.6 If the alleged detriments in relation to the claim of victimisation were influenced in any way by the claimant's claimed protected acts, the claim of victimisation should succeed.

13.7 The majority of the claims are in time. In any event there was an ongoing discriminatory state of affairs by reference to **Hendricks -v- metropolitan Police Commissioner 2003 IRLR 98.** Further it would be just and equitable to allow an extension for any out of time claim by reference to **British Coal Corporation -v- Keeble 1997 IRLR 336.**

Law

Discrimination arising from disability – section 15 of the 2010 Act.

14.1 The Tribunal has reminded itself of the provisions of **section 15 of the 2010 Act** which read:

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

(a) A treats B unfavourably because of something arises in consequences of B's disability, and

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

(2) Sub-Section (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

14.2 We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there

is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability.

14.3 We have reminded ourselves of the guidance of Simler J in **Pnaiser –v- NHS England 2016 IRLR 170** in respect of the proper approach to adopt in cases involving section 15 of the 2010 Act. We must identify whether there was unfavourable treatment - no question of comparison arises. We must determine what caused the impugned treatment: the focus must be on the reason or cause for the impugned treatment and motive is irrelevant.

14.4 We have reminded ourselves that in considering so called justification, that we must consider an objective balance between the discriminatory effect of the PCP engaged and the reasonable needs of the party who applies it. We have noted the words of Pill LJ in **Hardys and Hanson -v- Lax 2005.** This was a decision of the Court of Appeal taken in the context of a claim of indirect discrimination but this test was applied to claims advanced under section 15 of the 2010 Act by the EAT in **Hensman –v- Ministry of Defence UKEAT/0067/14/DM**. We have reminded ourselves of the decision of HH Judge Clark in **H M Land Registry –v- Houghton and others UKEAT/0149/14/BA** . We have noted the guidance given in that decision on the question of Justification:

……."justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. .....Ultimately, the balancing exercise, once properly identified, is a matter for the Employment Tribunal absent any irrelevant factors being taken into account or relevant factors disregarded.

Reasonable Adjustment Claim: sections 20/21 of the 2010 Act

14.5 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

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

(2) The duty comprises the following three requirements,

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in

comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

Section 21

(1) A failure to comply with the first second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person
(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection(2): a failure to comply is , accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8

The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:

" (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know...
(b)….that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

14.6 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"*An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –*

(a) the provision, criterion or practice applied by or on behalf of an employer;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate);

(d) the nature and extent of the substantial disadvantage suffered by the claimant.
It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by and on behalf of an employer" and the 'physical feature of the premises', so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

Harassment: section 26 of the 2010 Act

14.7 The relevant provisions of section 26 of the 2010 Act provide:

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

(5) The relevant protected characteristics are--.disability....;

14.8 In relation to what is required to establish a case of discrimination by harassment the Tribunal has reminded itself of the guidance given by Underhill J in **Richmond Pharmacology Limited -v- Dhaliwal 2009 IRLR 336** and in particular that the Tribunal should focus on three elements namely:

(a) unwanted conduct
(b) having the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him and
(c) being related to the claimant's disability.

Victimisation - Section 27 of the 2010 Act

14.9 The Tribunal has reminded itself of the provisions of this section which read:

(1) A person ("A") discriminates against another person ("B") if A subjects B to a detriment because-
(a) A does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following in a protected act-
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information given, or the allegation is made, in bad faith.....

14.10 The Tribunal has reminded itself that a claim for victimisation requires the Tribunal to make an enquiry into and to determine the reason why the alleged

discriminator did a particular act. That reason must be because the victimised person has done a protected act as defined by the 2010 Act. The protected act need not be the only or main reason for the action complained of: it is sufficient if the protected act materially influences those actions. In a victimisation claim there is no need for a comparator. The 2010 Act requires the Tribunal to determine whether the claimant has been subjected to a detriment because of doing a protected act. It is not necessary for a claimant to show that she has a particular protected characteristic but the claimant must show she has done a protected act.

