Case Numbers: 3200680/2019
2208119/2016 & 2200305/2018

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EMPLOYMENT TRIBUNALS

Claimant: **Ms S Conduit**

Respondent: **Rosslyn Hill Unitarian Chapel**

Heard at: **East London Hearing Centre**

On: **26-29 March 2019 & 2-4 April 2019**

Before: **Employment Judge Ross**

Members **Ms M Long**
Mr M Rowe

Representation

Claimant: Mr M Sprack (Counsel)

Respondent: Mr M Salter (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The complaints of automatic unfair dismissal under section 104 Employment Rights Act 1996, breach of contract (wrongful dismissal), and the complaint of disability discrimination pursuant to section 15 Equality Act 2010 in respect of the meetings on 26 May and 29 September 2016 (and at weekly catch-up meetings), are dismissed on withdrawal.**

2. **The complaints against Dr. Crispin in person are dismissed on withdrawal. Dr. Crispin is removed as Second Respondent.**

3. **The Respondent discriminated against the Claimant contrary to sections 20 – 21 Equality Act 2010, by a failure to make a reasonable adjustment between 1 June and 19 July 2016.**

4. **The Respondent discriminated against the Claimant contrary to section 15 Equality Act 2010, by prohibiting her from working at home between 1 June and 19 July 2016 (issue 7b of the List of Issues).**

5. **The Respondent discriminated against the Claimant by victimisation contrary to section 27 Equality Act 2010, by statements made by its agent at a meeting on 27 September 2017 (issue 27 of the List of Issues).**

6. **The Respondent made unlawful deductions from the Claimant's wages between 1 June and 19 July 2016 (issues 28-29 of the List of Issues).**

7. **The following complaints are not upheld and are dismissed:**

   7.1. **Unfair dismissal pursuant to section 98(4) Employment Rights Act 1996;**
   7.2. **Disability discrimination pursuant to section 20-21 Equality Act 2010 (save for issue 20a in respect of the failure to make a reasonable adjustment between 1 June to 19 July 2016);**
   7.3. **The remaining complaints of disability discrimination pursuant to section 15 Equality Act 2010 (issues 7a, 7c, 7d, and 7f of the List of Issues).**

REASONS

Complaints and Issues

1. By three Claims, the Claimant brought complaints of disability discrimination under sections 15 and 20-21 Equality Act 2010 ("EA 2010"), victimisation, unlawful deduction from wages, breach of contract (notice pay) and unfair dismissal.

2. The first two Claims (2208119/2016 and 2200305/2018) were linked to be heard together. The Claimant presented a third Claim following her dismissal; there was no issue over jurisdiction and the Claim was presented in time. The London Central Employment Tribunal did not issue the third Claim, nor explain why to the parties, leading this Tribunal to infer that this was the result of administrative oversight. On learning that the third Claim had not been issued, the parties applied for this Claim to be issued so that all the matters in dispute between the parties could be determined at this hearing. Accordingly, the Tribunal directed that the third Claim should be issued by the administration at East London Employment Tribunal on the first day of the hearing. The

Respondent had already prepared and served an ET3. The Tribunal dispensed with re-service, directing that draft statement of case to stand as the Respondent's ET3 in this Claim (3200680/2019) and that both Claim Form and ET3 Response be taken as amended to show East London Employment Tribunal as the relevant Tribunal Office.

3. We would like to thank the parties and their Counsel for the constructive approach taken in this case, which enabled the Tribunal to complete the evidence and decide the issues despite the loss of two days due to lack of Tribunal resources.

4. Helpfully, the parties had agreed a full list of issues to include those raised by the third Claim. The final list of issues is attached at Appendix A.

5. During the course of this hearing, various issues were withdrawn. At the outset, Counsel acknowledged that the Claim for automatic unfair dismissal was withdrawn. During the hearing, the Claimant withdrew her complaints against Dr. Crispin, who had been named as Second Respondent in the first Claim. These complaints were dismissed on withdrawal. At the outset of submissions, Mr. Sprack explained that the Claimant was withdrawing the allegation that she was disabled at relevant times due to a mental impairment and that the alleged unfavourable treatment at issue 7e was withdrawn. The complaint of unpaid notice pay was also withdrawn.

6. It was common ground that the Claimant had been continuously employed by the Respondent from 1 December 2009 until her dismissal in 2018.

The Evidence

7. The Tribunal read witness statements for, and heard oral evidence from, the following witnesses:

7.1. The Claimant;
7.2. Lorraine Hart, a friend of the Claimant;
7.3. Hassan Rahman, of the Working Well Trust, a mental health charity;
7.4. John Fenton, Human Resources Consultant;
7.5. James Chiriyankandath;
7.6. Kerry Reid;
7.7. Dr. Jane Crispin;
7.8. Tanya Morrison;
7.9. Reverend Kate Dean;
7.10. Hilary Ratnasabapathy (referred to as Hilary Ratna in her witness statement and in documents).

