EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs N Neale		**Care UK Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 1 – 4 April 2019

EMPLOYMENT JUDGE GASKELL **MEMBERS: Mrs RA Forrest**
Mr CJ Ledbury

Representation
For the Claimant: **In Person**
For Respondent: **Mr B Williams (Counsel)**

JUDGMENT

The judgment of the tribunal is that:

1 The claimant was not dismissed by the respondent: her claim for unfair dismissal is not well-founded and is dismissed.
2 The claimant was not dismissed by the respondent: her claim for wrongful dismissal is dismissed.
3 The claimant's claim for unpaid holiday pay is not well-founded and is dismissed.
4 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's claims, pursuant to Section 120 of that Act, of discrimination arising from disability and of failure to make adjustments, are dismissed.

REASONS

Introduction

1 The claimant in this case is Mrs Natalie Neale who was employed by the respondent, Care UK Limited, from 8 November 2016 until her resignation on 22 May 2017. It is not in dispute that, pursuant to the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006, the claimant has a period of qualifying service with previous employers sufficient to give the tribunal jurisdiction to consider a claim for unfair dismissal. The respondent contends that continuity of employment commenced on 10 March 2012; the claimant contends for a much earlier date in September 1992. As the jurisdiction of the tribunal is

not in issue, the qualifying length of service is a matter relevant only to the question of remedy if the claimant succeeds on her unfair dismissal claim.

2 Following her resignation, by a claim form presented to the tribunal on 4 September 2017, the claimant brought claims for constructive unfair dismissal; wrongful dismissal; a redundancy payment; unpaid holiday pay; and disability discrimination. The strands of disability discrimination alleged are discrimination arising from disability (Section 15 of the Equality Act 2010 (EqA)) and a failure to make adjustments (Section 21 EqA). The claimant claims to be a disabled person by reason of the physical impairment of a lumbar disc problem caused by a back injury suffered in July 2015; and a further physical impairment namely the rupture of a hamstring tendon following a leg injury which occurred in May 2016. The claim for a redundancy payment was formally withdrawn at a Preliminary Hearing before Employment Judge Choudhry on 10 May 2018; that claim was dismissed by a judgement issued by Judge Choudhry on 10 September 2018.

3 In response to the claims, the respondent denies that it has acted in fundamental breach of the employment contract and accordingly denies that the claimant was either unfairly or wrongfully dismissed; further the respondent asserts that all accrued holiday pay has been paid. So far as the disability discrimination claim is concerned initially the respondent did not concede that the claimant was at any material time a disabled person as defined in Section 6 and Schedule 1 EqA. At the commencement of the trial however, the respondent indicated that it was conceded that the claimant was a disabled person by reason of her back injury from July 2015 onwards; there was no such concession with regard to the leg injury suffered in May 2016. Further, the respondent denies any form of discrimination and maintains that all necessary adjustments were made.

The Evidence

4 The tribunal heard oral evidence from a total of four witnesses. The claimant gave evidence on her own account; and, for the respondent, we heard from Mrs Cynthia Dolores Clayton - Clinical Lead; Mrs Victoria Marie Bignell - ICU Clinical Assessment Service Manager; and Mrs Qurra Tul-ain - Clinical Lead Audit.

5 In addition to the oral evidence, we were provided with an agreed bundle of documents extending to approximately 600 pages. We have considered the documents from within the bundle to which we were referred by the parties during the course of the hearing. There was a second smaller bundle prepared by the claimant for an earlier hearing, this ran to 97 pages; and it appears that the relevant documents from that bundle were also included in the main trial bundle.

6 We found Mrs Clayton, Mrs Bignell and Mrs Tul-ain to be highly compelling. These witnesses were consistent with each other and with the contemporaneous documents.

7 The claimant was a much less satisfactory witness. Her evidence was internally inconsistent and inconsistent with contemporaneous documents. We do not find that the claimant was dishonest, but she was certainly disingenuous in one important aspect of her case namely her job role to the time of her resignation.