Constructive Dismissal

14.11 The Tribunal has reminded itself of the provisions of Section 95(1)(c) of the Employment Rights Act 1996:

"For the purposes of this part an employee is dismissed by his employer if and only if …

(c) 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."

14.12 The Tribunal has noted the classic definition of constructive dismissal by Lord Denning was in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221:**

"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, he terminates the contract by reason of the employers conduct. He is constructively dismissed."

14.13 We have reminded ourselves of the decision in **Malik -v- Bank of Credit of Commerce International SA [1997] IRLR 463** where Lord Steyn states that there is implied into a contract of employment an implied term of trust and confidence which provides that: *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee".* We note that the impact on the employee of the employer's behaviour is what is significant and not its intended effect and that the effect is to be judged objectively.

14.14 We have noted the words of Browne- Wilkinson J in **Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666:**

"To constitute a breach of this implied term it is not necessary to show the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it".

14.15 We have reminded ourselves of the decision in **Clements –v- Lloyds Banking plc (above)** and we note the guidance about a discriminatory constructive dismissal contained in the Judgment of Langstaff J:

The real question for determination was whether the resignation was because of the discrimination in any real causative sense. The conclusion that it was not was one of fact: a robust approach has to be taken by courts and tribunals to determining whether or not a particular act has caused or materially contributed to a given effect, for the purposes of determining which of two parties should suffer a given loss – here, the damage caused to the claimant by the discrimination for which he could claim compensation. The Tribunal thought carefully about whether, here, for those purposes, the discrimination involved in telling the claimant he was no longer 25 had played any material part in the breach in response to which the claimant resigned. It did so by asking (appropriately) whether it had "tainted" the dismissal. Its conclusion that it did not was one of fact, as to which Mr Leiper is right to say that, in the absence of any error of approach, the high hurdle of perversity would have to be overcome before it could be upset on appeal".

14.16 We have noted the guidance from Underhill LJ in **Kaur –v- Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978**.Paragraph 55:

I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[6]breach of the Malik term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

Conclusions and Discussion

15. We deal with the claims advanced by the claimant separately. We will consider first the claims in respect of reasonable adjustments and then the claims of harassment. We will deal then with the matters alleged pursuant to section 15 of the 2010 Act and then the claims of victimisation. Finally, we will consider the question of constructive dismissal separately and in the light of our previous findings.

Disability

15.1 We noted the concession made by the respondent in relation to the disability of the claimant at the material time as set out at paragraph 3.1 above.

Failure to make reasonable adjustments claim

15.2 We accept that the respondent applied a PCP that the claimant work in her IRO role and that that role was not desk based and included travel. It was a mobile role.

15.3 The claimant was placed at a substantial disadvantage by this PCP in comparison to her colleagues who were not disabled. The claimant had very severe mobility difficulties and the requirement that she carry out the IRO role was not one she could comply with at the material time because of her disability. This point was in fact conceded by the respondent.

15.4 We accept that there was a failure by the respondent to make reasonable adjustments in relation to this PCP. The respondent employs over 1600 people. Social worker posts were always available. The claimant was a social worker. Posts were available for triage social workers who were desk based. The respondent had twice found desk based work for the claimant of a temporary nature and we are not satisfied that no such work could have been found temporarily for the claimant beyond 27 September 2017. No thought was given to looking at the IRO role and finding parts of it which the claimant could have achieved when she was ready to return to work in August 2017 with a view to other parts of the role being added as the claimant gradually improved. The approach of the respondent's managers was that in August 2017 the claimant was entitled to have a period of four weeks alternative work but after that she was to return to her contracted role full time. If she did not, then she was to face being redeployed and for that she needed to be dismissed before redeployment opportunities could be considered. That approach was fundamentally flawed and not in accordance with the respondent's policies and gave no consideration to the claimant's status as a disabled person under the 2010 Act. That is not surprising, given the lamentable lack of training afforded to either of the senior officials of the respondent who were mainly involved with the claimant at this time. This claim of failure to make a reasonable adjustment is well-founded.