8. The majority of the relevant facts were not in dispute; and there were relatively few conflicts of relevant fact.

9. We found that all the witnesses were honest when giving their evidence; but this is not the same as saying that they were reliable in every respect. We found that the Claimant's account was different from that of the Respondent's witnesses in some instances because of her perception of events and the hurt that she felt. Her beliefs about certain matters were so strong that they coloured her perception of events, such as her perception that the introduction of time sheets from July 2016 (during the period of the temporary adjustment of working from home for two days per week) was a disciplinary or capability measure despite any objective evidence supporting that interpretation. This should not be taken as a criticism of the Claimant personally; subjective perception of events by parties can arise, particularly where events and litigation stretch over an unhelpfully long period.

10. In respect of Ms. Hart's evidence, we found that, again, her perception and sympathetic feeling towards the Claimant coloured her evidence in some respects. This is evidenced by her note of the meeting of 26 May 2016, which is relatively short and contains her comments, rather than verbatim notes. Again, this is no criticism of her personally nor any suggestion that she was not being honest in her evidence.

11. In respect of the witnesses overall, we found that some of the differences in the accounts were due to mistakes after the passage of time, given the degree of stress that the events described below had caused to those involved.

12. In respect of the Respondent's witnesses, we considered that the effect of the Board and organisation of the Chapel consisting of part-time volunteers cannot be underestimated. For instance, Dr. Crispin was a full-time medical professional. Moreover, the Members of the Board and the Chair changed over time, which we found resulted in some loss of knowledge despite Board Minutes; we heard no evidence of handovers between Chairs, for example. Given the nature of this organisation and the part-time roles held by the witnesses, we found it very likely that the Respondent's Chair and Board did rely on the advice of their employment consultants; but we found it likely that there were some gaps in their instructions as a result of the fact that Board Members were part-time and because of changes of Chair and Members over time.

13. There was an agreed bundle of documents. Page references in this set of Reasons refer to pages in that bundle.

The Facts

14. The Respondent ("RHUC") is a registered charity. It is run by volunteers from amongst the congregation, from whom Board Members are elected.

15. The RHUC site had developed as set out in the statement of Tanya Morrison at paragraphs 17-18. The site includes a Chapel, Chapel hall, and Manse. The vestry office is within the Chapel part. The Chapel is used by an Independent School from Monday to Friday for teaching; the hall is used from about 1430 each

day and on Saturday by a dance school. The site is fenced in, for safeguarding reasons. The Minister (currently Reverend Dean) lives in the Manse.

16. The main entrance to the site has an entry phone system. The door to the office is accessible to the public or delivery businesses, and is located next to the car park; visitors may ring the bell at this door for assistance from a person working in the office. Deliveries are taken in at this point and visitors (such as prospective wedding couples) greeted.

17. Dr. Crispin commenced as a member of the Management Board in 2011. The Management Board were volunteers not based on site; they could not perform day-today supervision of the Claimant.

18. Dr. Crispin was elected Chair of the Board on 12 May 2016, replacing Kerry Reid. Dr. Crispin held this position until 5 March 2017; at that point, she was required by the Constitution to step down after six years on the Board. Her position as Chair was filled by Tanya Morrison.

19. The Claimant was employed by RHUC as Operations Manager and Administrator from 1 December 2009 until her dismissal, effective on 9 April 2018. The Claimant was the only full-time employee of the Respondent and worked in the office in the vestry ("the office"). Her duties are set out in her job description p119-121, but included supervising the caretaker and outside contractors, dealing with rental clients or those who had bookings, taking in deliveries, and welcoming members of the local community, such as prospective users of the Chapel or hall. The Claimant accepted that some tasks could only be done when she was on site.

20. We noted the distinction between line management of policy matters and line management of day-to-day matters. It was difficult to have consistency over these matters where Board Members changed over time, with new Members being elected, and Members filling the role of Chair of the Board.

21. Although her line manager on policy matters was the Chair of the Board, on a day-to-day basis, the Claimant took instructions from the Minister as line manager. From 20 March 2016, the Minister was Reverend Dean part-time (three days per week), then full-time (from 20 September 2016).

22. Under the management of the former permanent Minister, the Claimant had worked from home on one day per week, before she became a disabled person by reason of her physical impairments.