8 The claimant's case is that she was employed as a Clinical Quality Improvement Lead (CQI) and that this role was fundamentally different to that of Clinical Advisor (CA). One of the complaints she makes is that, in December 2016, the respondent attempted to impose the CA role upon her. In our judgement, the contemporaneous documentation is perfectly clear; the claimant's role as a CQI ceased in November 2013 when her employment transferred from NHS Direct to the West Midlands Ambulance Service (WMAS). The claimant is well aware of the documentation and indeed one of the documents is signed by her our judgement is that she well knew that the CQI role no longer existed, but it was convenient to other aspects of her case to attempt to revive it. The inconsistency does not simply arise from the documents it was the claimant's evidence before us that she was unable to undertake a CA role if office-based but that she could undertake a CQI role whilst office-based. It was her case that she was a CQI until December 2016, and this evidence is therefore quite inconsistent with the fact that she was also claiming by then to have a need to be a home worker.

9 There were other inconsistencies in the claimant's evidence: and suffice to say, that where there is a contradiction between the evidence given by the claimant and that given by the respondent's witnesses, we prefer the evidence of the respondent's witnesses and we have made our findings of fact accordingly.

The Facts

10 The claimant commenced employment as a Student Nurse in the NHS in September 1992. On 10 March 2012, she left the NHS and joined Nestor Primecare Services Limited (Primecare) a private organisation. The claimant did not join Primecare under a TUPE transfer. On 12 March 2013, she was subject to a TUPE transfer from Primecare to NHS Direct - this brought her employment pact within the NHS after an interval of one year and two days. It is on the basis of this break in service with the NHS that the respondent argues that the claimant does not have continuity of employment from September 1992. The transfer from Primecare to NHS Direct, and three subsequent transfers have all been subject to the TUPE Regulations and accordingly it is conceded by the respondent that

the claimant has continuity of employment since her move to Primecare on 10 March 2012.

11 The relevant TUPE transfers are as follows: -

(a)	12 March 2013:	Primecare to NHS Direct
(b)	11 November 2013:	NHS Direct to West Midlands Ambulance Service (WMAS)
(c)	8 September 2015	WMAS to Vocare
(d)	8 November 2016	Vocare to the respondent

12 When employed at Primecare the claimant was employed as a CA. On 1 March 2013, she became a Clinical Lead Nurse. Following the transfer to NHS Direct, on 20 May 2013, the claimant applied for and became a CQI.

13 The role of CQI did not exist within the structure of WMAS. WAMS shared the duties of CA and CQI across two levels of relevant roles - CA and Clinical Manager (CM). CA was a Band 6 role principally required to answer NHS 111 calls and advise patients directly when they called the service. CM was a Band 7 role, principally required to manage the service - including auditing and assessing Cas; people management; and the management and distribution of calls. Upon the transfer to WMAS, the claimant did not apply for consideration as a CM, she therefore became a CA. Many of the duties pertaining to her previous CQI role were absorbed within her role as a CA. We find is a fact that the claimant fully understood the position. We reject entirely the claimant's assertion that the claimant was later being forced into a CA role.

14 On 26 July 2015, the claimant commenced a period of sickness absence having injured her back whilst Thai Boxing. The claimant was absent from work for 169 days. During the claimant's absence from work, on 8 September 2015, the claimant's employment transferred from WMAS to Vocare.

15 In the period from 26 July 2015 to 8 September 2015, there was extensive communication between Mrs Clayton and other managers at WMAS and the claimant. At one stage, the claimant had reported that she was bed-bound; using crutches; and in a great deal of pain. However, when Mrs Clayton attempted to contact her, it was apparent that the claimant was abroad on holiday. The claimant later explained that she had taken the holiday with a friend and that it was a holiday with specific facilities for a disabled person.

16 A Team Manager, Mr Darren Instone had extensive contact with the claimant on many occasions to discuss her ongoing absence and to arrange Occupational Health (OH) referrals.

17 In January 2016, the claimant's GP and the respondent's OH provider certified that she was fit to return to work with workplace adjustments. A workplace assessment undertaken on 21 February 2016 recommended that the claimant be provided with a lumbar support to add to her chair; and that she be permitted to use a riser desk where available.

18 Whilst awaiting receipt of the lumbar support, the claimant worked successfully in the office from January 2016 - March 2016 by bringing with her a cushion from home. It is the claimant's case before us that she was only able to work in the office at this time because she was working as a CQI; and the nature of this work permitted her to move away from her desk and walk around the office rather than remain in a seated position throughout her shift. We accept the respondent's case, that the claimant was not working as a CQI; no such role existed; she was working as a CA. The respondent was unable to comment on the claimant's assertion that she periodically left her desk to walk around the office – we accept this may have been the case; but it occurred without disruption to the claimant's work.