15.5 We do not accept the respondent's submission that no adjustment could have avoided the substantial disadvantage to the claimant in returning to the IRO role.

15.6 We have considered the claim which relies on an asserted PCP of having to work at a desk without a footstool. There was no such PCP as asserted. This is a claim under section 20(5) of the 2010 Act but not pleaded in that way. In any event a foot stool was provided from the outset of the claimant's return to work in November 2016. The claimant's evidence to the contrary is rejected and that of the witnesses for the respondent is preferred. This claim is dismissed.

15.7 We have considered the claim which relies on an asserted PCP to remain on sick leave in 2016 and between end July 2017 and 21 August 2017. We conclude that no such PCP was in play. In 2016 the claimant was permitted to return to work to a role which was found for her as soon as it could reasonably be arranged after

OH had clarified the position. There was no such PCP in 2017. Once it was clarified on 27 July 2017 that the claimant was able to return to work, alternative duties were sourced for the claimant and she began those duties on 21 August 2017 – albeit that they were to last for only a short time. The claimant only became available for work on 14 August 2017 and from that date returned to payroll with the use of annual leave. There was no PCP that the claimant remain on sick leave beyond the date she said she was available for work. The claim does not get off the ground.

15.8 We have considered the claim based on a PCP that the claimant return to work full time from September 2017. There was such a PCP. The substantial disadvantage is conceded and the duty to make an adjustment arises. The contended adjustment of a more gradual return to work was reasonable. Adjustments to the role of IRO were not considered and a gradual return to that role (or indeed some other temporary role) over a period of three to six months after the initial return to work would have been a reasonable adjustment. The claim is well-founded.

15.9 We have considered the claim based on an asserted PCP of being required to work without taking annual leave. There was such a PCP employed by the respondent. We accept that R applied this requirement as a policy. We accept that KM was concerned about the effect of the claimant's return on other members of the IRO team and how that would affect their leave position. There is substantial disadvantage to the claimant as this meant her return to work was more difficult and that would not have been the case with a non-disabled employee who was less likely to be away from work in the first place.

15.10 It would have been a reasonable adjustment to have allowed the claimant a longer period of staged return to work by allowing the use of annual leave. No matter what duties the claimant was then taking up, be it parts of the IRO role or another temporary role, it would have been a reasonable adjustment to allow the claimant to continue with her use of annual leave in order to extend the period of any agreed phased return to work. That adjustment would have removed the substantial disadvantage from the claimant. This claim is well-founded.

15.11 Accordingly the respondent failed in its duty to make reasonable adjustments in respect of three matters.

15.12 We have considered whether these claims are in time. The three claims established all relate to a failure to make adjustments at the time of the claimant's return to work in August 2017 and later. The claimant approached ACAS for early conciliation on 19 October 2017 and thus any act after 20 July 2017 is in time. There are therefore no time issues in respect of the three proven acts of failure to make reasonable adjustments.

Section 15 of the 2010 Act allegations

15.13 We turn then to the allegations under section 15 of the 2010 Act. The first and second allegations were that there was a delay in acting on occupational health advice in 2016 and between the end of July and 21 August 2017. We do not accept that there were any delays. These allegations are not established on the facts and are therefore dismissed.

15.14 Thirdly, there was an allegation of a refusal to allow or consider an extended phased return to work in September 2017. We find that there was such a refusal by the respondent and that that position was confirmed by KM and AA at the meeting on 14 August 2017. We refer to our findings of fact at paragraph 11.28 above. That is unfavourable treatment for it caused the claimant to be more concerned and anxious about her return to work and amongst other consequences caused her to look for work elsewhere. The reasonable support which should have been available to the claimant to effect a successful return to work by allowing an extended return to work by use of holiday leave or otherwise was not there. This unfavourable treatment clearly arises from her absence from work and is a consequence of her disability.