23. At all material times, RHUC's expectation in respect of working practice was that the office on the site was staffed Monday to Friday each week. This is apparent from the Claimant's job description (see Place of Work, p.116) and from all the other evidence that we heard. It was accepted by the Claimant when she met Reverend Dean on 17 June 2016 that the office needed to be staffed through the working week: see p 276 (the Claimant confirmed these notes were an accurate record in cross examination).

24. At the time of the incidents in question, the relevant statement of terms and conditions are those at pp129-133, dated 9 July 2014, which include

> *"If there is any apparent contradiction between anything that you were told at interview, or subsequent to it, or what was in an offer letter and this statement, this statement of terms and conditions takes precedent unless you are told otherwise in writing.*
>
> *…*
>
> *2. Job title: Operations Manager and Administrator. This position reports to the Minister on day to day matters and the Chair of the Board on matters of policy.*
>
> *….*
>
> *8. Location: Your work will be based at Rosslyn Hill Unitarian Chapel, Pilgrim's Place, London NW3 1NG. You may work from home for one or two days each month, to be agreed with your line manager in advance.*
>
> *…*
>
> *12. Sickness or Injury Absences … The Chapel will pay statutory sick pay (SSP) for sick leave in excess of 3 consecutive days. Your qualifying days for SSP will be Monday to Friday."*

25. We heard no evidence that, during the course of the Claimant's employment, there were written procedures or policies in respect of Health and Safety at Work, Sickness Management, or Equality and Diversity. We saw no standard forms or documents relating to risk assessments, work station assessments or referrals to occupational health.

26. During the course of the Claimant's employment, no risk assessment was carried out by the Respondent, but a work station assessment was carried out during 2017 (explained below).

The Claimant's physical impairment

27. The Claimant sustained a back injury. How this occurred is not relevant for our findings in this case. On 2 June 2015, the Claimant had surgery on her spine. At all material times since the operation, the Claimant has been paralysed from her right knee down. She mobilises with a stick and sometimes a wheelchair; her mobility limitations are set out in her witness statement at paragraph 5.

28. Despite the Claimant's sickness absence from May 2015, RHUC paid her discretionary sick pay and her full salary until 1 February 2016 when she returned to work.

29. During her sickness absence, the Claimant's role was covered part-time by two assistants with other help. Despite her absence convalescing, the Claimant wished to continue to do tasks at home, and requested adjustments (p.161-162), for which the Respondent provided aids and agreed to the adjustments in substance, as explained by Mr. Reid in his statement (paragraph 15).

30. Mr. Reid and other Board Members became concerned that the Claimant was working at home. The Claimant had informed Mr. Reid that her doctor had agreed that she could undertake some duties at home, as long as it did not exceed more than one day per week.

31. Subsequently, having consulted its insurers, on 19 August 2015, Mr. Reid instructed the Claimant not to carry out any work, because she was signed off as unfit to work. This followed an email from the Claimant (p.169) stating that she could not deal with the stress and worry of all the work.

Return to work

32. Prior to her return to work, the Claimant did not request any adjustments to either her hours of work or her place of work.

33. From 1 February 2016, the Claimant worked two days per week on site. Although the Claimant did not request this nor receive express permission for it, on the remaining three days per week, the Claimant worked from home (evidenced by the email p.218). There was no day-to-day line management at this time (in the absence of any Minister appointed by the Board).

34. On 11 February 2016, the Claimant attended a "well-being" meeting with Mr. Chiriyandath, Chair of the Staffing Committee. This was set up because it had been suggested by *Fit For Work*, a government initiative. When RHUC had made an inquiry, *Fit For Work* had stated that it could not carry out a workplace needs assessment because the Claimant had returned to work already.

35. At this meeting, adjustments to the office were proposed, which were: shifting the shelf by her desk to a lower level so she could reach it, and the fitting of a support handrail by the steps of the office entrance. The Staffing Committee recommended to the Board that these adjustments and an occupational health assessment were made without delay: see p.202 report.

36. At the meeting on 11 February 2016, the Claimant stated that she would instruct the acting caretaker to move the shelf. The Claimant did not request, whether at this meeting or subsequently, that the RHUC site be adjusted in any way for

enhanced wheelchair access. The Staffing Committee report to the next Board meeting stated:

"*The Staffing Committee strongly recommends that both these adjustments and an occupational health assessment be made without delay: Sharon has said she will instruct Danny, the acting caretaker, to move the shelf, and the Board needs to approve the fitting of a handrail and the commissioning of an occupational health assessment*." (p.202)

37. On 10 March 2016, the Board meeting approved the installation of handrails. The Claimant was requested to liaise with RHUC's usual building contractor, George, to show him where the handrails were required.