19 On 12 March 2016, the claimant commenced a further period of absence which was initially unauthorised and uncertified. A further OH report was obtained which confirmed that the lumbar support which the claimant was bringing in from home was sufficient and that she was prepared to continue with that arrangement. At around this time, it was also agreed as a temporary arrangement that the claimant need only attend the respondent's office for her shift on a Monday each week - and that shifts on Wednesdays and alternate Sundays could be carried out from home using a laptop.

20 On 27 May 2016, the claimant suffered a ruptured hamstring tendon to her right leg. This injury was unrelated to the claimant's back injury. She was absent from work as a result of her leg injury for a period of 27 days and was certified fit to return to work on 24 June 2016. However, at that time, the claimant was unable to drive and had no alternative means of attending the respondent's workplace. As a temporary arrangement, the claimant was permitted to work from home for the entirety of her working week (three shifts per week). On 31 August 2016, Vocare agreed to temporary changes to the claimant's terms and conditions whereby the claimant would work shifts across three days per week as before, but with a fixed pattern of one day per week from home; one day per week from the office; and alternating her third day per week between homeworking and office working. It was agreed that the arrangement would be kept under review.

21 On 26 September 2016, the claimant attended a further OH assessment. The subsequent report indicated that the obstacle to the claimant's return to work now was her leg injury rather than her back. The leg injury was a ligament tear for which the recovery period could be 6 -12 months. Whilst the claimant was

now able to drive, she advised OH that she could perform her full range of duties whilst working from home and that she could more easily alleviate the leg pain in her home environment by moving around continuously. It was therefore recommended that the claimant worked from home for a period of eight weeks after which there would be a further review.

22 On 3 October 2016, the claimant attended a meeting with Mrs Bignell and Mrs Clayton this was to discuss the claimant's failure to attend site on days when she was expected there and also the respondent's concerns that her activity on the days working from home was unacceptably low. The claimant accepted that productivity when working from home was low and explained that this was due to her poor broadband speed and connectivity problems. Of course, these were matters over which the respondent had no control.

23 On 3 and 5 October 2016, the claimant completed grievance forms in which she contended that her duties ought to be those purely of a CQI and not a CA; she further contended that OH advice and her DSE workplace assessment had been ignored. Before this grievance was dealt with, on 8 November 2016, the claimant's employment was transferred to the respondent. Following the transfer, the claimant's line management changed and, pending a detailed review of the situation, the respondent agreed that the claimant should remain as a home-worker on her existing shift pattern. On 6 December 2016, the claimant reminded the respondent that she had an outstanding grievance pre-transfer.

24 Following the transfer, due to an administrative error involving another member of staff with the same surname as the claimant, it was discovered that the claimant could not log into the respondent's system and continue her work. Significantly, on 12 December 2016, by email, the claimant requested a new login so that "*she could continue to work as a Clinical Adviser*". The issue over the login was quickly resolved; and the claimant continued her duties.

25 In order to properly consider the claimant's grievances, the respondent wished to obtain a report from its own OH advisers. An initial appointment was arranged for 5 January 2017, but the claimant did not attend; the appointment was rearranged for 6 February 2017.

26 On 24 January 2017, the claimant commenced a further period of sickness absence and remained absent from work until 2 May 2017. In the meantime, there was something of an impasse between the claimant and the respondent: the claimant attended for an up-to-date OH report but she refused to attend or cooperate with a recommended for a further DSE assessment because she believed that her earlier DSE assessment had been ignored; and she did not feel it appropriate to proceed further until her grievances were resolved. On 25 March 2017, the respondent sent the claimant a copy of its grievance policy inviting her to set out her grievances to enable an investigation. The claimant

refused to complete the respondent's grievance form or acknowledge the policy; she maintained that the applicable policy was the previous NHS grievance policy which had been in force at the time of her grievances and before the relevant transfer. The claimant maintained (in our judgement erroneously) that she was at the final stage of that policy and she sought a reference of her grievances to the CEO and non-executive directors of the respondent.