15.15 We have considered whether in acting as it did the respondent has shown that it acted proportionately to achieve a legitimate aim. In respect of justification generally, we accept the detailed submission made by Mr Anderson for the claimant at paragraphs 25-30 of his written submissions and paragraph 29 in particular. The claimant was a qualified social worker and there was a shortage of experienced individuals in this field within the respondent. The claimant had a lengthy history of employment with the respondent and her ill health and disability was a relatively recent part of that employment history. The claimant had shown herself anxious to return to work as soon as she was able as evidenced by her return at the end of 2016 before her hospitalisation in December 2016. The respondent is a large employer with considerable resources and ability to accommodate creative methods of ensuring a successful return to work.

15.16 In relation to this particular allegation the respondent did not identify a particular legitimate aim it was pursuing in treating the claimant as it did but chose rather to deny the treatment had occurred. We reject that submission. This allegation is well-founded.

15.17 Fourthly, there was an allegation that subjecting the claimant to a sickness investigation commencing in March 2017 and continuing right up to 29 September 2017 was unfavourable treatment. This is something which occurred, it was unfavourable treatment and it patently arose out of the claimant's disability. Carrying on with that hearing was not within the terms of any policy to which we have been referred. The respondent had not followed the terms of its own policy. It had not convened a stage 1 meeting and it knew by 29 September 2017 that the claimant was already going to leave its employment by 20 October 2017 and there was simply no purpose in continuing with it. The stance of the respondent's officers that it was necessary to do so in order to complete the process and in order to access opportunities for redeployment is not within the policy which they were applying and in our judgment their actions in so doing were not a proportionate means of pursuing the legitimate aim of accessing the redeployment register. We do not accept that the policy of the respondent so provided. This claim is well-founded.

15.13 Fifthly, we have considered the allegations in relation to the remarks of KM at a series of meetings between June and September 2017. We refer to our findings of fact. This allegation is repeated as an allegation of harassment and given our findings of fact we consider these matters more appropriately dealt with under the harassment claims below.

15.14 Sixthly, we have considered the decision to dismiss the claimant on 29 September 2018. We conclude that this was unfavourable treatment. It arose from the inability of the claimant to carry out her duties under the IRO role. That was something arising from her disability. The decision to dismiss was not in pursuance of a legitimate aim. There was no need to take that decision as the claimant had already terminated her contract on notice by her resignation. The respondent's policies did not require that the claimant had to be dismissed in order to access redeployment opportunities let alone in circumstances where the claimant had already resigned her employment albeit on notice. The decision to dismiss in those circumstances is inexplicable. The claim is well-founded.

15.15 Next we have considered the allegation set out at number six in the list of issues under this head of claim in respect of a refusal to allow annual leave to be taken in September 2017 to extend a planned phased return to work. We consider this to be a repeat of the second allegation under this head of claim in respect of an extended phased return to work. It is not appropriate to consider the matter again.

15.16 Finally we have considered the reference provided by KM and AA and the refusal to amend the reference further. In respect of the question of reference we conclude that the reference was unfavourable as is witnessed by the fact it led to the withdrawal from the claimant of a post she had been offered at Darlington Council. The contents of the reference arose from the claimant's absence from work which was something arising from her disability. The reference makes specific mention of the inability of KM to comment on certain aspects of the claimant's work because of the claimant's ill health issues and need for surgery which had kept her away from work (page 438). The reference was given scant attention. It did not seek properly to assess the competencies which it gave a list of. The statement which was subsequently added to that reference by the principal social worker spoke well of the claimant's ability in communication and report writing and yet the assessment of those skills is only deemed satisfactory. It is clear that the reference was not given proper attention and we infer that was because the claimant was deemed by both KM and AA to be a nuisance and that was in part because of her medical condition which neither KM or AA accepted as a disability with a consequent lack of appreciation of their duties towards a disabled employee. We accept the submission of Mr Anderson that the reference provided inaccurate information and that cannot be a proportionate means of achieving a legitimate aim.