38. At the Board meeting, at which the Claimant was in attendance, it was decided that the Claimant was to arrange a risk assessment of her workplace: see action plan p.203. In cross-examination, the Claimant agreed that it was appropriate for her to arrange this and did not criticise the Respondent in this respect.

39. By the beginning of April 2016, the Claimant had liaised with the builder, and shown him where the handrails were required. In response to an email dated 4 April 2016, the Claimant stated that the builder would be fitting the handrail in the next week or so. At a regular weekly meeting with Reverend Dean, in about early April 2016, the Claimant indicated to her that a low shelf that had been installed, and that she was waiting to hear back from George the builder on the installation of handrails.

40. From the minutes of the next Board Meeting, 14 April 2016, the action points indicated that the Claimant and the caretaker were responsible for getting the handrails and other works carried out.

41. The Respondent understood that the Claimant was undertaking the arrangement of adjustments as agreed at the well-being meeting, save that she was to obtain a workplace risk assessment rather than an occupational health report.

42. The Claimant met Kerry Reid on 19 April 2016 in the vestry. He had stood down from the Board and gave her flowers to thank her for assisting him during his tenure as Chair. The Claimant informed him that all necessary adjustments to her office had been made, and the handrail was to be installed shortly.

43. Subsequently, the Claimant learned that Dr. Crispin's report for the 14 April Board Meeting stated that the Chapel administration was becoming "*rather ad hoc*". This deeply upset her, evidenced by her request for a meeting with members of the Staffing Committee, Mr. Levy and Ms. Frankel, and the record of that meeting of 22 April 2016 within the email from Mr. Levy (p.218). At this meeting, the Claimant raised a number of points. She produced the Fit for Work certificate dated 7 April 2016, stating that she may benefit from: a phased return to work; altered hours; amended duties; and

workplace adaptations. The Claimant complained that she had worked 5 days per week since her return and the handrails hand not been fitted, that she was having to organise her own Workplace Risk Assessment, and that she had had no support or contact from the Board, who had not met its obligations to her, and were in breach of contract with her. At this meeting, the Claimant did not allege the Respondent had breached the Equality Act 2010, nor was there any evidence that her actions at the meeting were for the purposes of or in connection with that Act.

44. The inference from this email (p218) and contemporaneous documents is that the Claimant was feeling under stress at this time and so reacted to the perceived criticism of her work in the Chair's report. Until this meeting, however, the Claimant had taken the responsibility for having the physical adjustments made, had not indicated any detriment to her due to delay in those adjustments being made, and had not made any complaint about her employer at all. In addition, the Claimant accepted in cross-examination that she was the best person to obtain the workplace risk assessment and accepted that up to mid-May 2016, all requests by her had been agreed by the Respondent.

45. Furthermore, the Fit for Work Certificate dated 20 January 2016, had recommended only amended duties and workplace adaptations (p.186); it made no mention of a phased return to work. It stated that the Claimant had mobility issues and "*would like to work from home as much as possible and would need some small adaptations in the workplace to aid mobility*".

46. On 29 April 2016, the Claimant and Ms. Frankel had a telephone discussion about the risk assessment. Ms. Frankel had taken this task from the Claimant because of the complaint that no assessment had been carried out; she wanted information gathered by the Claimant. Subsequently, Ms. Frankel chased George the builder to put up the handrails outside the vestry and in her toilet. The builder agreed to do the work that week: see p.222 (email 2 May 2016). He met with the Claimant on 3 May 2016.

47. On 3 May, Dr. Crispin chased Ms. Frankel to see if the work place assessment had been completed; the gist of Ms Frankel's response was that she hoped to speak to the providers that day.

48. At no point, whether prior to her return to work nor during the meeting on 22 April 2016, nor during the above correspondence, did the Claimant request wheelchair ramps or improved wheelchair access. The Claimant did not mention to the Respondent, at any point during her employment, that she required a wheelchair to mobilize at work when suffering with pain or weakness nor did she adduce any evidence that she was put at any disadvantage by any provision or practice or physical feature of the premises in respect of wheelchair access.

49. From 6 May 2016, the Claimant was signed off work by her GP. The Fit Note dated 19 May 2016 states that she was absent due to the operation on her spine, which left her with some weakness and mobility issues (p.238). The GP supported

her working from home in her "*transition*" back to work. The Claimant was signed off until 12 June 2016.

50. Following the Claimant's indication that she would be returning to work, Mr. Chiriyandath invited her to an ill-health consultation meeting on 26 May 2016. The covering email (p.232) states that the Claimant would not be expected to return to work unless the physical adjustments to the office environment proposed by the GP are made.