27 On 30 March 2017, Mrs Tul-ain telephoned the claimant in the hope of obtaining clarification of the outstanding grievance: the claimant offered little by way of cooperation simply stating that her grievances were a matter of record prior to the transfer. Mrs Tul-ain requested a copy of the grievances from the claimant but the claimant refused to provide them although she confirmed in evidence that she still had them available.

28 On 2 May 2017, when the claimant was ready to return to work, she attended a meeting with Mrs Tul-ain at which it was agreed that, pending resolution of the claimant's grievances, she would be permitted to continue working from home as a CA. Mrs Tul-ain then took the opportunity to attempt to discuss the outstanding grievances; she asked the claimant to state what resolution she was seeking; the claimant's response was that she wished to be made redundant.

29 There was a grievance meeting held on 9 May 2017: Mrs Tul-ain was present with Julie Harrison who was shortly to take over from Mrs Tul-ain as the claimant's line manager. At the meeting it was established that the outstanding grievances were as follows: -

(a) The claimant maintained that her role was that of CQI and not a CA.
(b) The claimant was complaining that she should have been paid a retention fee following the transfer from NHS Direct to WMAS.
(c) The claimant was complaining that she had been required to attend the workplace on 3 October 2016 with no equipment available to her she stated that this was against OH advice.

Mrs Tul-ain requested the claimant to send her as much documentation as possible to substantiate the grievances. The claimant was again asked what her preferred outcome was and stated that she wished to be made redundant.

30 Mrs Tul-ain was at this time working on a plan for the claimant's return to work. This entailed her working from home until the grievance was resolved but, under the plan it was agreed that the claimant would work from the respondent's office for two days - namely 22 and 24 May 2017. The reason for this attendance was to enable the claimant to meet with a coach and also to allow a DSE assessment so as to enable the claimant to work from the office as and when necessary.

31 In advance of 22 May 2017, Mrs Tul-ain ensured that the following equipment was available: -

(a) A desk-riser to allow the claimant to sit or stand at her desk.
(b) A fully adjustable chair with good lumbar support.
(c) A footstool to enable the claimant to elevate her leg.

Mrs Tul-ain also arranged that the claimant should be allowed to take short breaks on a frequent basis - namely a five-minute break every hour. This had all been discussed with the coach with whom the claimant was to work that day. It was also agreed that Mrs Tul-ain would meet with the claimant when she came on duty (the claimant was to start work at 7am; Mrs Tul-ain was due in the office at 9am).

32 The claimant emailed Mrs Tul-ain at 10:43am to say that she had walked out and would not be returning. She stated that she had a solicitor and would be bringing a claim for constructive unfair dismissal. She stated that she could not work in a call-centre environment due to her physical limitations. Mrs Tul-ain's understanding was that, whilst working from home, the claimant was undertaking exactly the same work as she would have undertaken in the office: she would be taking calls; triaging calls; and using a computer. The claimant did not have any specialist equipment at home. The only difference was that she could self-regulate her breaks at home - but regular breaks were to be allowed in the office. The claimant's resignation was accepted by letter dated 26 May 2017.

33 Notwithstanding the claimant's resignation, Mrs Tul-ain continued to investigate the claimant's grievances and a formal outcome letter was provided to the claimant on 13 June 2017. Mrs Tul-ain's findings were as follows: -

(a) The claimant had been employed as a CA and not as a CQI ever since the transfer to WMAS. The role of CQI had from that time been incorporated into the role of CA.
(b) Because, at the time of the transfer, the claimant had been employed as a CQI she was not entitled to the retention fee paid by WMAS to existing CAs. The claimant was well aware of the position. There was an inherent contradiction between this grievance which depended on her being employed as a CA at the time of the transfer; and the basis of her first grievance which was that she had been employed as a CQI throughout.
(c) Mrs Tul-ain found that all necessary equipment had been provided to the claimant on her return to work on 3 October 2016; and at all times thereafter, including and especially, when the claimant attended for work on 22 May 2017.

34 In the circumstances Mrs Tul-ain did not uphold the claimant's grievance. The claimant was advised of her right to appeal but she did not do so.

The Law

35 **Equality Act 2010**

Section 6: Disability

(1) A person (P) has a disability if—

(*a*) P has a physical or mental impairment, and
(*b*) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(6) Schedule 1 (disability: supplementary provision) has effect.