15.17 We will consider the allegation that the claimant was constructively dismissed and that the constructive dismissal was tainted with discrimination below.

15.18 Accordingly, there are four allegations of discrimination arising from disability which are well-founded. In relation to those four proved allegations, there are no time issues as all matters occurred within the period of three months before Day A referred to in paragraph 1 above.

Harassment

15.19 We turn next to the many allegations of harassment and we do so in the context of the matters which we find were spoken at the meeting on 14 August 2017 and the subsequent meetings. We do not propose to set out conclusions in respect of all the allegations of harassment but rather we concentrate our

conclusions in respect of those allegations we find proved and those matters, which whilst not amounting to actionable acts of harassment related to disability, do have relevance to the claim of unfair dismissal.

15.20 We accept that KM did liken the behaviour of the claimant to an angry stroppy teenager on 14 August 2017 and did say that she had felt like poking her eyes out by reason of her behaviour in November 2016. Those are remarks which should never fall from the lips of a senior manager but they were said. We would have no difficulty in saying that those remarks violated the claimant's dignity. The effect was to violate her dignity or at least to create an intimidating and hostile environment for the claimant. However, having considered that matter in detail, we find that those claims are not made out because those remarks do not relate to the claimant's disability in respect of her mobility and her feet. Instead they are indicative of the poor relationship which by then had developed between the claimant and her line manager. Whilst they are not acts of harassment they are certainly acts which go towards our assessment of whether there was a breach of the implied term of trust and confidence for the purposes of section 95(1)(c) of the 1996 Act and section 39(7)(b) of the 2010 Act.

15.21 There are two matters which we find did amount to harassment of the claimant. First we accept that on 14 August 2017 the claimant was left in no doubt by KM and AA that she was a nuisance. We reach that view because the claimant was told by KM that she had been busy, that work was not available for her on that day, that the sickness investigation had been ongoing then for some time, that there was a complete lack of empathy towards the claimant and the disability from which she suffered and no appreciation whatever that the respondent was dealing with an employee who was disabled. Furthermore there was an initial reluctance to allow the claimant to return to payroll from 14 August 2017 by the use of annual leave but this was eventually accepted. other than on 21 August 2017 by use of annual leave although that matter was subsequently accepted.

15.22 We conclude that the tenor of that meeting was that the claimant was a nuisance to both officers. That was unwanted conduct and whilst the purpose might not have been to create the prohibited environment for the claimant that was certainly the effect and in our judgment that was a reasonable conclusion to be drawn from the contents of that meeting. The meeting was convened to deal with the claimant's sickness absence and discuss matters in respect of her disability. We conclude that those matters did relate to the claimant's disability and that allegation of harassment is well-founded.

15.23 Secondly, in respect of the meeting on 8 September 2017, we find that the remark when will "*this disability thing*" end was made to the claimant and that was unwanted conduct. Whilst its purpose might not have been to create an intimidating environment, the effect of that remark certainly did and reasonably did create such an environment for the claimant. The remark patently related to the claimant's disability and therefore that allegation of harassment succeeds. The claimant advanced the same matters as acts of unfavourable treatment under section 15 of the 2010 Act. We consider that it is appropriate to consider the matters under the heading of harassment and having done so, it is not necessary to consider the matters under section 15 of the 2010 Act.

15.24 In relation to the other allegations of harassment we find that they do not succeed either because the events as pleaded did not occur and our findings of fact inform those decisions or, if they did occur, that they did not reasonably violate the claimant's dignity or create the prohibited environment or, if they did, that they did not relate to the claimant's disability.