51. The Claimant was paid her full wages up to 1 June 2016 on a discretionary basis, her entitlement to contractual sick pay and SSP being exhausted. Prior to the meeting on 26 May, Dianne Fenton, an employment consultant, had advised that the Respondent should stop paying the Claimant.

52. There are two records of the meeting on 26 May. Notes taken by Ms. Hart are at p.242. These contain various comments, which did not form part of the meeting, and are relatively brief notes. The events of the meeting are also described in the letter recording the outcome of the meeting (p251-253), prepared by Dr. Crispin, Mr. Chiriyandath and Dianne Fenton, which is a more thorough account of the meeting and likely to be more accurate, although not verbatim.

53. At the meeting on 26 May, in summary, the following was communicated to the Claimant:

53.1. A report would be obtained from the Claimant's GP to assess the Claimant's physical capacity to undertake the role.

53.2. The Claimant's absence from the Chapel premises was having a deleterious impact on the administrative functioning of the Chapel. It was important to have a full-time staff presence on the Chapel premises, and this was not a suitable job for home working.

53.3. From 1 June 2016, the Claimant would only be paid pro-rata for the hours worked in the office. RHUC considered that it could no longer continue financial support, having had to pay people to cover various aspects of the Administrator role already and with the need to pay for future onsite support.

53.4. The Claimant was not expected to work from home.

53.5. RHUC would arrange for a temporary worker to cover days when the Claimant was not at the Chapel.

53.6. A further ill health review would be carried out in three months to review this temporary situation – or sooner, subject to the medical evidence.

53.7. The fitting of the handrails was a priority and if George could not do it, another builder should be instructed. (The Claimant admitted that she had been too busy to commission these). Dr. Crispin offered to arrange the adjustments required if the Claimant did not have time (p253).

54. At the meeting, the Claimant's case was that: she could undertake all aspects of her job, she could manage to work two days per week on site, her GP had advised her to build up work slowly, she found driving to work or coming on the Underground tiring and difficult due to her weakness and mobility issues, she did not need to be on site for five days (Monday to Friday) and the current arrangement had been working well, and she did not want to reduce her hours to part-time on a permanent basis. We found it likely that she asked to work at home for part of the week, which is corroborated by the minutes of Ms. Hart (p.241).

55. At the meeting, the Claimant stated that she could work two days per week on site, to be increased to three days per week. This arrangement was agreed and understood to be temporary. None of those present for RHUC said that it was planning to split the job into two part-time roles in the immediate future at that point in time; the Claimant was informed that if the job was to be split, into two part-time roles, it would be split down duty lines rather than the temporary position decided upon at the meeting.

56. Moreover, at the meeting, no one told the Claimant that she was unable to do her job. We preferred the oral evidence of the Respondent's witnesses on this point. We found that such a statement, if it had been made, would have been the subject of separate complaint by the Claimant after the meeting and would have featured in her Claim or witness statement.

57. Also, at the meeting, the Claimant was asked whether she required any help with her journey to work; the Claimant said no.

58. After the meeting, the Claimant responded to the letter of 2 June 2016, disputing several points, such as the requirement to work on site each day (given that she had been doing some work at home for 4 months), and disputing that there had been any deleterious impact on performance from February 2016.

59. Dr. Crispin sent an email to the Board, 3 June (p261), copied to the Claimant, setting out that the plan for Administrator coverage at the Chapel. It was explained that the arrangement with the Claimant working only part-time at the Chapel and with staffing cover on site, was temporary, for 3 months. The Claimant responded to this writing comments upon it, one of which was that she would see to it that workplace adjustments were made on her return to the Chapel. Furthermore, the Claimant stated that she would be working 5 days back at the Chapel from 20 June 2016 "*with a slight adjustment*" which she planned to raise at the next Board meeting.

60. At the next Board Meeting, the Claimant proposed working from home for two days per month. Despite the Board Meeting minutes (9 June 2016, p264, which we found to be inaccurate in this respect), we preferred the Claimant's evidence that she was proposing that she work at home for two further days per month, in addition to the two days per month that she believed her contract of employment permitted. We preferred her oral evidence on this point in part because that is what she discussed with Reverend Dean on 17 June 2016, which was passed on to Dr. Crispin and other Board Members (p276).

61. From about 1 June 2016, the Claimant worked three days per week at the premises. She contacted the builder, who installed the handrails. This was around 20 June 2016.

Working from home from 19 July 2016

62. On 21 June 2016, the Claimant's legal adviser requested that the Claimant was allowed to work the remaining two days from home, with a view to building up to four days per week at the Chapel with one day at home (p.283). In this letter, the adviser pointed out the terms of the Claimant's contract, drawing attention to clause 4.