Section 15: Discrimination arising from disability

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

(*a*) A treats B unfavourably because of something arising in consequence of B's disability, and
(*b*) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

Section 20: Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

Section 21: Failure to comply with duty

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

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

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

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

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

(5) A duty to make reasonable adjustments applies to an employer.

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Schedule 1: Disability Supplementary Provision
Part 1: Determination of Disability

2 **Long-term effects**

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

Schedule 8 – Part 3: Limitations of the Duty [to make adjustments]
Paragraph 20: Lack of knowledge of disability etc.

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

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

36 **The Employment Rights Act 1996 (ERA)**

Section 94 - The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal,*
(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 - *Constructive dismissal.*

Section 98 - General Fairness

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

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

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

37 **Decided Cases**

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Discrimination and victimisation may be conscious or sub-conscious.

High Quality Lifestyles Limited –v- Watts **[2006] IRLR 850 (EAT)**
Aylott –v- Stockton on Tees Borough Council **[2010] IRLR 994 (EAT)**

In order to establish direct discrimination, it is not sufficient for the claimant to show that his treatment was on the grounds of his disability. It has to be established that the treatment was less favourable than the treatment which would have been afforded to a comparator in circumstances that are “not materially different”

There are dangers in attaching too much importance to constructing a hypothetical comparator and to less favourable treatment as a separate issue. If a claimant is dismissed on the ground of disability then it is likely that he will be

treated less favourably than a hypothetical comparator, not having the particular disability, would have been treated in the same relevant circumstances,

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**
JP Morgan Europe Limited –v- Chweidan **[2011] IRLR 673 (CA)**

There can be no question of direct discrimination or discrimination arising from disability where everyone is treated the same.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Laing –v- Manchester City Council **[2006] IRLR 748**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

Cruickshank –v- VAW Motorcast Ltd **[2002] IRLR 24 (EAT)**
McDougall -v- Richmond Adult Community College **[2008] ICR 431 (CA)**

The appropriate tests as to whether a claimant is a disabled person must be applied to the claimant's condition at the date of the alleged discriminatory act.

Where an employee's symptoms, and the degree of impairment, are exacerbated by conditions at work, the tribunal should consider the employee's ability to carry out normal day-to-day activities within the working environment. The employee should not be deprived of protection merely because the degree of impairment suffered is substantially less when away from work.

Morse –v- Wiltshire County Council **[1999] IRLR 352 (EAT)**

A tribunal hearing an allegation failure to make reasonable adjustments must go through a number of sequential steps: It must decide whether the provisions of EqA impose a duty on the employer in the circumstances of the particular case. If such a duty is imposed it must next decide whether the employer has taken such steps as it is reasonable all the circumstances of the case for him to have to take.

Smith –v- Churchills Stairlifts plc **[2006] IRLR 41 (CA)**

The test is an objective test; the employer must take "such steps as it is reasonable to take in all the circumstances of the case". What matters is the employment tribunal's view of what is reasonable.

Tarbuck –v- Sainsbury's Supermarkets Limited **[2006] IRLR 664 (EAT)**

There is no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustments might be made. The only question is objectively whether the employer has complied with his obligations or not. If the employer does what is required of him than the fact that he failed to consult about it, or did not appreciate that the obligation even existed, is irrelevant. It may be entirely fortuitous and unconsidered compliance but that is enough. Conversely if he fails to do what is reasonably required it avails him nothing that he has consulted the employee.

Project Management Institute –v- Latif **[2007] IRLR 579 (EAT)**

In order for the burden of proof to shift to the respondent, the claimant must not only establish that the duty to make reasonable adjustments has arisen but also that there are facts from which it can reasonably be inferred that it has been breached.

Environment Agency –v- Rowan **[2008] IRLR 20 (EAT)**

An employment tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

(a) the provision criterion or practice apply by or on behalf of the employer, or
(b) the physical feature of the premises occupied by the employer, and
(c) the identity of non-disabled comparators, and
(d) the nature and extent of a substantial disadvantage suffered by the claimant.

Unless the tribunal has gone through that process it cannot go on to judge if any proposed adjustment is reasonable.