15.25 Therefore there are two allegations of harassment which succeed and for which the claimant is entitled to a remedy. Given that the dates of the meetings where harassment related to disability occurred were in August and September 2017, there are no time jurisdictional issues.

Victimisation

15.26 Finally we turn to the claim of victimisation. We do not accept that the statements made by the claimant on 14 August 2017 amounted to a protected act. The claimant placed reliance on the contents of paragraphs 44 and 47 of her witness statement in this regard but there is nothing in those paragraphs in our judgment which could be said to have been said or done for the purposes of the 2010 Act. The definition within section 27 of the 2010 Act of a protected is not met so far as those statements are concerned.

15.27 On the other hand, the grievance of 20 October 2017 is clearly a protected act as the respondent accepted.

15.28 Two detriments were alleged. First the inaccurate and unfavourable reference of 28 September 2017 and secondly the decision on 7 November 2017 not to amend it further. The reference dated 28 September 2017 patently was not influenced by the grievance predating it, as it did by some 28 days. If we are wrong in respect of the characterisation of the first alleged protected act, then we conclude that the reference on 28 September 2017 was not materially influenced by what the claimant had said on 14 August 2017: rather we conclude the reference was given scant attention by KM because by then she was at the end of her tether. She was exasperated with the claimant. Her relationship with the claimant had effectively broken down and thus she acted as she did. It was not an act of victimisation within section 27 of the 2010 Act.

15.29 In respect of the decision to close down discussion about further amending the reference, we are not satisfied the claimant has shown a prima face that AA actually knew of the grievance when she took that decision. The grievance had not been addressed to AA and we infer in her case also that she too had become exasperated by the claimant. In closing down further discussion on the terms of the reference, AA acted so because of her level of exasperation: we are not satisfied that AA knew of the grievance when she acted as she did and the actions of AA were not in any sense whatsoever influenced by the raising of the grievance on 14 November 2017. The claims of victimisation fail and are dismissed.

Constructive unfair dismissal: section 95(1)(c) of the 1996 Act

Constructive dismissal: section 39(7)(b) of the 2010 Act

15.30 The Tribunal has considered whether the claimant has established that she was dismissed for the purposes of section 95(1)(c) of the 1996 Act. In so doing, the

Tribunal has considered whether the actions of the respondent amounted as alleged to a breach of the implied term of trust and confidence contained in the contract of employment of the claimant. The Tribunal reminds itself that it is not necessary for it to be satisfied that the respondent intended any breach. The Tribunal must assess the effect of the respondent's behaviour on the claimant and consider it objectively and consider reasonably and sensibly if the conduct amounted to a breach of the implied term. On what conduct does the claimant rely to establish the breach? Her case was advanced that whilst all matters complained of were relied on, it was the contents of the meetings on 14 August 2017 and 8 September 2017 which were the matters principally relied on. The claimant did not refer (page 393) in her letter of resignation to breach of the implied term of trust and confidence but gave her resignation "*with some regret".* We have considered these submissions but note there is no legal requirement on any claimant to set out the reasons for her resignation in a letter of resignation. Furthermore, we accept that it is established law that there may well be concurrent causes operating on the mind on an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both the breach and other factors such as the availability of another job. The Tribunal finally notes that the burden of proving a dismissal under section 95(1)(c) of the 1996 Act lies with the claimant. Against that background we consider the facts of this case.