63. We found that the Respondent's witnesses present at the meeting on 26 May 2016 did not know that the Claimant's contract included a term which permitted the

Claimant to work at home for up to two days per month; as a result, it is likely that Diane Fenton was also unaware of this. This gap in knowledge is evidenced by the minutes of the meeting of 24 June 2016 (which state that it was contrary to her contract to be working from home one day per week, despite the fact that this had been the arrangement when the former minister was in place). Mr. Chiriyandath stated in evidence that this clause was not part of the contract that he had had drafted when Chair of the Staffing Committee, and must have been added by the Board at a later date. Dr. Crispin thought that she had read the contract when she was on the Staffing Committee; but we concluded that she had probably not seen the final draft, with the added provision for home working, before the meeting on 26 May 2016.

64. One of the Claimant's motives for working from home was stated to be administrative efficiency. The notes of the meeting of 24 June 2016, attended by Dr. Crispin, Kate Dean, Mr. Chiriyandath and the Claimant, show that at the meeting the Claimant could not say when she would be able to return to work on site four or five days per week; and this statement was linked to her physical impairment, including pain and the stress of coping with it. Administrative efficiency was merely a factor, in the Claimant's evidence at that meeting, in favour of working from home.

65. It is clear from these minutes that at this meeting the Claimant stated that she could think of no further physical adjustments required in her work environment, and that she was driving to work and using a reserved parking space. We found that the provision of a parking space for the Claimant (by allowing her to use one reserved for chapel business) was an adjustment made for her; previously she

had used public transport. Moreover, the Claimant stated that she did not need to use her wheelchair at the Chapel (see p.287-288).

66. We found that Dr. Crispin honestly considered the material put before her by the Claimant and her advisor, evidenced by the email on staffing issues to the Board, dated 14 July 2016 (p294A-B). Although the Claimant may well have formed the view that Dr. Crispin sought to remove her from her role, we found that this was not the case. We found that, as Chair of the Management Board and with a new Minister in place, Dr. Crispin was concerned to minimise the effect of the Claimant's absence from the office. This included the effect to the support that could be provided to the Minister, the quality of work of other staff, the running and maintenance of the site, and the need for the Chapel to maintain a public, "human face" during the working week.

67. At or about this time, the Respondent took further advice from its HR consultant.

68. Following a further Board Meeting, from 19 July 2016, a temporary arrangement was put in place to allow the Claimant to work from home for two days per week, so that she was paid in full from that date. This was intended to be a trial period until 30 September 2016, for the Respondent to see what work the Claimant could perform at home, and what needed to be performed in the office. This was set out to the Claimant in the letter at p.304-305.

69. As part of the new arrangement, it was proposed that the Claimant complete timesheets "*that track what tasks you do in a day and how long they take*". This request was made not for any disciplinary reason nor as part of a capability process, but because the Respondent wanted to understand the nature of her role in detail, and the resources needed to carry it out. Since 2015, Mr. Chiriyandath as Chair of the Staffing Committee had had the idea that her role should be split into two parts.

70. The Claimant did not object to completing timesheets. She stated in crossexamination that she considered the timesheets to be a reasonable approach in this trial situation and that the trial period was a great idea, agreeing with the suggestion that it would allow her to find the level of work which she could perform on site. We found that the requirement to complete time-sheets was not unfavourable for the Claimant, given that their purpose could have led to one or more permanent adjustments to her role.

71. Although we found that more detailed time sheets may have been more beneficial for the purposes of the trial, we found that the Claimant did not co-operate with the process by not completing the timesheets in a helpful way. She completed the time sheets in such a way that they lacked much detail. We found that by this time, communication was breaking down; and the Claimant was not prepared to assist her employer.

72. Part of the Claimant's case was that it was unreasonable and unfavourable treatment to use time sheets rather than using the weekly meetings between the Claimant and Reverend Dean as a tool for gaining the information sought. We did not agree with her perception about this for various reasons. Primarily, Reverend Dean was not present at the Chapel full-time until September 2016; and the nature of her work, in any event, meant that she would have meetings and work to attend to out in the Community. Secondly, the Board (all of whom were volunteers giving up their time to attend to Board matters) really needed written evidence to reach a decision after the trial; and this was a policy decision. Thirdly, the nature of the Chapel and its site meant that there needed to be a good working relationship between Reverend Dean and the Claimant; it would have been invidious for the new Minister to start this relationship with a requirement to precisely monitor the work of the Claimant.

73. Furthermore, the Claimant was assisting the caretaker to produce worksheets for his annual review in September 2016. The documents show that the treasurer and Management Board sought to understand the work done by the other employees as well: see, for example, the notes of the meeting of 27 September 2017 which show that the caretaker was completing time sheets.