DWP –v- Alam **[2010] ICR 665 (EAT)**
Wilcox –v- Birmingham CAB Services Limited **[2011] EqLR 810 (EAT)**

The duty to make adjustments is not engaged unless the employer knows (or ought to know) of both the disability and the substantial disadvantage.

Royal Bank of Scotland –v- Ashton **[2011] ICR 632 (EAT)**

Before there can be a finding that there has been a breach of the duty to make reasonable adjustments an Employment Tribunal must be satisfied that there was a provision criterion or practice that placed the disabled person, not merely at some disadvantage viewed generally but, at a disadvantage that was substantial viewed in comparison with persons who are not disabled. In this case an attendance policy which applied equally to all employees, but which provided for a degree of *"flexing"* in the case of an employee who was disabled or suffered from a chronic or long-term underlying condition could not be said of itself to be a provision criterion or practice which placed the disabled person at a substantial disadvantage.

Western Excavating (ECC) Ltd, -v - Sharpe **[1978] IRLR 27 (CA)**
An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

The employee must make up his mind to leave soon after the conduct of which he complains if he continues the any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

Garner -v- Grange Furnishing Ltd. **[1977] IRLR 206 (EAT)**
Conduct amounting to a repudiation can be a series of small incidents over a period of time. If the conduct of the employer is making it impossible for the employee to go on working that is plainly a repudiation of the contract of employment.

Woods -v- WM Car Services (Peterborough) Ltd. **[1981] IRLR 347 (EAT)**
It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

WE Cox Toner (International) Ltd. –v- Crook **[1981] IRLR 443 (EAT)**
The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between those two possible courses. If he once affirms the contract his right to accept the repudiation is at an end, but he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract since his conduct is only consistent with the continued existence of the contractual obligations.

Malik –v- BCCI **[1997] IRLR 462 (HL)**
The obligation (to observe the implied contractual term of mutual trust and confidence), extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct, objectively considered, is likely to cause damage to the relationship between employer and employee a breach of the implied obligation

may arise. The motives of the employer cannot be determinative or even relevant.

Waltons & Morse –v- Dorrington **[1997] IRLR 488 (EAT)**
It is an implied term of every contract of employment that the employer will provide and monitor for employees, so far as is reasonably practicable, a working environment which is reasonably suitable for the performance by them of their contractual duties.

BCCI –v- Ali (No.3) **[1999] IRLR 508 (HC)**
The conduct must impinge on the relationship of employer and employee in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is entitled to have in his employer. The term "likely" requires a higher degree of certainty than a reasonable prospect or indeed a 51% probability.

Nottinghamshire County Council –v- Meikle **[2004] IRLR 703 (CA)**
Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted the repudiation by treating the contract of employment as at an end. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer.

GAB Robins (UK) Ltd. –v- Gillian Triggs **[2007] UKEAT/0111/07RN**
The question to be addressed is whether, taken alone or cumulatively, the respondent's actions amount to a breach of any express and/or implied terms of the claimant's contract of employment amounting to a repudiation of that contract.

Bournemouth University Higher Education Corporation –v- Buckland **[2010] IRLR 445 (CA)**
The conduct of an employer, who is said to have committed a repudiatory breach of the contract of employment, is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one factor in the employment tribunal's analysis as to whether or not there has been a fundamental breach, but it is not a legal requirement. Once there has been a repudiatory breach, it is not open to the employer to cure the breach by making amends, and thereby preclude the employee from accepting the breach as terminating the contract. What the employer can do is to invite affirmation, by making or offering amends.

Price –v- Commissioners for Revenue and Customs **UKEAT/0518/10/JOJ**
Where the conduct complained of amounts to delay there are two questions to be addressed; firstly, was there reasonable and proper cause for the delay? And secondly, if not in was the delay conduct by the employer calculated or likely to destroy or seriously damage the relationship of trust and confidence? These

questions are not to be, answered by reference to the standard of the reasonable employer but on the basis of the tribunal's own objective assessment.