15.31 We refer back to our findings of fact and in particular the matters said to the claimant in the meetings of 14 August 2017 and 8 September 2017. We note that the claimant was told on 14 August 2017 that a job could not be made to magically appear for her and the use of holiday leave to extend a phased return to work was refused – initially at least. Despite OH advice that the claimant needed up to six months in order to return fully to the IRO role, it was made plain that she was expected to return to that role fully after the four weeks of her phased return. The claimant was clearly told that if she was not back at work in that capacity in that time scale, she would be dismissed. She was told by her line manager that her behaviour was like that of a stroppy teenager and her line manager did say words to the effect that she had felt like poking the claimant's eyes out when she had returned to work in November 2016. The claimant was told that her line manager was sick of her raising particular points in relation to her former Team Manager role and that she may need counselling in respect of her anger issues. The claimant was given the impression by both KM and AA that she was a nuisance. The claimant was asked by her line manager on 8 September 2017 how long "*this disabled thing"* was going on which was a reference to her mobility issues which it is accepted amounted to a disability at that time.

15.32 In relation to the question of the constructive dismissal, the Tribunal has considered all the matters to which we have made reference. We have considered whether the claimant could reasonably be expected to put up with the behaviour with which she was confronted by the time of her resignation on 22 September 2017. We conclude that she could not. The respondent had no reasonable and proper cause to act in the way it did towards the claimant in those two meetings and looking at the respondent's conduct as a whole reasonably and sensibly, we conclude that it did amount to a breach of the implied term of trust and confidence.

15.33 Furthermore we take account of the fact that the respondent failed in its duty to make reasonable adjustments for the claimant's disability and also committed some acts of discrimination arising from disability before the date of her resignation and two of the matters referred to above in respect of the meetings on 14 August and 8 September 2017 were acts of disability related harassment.

15.34 We are satisfied that the reason for the claimant's resignation was in part because of the treatment she had received at the hands of the respondent. She had obtained other work but the question we have to consider applying the authority of **Nottinghamshire County Council -v- Meikle 2004 IRLR 703** (amongst others) is to consider whether she resigned in part because of that behaviour and she did. She was looking for other work but the reason she was looking for other work was because of the way she had been treated.

15.35 In considering the questions posed in **Kaur** (above), we conclude that the most recent act on the part of the respondent which led to the claimant's resignation was the comment of KM at the meeting on 8 September 2017 in respect of *"this disabled thing".* The claimant resigned within 14 days of that act and did not affirm the contract of employment in the meantime. This act of disability harassment on 8 September 2017 was in our judgment a repudiatory act but, if that is wrong, then that act formed part of a series of acts and it contributed to the breach of the implied term of trust and confidence. The claimant resigned at least in part in response to that breach of contract by the respondent.

15.36 For the purposes of the claim under the 1996 Act, the respondent does not seek to establish a reason for the claimant's dismissal and thus the dismissal was unfair for the purposes of sections 94-98 of the 1996 Act.

15.37 The constructive dismissal is said to be an act of discrimination arising from the disability of the claimant. The dismissal (for so we find it was) was materially influenced by acts of disability discrimination. Some of the remarks made to the claimant at the meetings on 14 August and 8 September 2017 were acts of harassment related to her disability, the way the claimant was treated by the respondent in respect of her disability related absence was discrimination arising from her disability as was the inexplicable decision on 8 September 2017 to threaten the claimant with dismissal if she could not return to her full-time duties at the end of the four-week phased return. We are satisfied that much of the conduct of the respondent which caused the claimant to resign her employment on 22 September 2017 was discriminatory and actionable under the provisions of the 2010 Act and was a large part of the conduct which amounted to a breach of the implied term of trust and confidence. The dismissal was tainted with acts of discrimination and is actionable under the provisions of the 2010 Act as unfavourable treatment because of something arising as a consequence of her disability. In reaching this decision we have been careful not to take account of any actions of the respondent which occurred after the resignation had occurred on 22 September 2017. There are no time issues in respect of the claims of unfair and discriminatory dismissal.

15.38 We conclude that the dismissal of the claimant was both unfair for the purposes of the 1996 Act and discriminatory for the purposes of the 2010 Act and the claimant is entitled to a remedy.

Remedy hearing

15.39 The Remedy Hearing has been set for 24 September 2018.

Employment Judge A M Buchanan

Date: 10 September 2018