74. As the Claimant accepted, we found that it was reasonable for her employer to have a trial period for the adjustment of the Claimant working from home for two days per week, given the belief of the Management Board at that time that the job could not be done off-site, and given the presence of a new Minister (who was due to commence full-time in September 2016), and given the use of the Chapel site during the week.

75. As the Claimant accepted, the Respondent had, up to this point, complied with the requests made through the Claimant's solicitor.

76. Subsequently, on 28 July 2016, the Claimant's adviser requested a permanent adjustment to the Claimant's role, allowing her to work at home for one day each week and four days on site. This proposal conflicted with the temporary arrangement and we accepted the Claimant's evidence that she could not attend the Chapel on four days per week at that time.

77. The temporary arrangement – whereby the Claimant worked at home for two days per week – continued until her dismissal (albeit she was absent sick from 2 November until her dismissal on 28 March 2018).

78. The Claimant knew, and accepted in cross-examination, that this arrangement was subject to review based on medical evidence. She admitted that it was reasonable for the Respondent to await evidence before converting a temporary adjustment into a permanent adjustment.

Events from September 2016 to September 2017

79. At the Staffing Committee on 29 September 2016, when asked whether her health prevented her coming to the office five days per week, the Claimant stated that it did not. We found that, whatever the Claimant stated, what she meant was that she could work five days per week for the Chapel, although not necessarily on site.

80. By a robust email of 19 October 2016, the Claimant's adviser demanded a response within less than 24 hours to the proposal that the Claimant worked at home one day per week on a permanent basis. A comprehensive response was provided by Dr. Crispin.

81. Following this, Dr. Crispin sought to hold a review with the Claimant of the adjustment (the three days at the office, two days at home working arrangement): see email 21 October (p354) and 2 November (p.369).

82. On 18 November 2016, Dr. Crispin collected a package at the office. It contained an ET1 Claim, which named her as a respondent, together with the Chapel. She was upset by this. We preferred the evidence of Dr. Crispin and Reverend Dean (whose evidence was not challenged) about the reaction of Dr. Crispin. We found her reaction to be understandable in the circumstances. The reaction of Dr. Crispin alleged by the Claimant is not mentioned in the Claims. We found that the Claimant's perception of events was due to her belief that Dr. Crispin was driving an agenda against her, an allegation for which we found no evidence and which we rejected.

83. When Ms. Morrison took over as Chair of the Board, no Board members were aware of any further reasonable adjustments being sought by the Claimant. The Board did consider whether it was reasonable to make the entire site wheelchair accessible, but given that some adjustments for wheelchair accessibility had been made and given the age and layout of the site, the Board decided that this was not reasonable for the reasons given by Ms Morrison: the age of the buildings; the fact that it was in a conservation area and substantial change would require planning permissions and consultation; costs would be disproportionate.

84. From about March 2017, Ms. Morrison had regular monthly meetings with the Claimant. At none of these meetings did the Claimant request any other adjustments.

85. The Claimant was absent sick between May and June 2017. On 19 June 2017, by email (p417A) she was welcomed back by Ms. Morrison. By this email, Ms. Morrison invited her to raise any reasonable adjustment needed; and agreed to set up a meeting with Mr. Rahman of WWT, but asked what it would cover (because it did not look like WWT was focussed on physical impairments). The

Claimant did not raise any adjustment in response and accepted in cross-examination that this was an appropriate response from her employer.

86. In August 2017, a DWP work assessor attended the Chapel site and carried out an assessment. This recommended a new chair and footstool.

87. On 13 September 2017, Mr. Rahman prepared a report (p420ff) which was sent to the Respondent. This report set out that she had symptoms of a depressive illness and generalised anxiety secondary to her physical injury. It explained that stress posed an ongoing risk to her health and that she was vulnerable to those symptoms.

88. On 27 September 2017, a meeting was arranged with the Claimant, Mr. Rahman, and Ms Morrison. One of the Respondent's employment advisers, John Fenton, was also present. The bulk of the meeting was about the Claimant's physical condition and return to the office full-time, with Ms. Morrison explaining re-structuring agreed by the Board.

89. At the meeting, the Claimant stated that, from a recent consultation with a neurologist, there was no change in her condition. The Claimant now recognised that her condition would not improve, and that she could not work on site for more than three days per week; in 2016, she had expected her condition to improve.

90. Ms. Morrison explained that, after 18 months, it had been decided that somebody was required on site each day, to achieve the aim of a well-run Chapel, and that the Respondent kept reasonable adjustments under review. She confirmed that the new chair and foot rest were due to arrive the following week and were auxiliary aids; these recommendations were the product of an assessment of her workplace by an external body.