Tullet Prebon PLC & Others -v- BCG Brokers LP & Others
[2011] IRLR 420 (CA)
A repudiatory breach of contract; conduct likely to damage the relationship of trust and confidence must be so serious that looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the putative innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

Waltham Forest LBC -v- Omilaju **[2005] IRLR 35 (CA)**
This case clarified the position where a complainant was lying on the "final straw" principle: if the final straw is not capable of contributing to a series of earlier acts which may cumulatively amount to a breach of the implied term of trust and confidence, then there is no need to examine the earlier history. If an employer has committed a series of acts which amount to a breach of the implied term; but the employee does not resign his employment In response thereto; he cannot subsequently rely on those acts to justify a constructive dismissal in the absence of a later act which enables him to do so. If the later act is entirely innocuous It is entirely unnecessary to examine the earlier conduct as the later act will not permit the employee to invoke the final straw principal. An entirely innocuous act on the part of the employer cannot be a final straw.

Kaur -v- Leeds Teaching Hospitals NHS Trust **[2018] EWCA Civ 978 (CA)**

In this case the Court of Appeal affirmed its earlier decision in ***Omilaju***: where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions: -

(a) 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?
(b) Has he or she affirmed the contract since that act?
(c) 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) breach of the implied term of trust and confidence.

Hadji -v- St Lukes Plymouth **(2013) UKEAT 0095/12**
This case provides a recent re-statement of the law on affirmation:-

(a) The employee must make up his/her mind whether or not to resign soon after the conduct of which he/she complains. If he/she does not do so he/she may be regarded as having elected to affirm the contract, or as having lost the right to treat himself/herself as dismissed.

(b) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay.
(c) If the employee calls on the employer to perform its obligations under the contract or otherwise initiates an intention to continue the contract; the Employment Tribunal may conclude that there has been affirmation.
(d) there is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts.

The Claimant's Case

38 The claimant's case can be summarised as follows: -

(a) That she was a disabled person by reason of both her back injury and the injury to her leg.
(b) That the respondent treated her unfavourably for a reason arising from her disability in its requirement that she should work as a CA in its office premises.
(c) That the respondent failed in its duty to make adjustments:

    (i) The PCP relied upon was the respondent's requirement that the claimant work from its office premises without the necessary adjustments to her workstation or in the alternative the respondent's failure to allow her to become a permanent home worker.
    (ii) The adjustments contended for are the provision of a riser desk, a suitable chair with lumbar support, a footstool, and an opportunity to take regular breaks in order to alleviate pain. In the alternative, the claimant should be permitted to become a permanent home worker.

(d) By reason of the matters set out at Paragraphs (b) and (c) above, together with its requirement that the claimant should work as a CA rather than a CQI, the respondent acted in fundamental breach of the claimant's employment contract. It was in response to such breaches that the claimant resigned. Accordingly, she was constructively dismissed. Her dismissal was both unfair and wrongful.

The Respondent's Case

39 As previously indicated, the respondent accepts that, at all material times after 26 July 2015, the claimant was a disabled person because of the injury to her back. The respondent does not accept that the claimant was a disabled

person because of the subsequent injury to her leg. The issue for determination here is whether or not, at the material time (27 May 2016 - 22 May 2017), it could properly be said that the adverse effects of the leg injury were "*long term*".

40 The respondent did not treat the claimant unfavourably by requiring her to work from the office. The respondent had generously allowed the claimant time working from home when she was unable to drive; but, during her homeworking periods, the claimant's productivity was unacceptably low. The respondent was entitled to require the claimant to work from the office with all appropriate equipment in place.

41 The respondent's cases that all necessary adjustments were made in accordance with OH recommendations. There was no requirement for the claimant to be permitted to work from home permanently or indefinitely.

42 The respondent denies any breach of the employment contract by its categorisation of the claimant as a CA. This had been her role since the transfer to WMAS on 11 November 2013. The claimant was well aware of the position; and only raised the question of her job role as part of her attempt to secure permanent homeworking.

Discussion & Conclusions

Disability

43 The respondent concedes that, quite independently from the back injury, the claimant's leg injury and its adverse effects fully met the definition of disability save for the question of whether or not the effects would be "*long term*". The claimant suffered the injury on 27 May 2016; her employment with the respondent continued until 22 May 2017; five days short of 12 months. The respondent's case regarding the longevity of the effects of the claimant's leg injury is founded on the OH report received in September 2016 stating that the recovery time for the leg injury would be 6 - 12 months. At its most optimistic, this may have heralded complete recovery by March 2017: but it is clear that the effects of the leg injury continued after that date and that the respondent was well aware of this. It is the respondent's case that a footstool was required and was provided when the claimant attended work on 22 May 2017. In our judgement therefore, by any realistic assessment, certainly by September 2016, it must be said to have been "*likely*" that the effects of the leg injury would endure for 12 months or more. Accordingly, we find that, from September 2016 onwards, the claimant was disabled by reason of her leg injury as well is by reason of her back injury.

Discrimination for a Reason Arising from Disability

44 In our judgement, the claimant's claim for *discrimination arising from disability* is entirely misconceived and totally without merit. The unfavourable treatment of which she complains is either, the requirement for her to work from the office rather than from home, or alternatively, the requirement for her to work from the office but without the provision of specialised equipment. In our judgement, it is plain nonsense to suggest that this treatment, even if unfavourable, was visited upon her *for a reason relating to her disability.* Put another way, that such treatment would not have been visited upon her if she was not disabled, and nothing arose from her disability. The claimant does not suggest that, if she had not suffered her accidents, she would have been permitted to work from home or that specialist equipment would have been provided. In our judgement, the treatment about which the claimant complains is properly categorised as a failure in the duty to make adjustments, and not as discrimination arising from disability.

45 Accordingly, the claim for discrimination arising from disability is dismissed.

Adjustments

46 Preferring as we do the evidence given by the respondent's witnesses over that given by the claimant, we find as a fact that the required adjustments to the workplace in accordance with OH recommendations were provided. On this basis, the claimant's claim of a failure in the duty to provide such adjustments must fail.

47 The claimant sought to cloud the issue by suggesting firstly, that her proper role was as a CQI and not a CA and secondly, that there was a material difference in the requirements of those two roles such that, with her physical restrictions, she could cope more easily as a CQI than as a CA. In our judgement, there is no merit in either of these aspects of the claimant's case. The claimant was employed as a CA ever since the time of the transfer to WMAS in November 2013 and she was well aware of the position. Further, in terms of its physical demands, the work of a CA was identical to the work of a CQI - both required the taking of telephone calls and working at a computer screen. The claimant's suggestion that she could work as a CQI from home but not as a CA is not correct; her suggestion that she could use her laptop at home was without merit because there was clearly no reason why she could not use her laptop at the office. This is something she conceded in evidence.

48 From around September 2016, the claimant wish to secure permanent homeworking. In our judgement, she cynically failed to cooperate with the investigation of her grievances thereafter; and deliberately clouded issues in the

way set out above. The respondent had good reason to require the claimant to be working from the office and it put in place the necessary specialist equipment to enable this. The respondent's obligation was to make such adjustments as were reasonable - the allowance of permanent homeworking with its consequent adverse effect on the claimant's productivity went beyond that which was reasonable.

49 We find that the respondent fully complied with its obligations to make adjustments: and accordingly, the claim for a failure to make adjustments is dismissed.

Constructive Dismissal

50 We have already found that the respondent did not discriminate against the claimant.

51 Additionally, we reject the claimant's assertion that the respondent attempted to force upon her the new role of CA rather than her existing role of CQI. As previously stated, the claimant's role had been that of CA ever since the transfer to WMAS in November 2013; the claimant was aware of the position; and had worked in that position without complaint for nearly 3 years before she perceived that there may be some advantage to her in seeking to assert that her correct role was that of CQI.

52 In our judgement, the respondent did not at any stage act in breach of the claimant's employment contract; it did not act in a way which undermined the implied term of mutual trust and confidence. Absent a breach of the employment contract, there can be no constructive dismissal. Absent a dismissal, the claims for unfair and wrongful dismissal are not well-founded and are dismissed.

Holiday Pay

53 The claimant did not adduce before us any evidence regarding outstanding holiday pay. She made no reference to this claim in her witness statement; she made no reference to this claim in her oral evidence; she produced no documents in support of such a claim; and she made no reference to it in her closing submissions.

54 It may be that, without expressly stating her position, the claimant had decided not to pursue the holiday pay claim. Be that as it may, absent any evidence at all to support the claim we clearly cannot uphold it. The claim for outstanding holiday pay is dismissed.

Signed by: Employment Judge Gaskell
Signed on: 25 July 2019