91. It was agreed that an occupational health assessment should be arranged. Ms. Morrison explained that the Respondent was trying to obtain an occupational health assessment, but was having trouble finding a provider.

92. The notes of the meeting at p.429 were not disputed, but Mr. Fenton's own notes are at p.430A. These show that about three quarters of the way through the meeting, he said the following:

> *"John then spoke of what he considered to be a difficulty for the relationship with the chapel's congregation. This was in relation to the employment tribunal claim that named as respondents both the chapel and a member of the congregation.*
> *John said: You have taken claims of unlawful discrimination against both the chapel and an individual member of the congregation – Dr Jane Crispin. You have not put forward any grounds for your discrimination claims against the individual respondent.*

This makes it very difficult for anyone in the chapel to have dealings with you for the fear that you will take out a claim against them. They are scared of you. If you want good relations with the congregation, then withdrawing the action against Dr Crispin, against whom you have given no particulars of wrong-doing, will assist them have a good relationship with you."

93. In cross-examination, Mr. Fenton agreed that he had also made a further comment along the following lines:

"*You're not doing yourself any favours by continuing with this claim*"

94. The Claimant found these comments to be inappropriate and intimidating. She perceived that they were designed to compound her stress and anxiety. We found that, given her vulnerable state (as explained by Mr. Rahman in his report), it is likely that the comments, particularly those about members of the congregation being scared of her and the Claimant not doing herself "*any favours*", did have this effect.

95. We found that the comment about someone being scared of the Claimant was not true, and there was no evidence in support of it. Mr. Fenton explained in evidence that his comments were not made on information from the Respondent's Board, but made from his experience in other cases and knowledge that members of the congregation would have talked to one another. Mr. Fenton conceded in crossexamination that he should have said "*I think that they are likely to be scared of you*.".

96. After Mr. Fenton made these comments, Ms. Morrison did not intervene, such as by correcting the impression that someone was scared of the Claimant. We found that this was because she had had no idea that Mr. Fenton was going to make such remarks and trusted him as the Respondent's adviser to be acting in the Respondent's best interests.

97. From 28 September 2017, the Claimant commenced a period of long-term sickness absence. She had no direct contact with Ms. Morrison during this absence, despite the fact that she had been having regular meetings with her. The original not Fit for Work Certificate was for six weeks; this was followed by a further Certificate for three months (at p.430C). The stated illness was: "*Work-related stress major trigger for episode of depression*."

98. The Respondent employed a temporary worker to cover the Claimant's job, because the former assistant administrator (Mr. Wagner) had retired.

99. From the end of November 2017 until her dismissal, the Claimant received Statutory Sick Pay, which she made no complaint about.

The decision to dismiss

100. On 1 November 2017, Ms. Morrison invited the Claimant to a return to work meeting. On about 10 November 2017, an occupational health referral was made for the Claimant, which, during cross-examination, the Claimant accepted was an appropriate step.

101. An appointment for this assessment was arranged for 28 November 2017. The Claimant's case is that she was unable to attend this meeting due to her depressive symptoms. There is no medical evidence to show that she was unable to attend such an assessment. We find it was a reasonable expectation that the Claimant could attend the occupational health assessment.

102. We found that the Claimant felt unable to attend the assessment. She was by this stage unable to communicate with the Board. She had passed on the function of communication with the Board to Mr. Rahman.

103. By letter dated 15 December 2017, the Claimant was invited to a sickness absence meeting on 9 January 2018. This letter explains that the meeting was to discuss her return to work (including a phased return to work) and whether any reasonable adjustments were required.

104. By email, on 21 December, Mr. Rahman responded by explaining that the Claimant was unable to attend due to her symptoms, but that she would be contacting the occupational health provider to request a new appointment. It suggested postponing the meeting until the assessment had been carried out. On the same date, the Claimant informed the provider that Mr. Rahman had been asked to make arrangements for her to attend.

105. On 3 January 2018, Mr. Rahman stated the Claimant was too unwell to attend the 9 January meeting and requested a postponement. His email included:

> "*At this time, it is difficult to indicate when she will be well enough to engage in a formal meeting, but, nonetheless, the WWT will update the Chapel on her behalf in respect to any changes to her recovery status*."

106. A further occupational health appointment was fixed for the Claimant on 26 January 2018. To facilitate the Claimant's attendance, the Respondent arranged for a taxi to get her to and from the appointment, because the assessment provider had been informed that the Claimant wanted disabled parking, which they could not offer. By email, Ms. Morrison explained (p.436 C-D), that the Claimant's contract of employment allowed the employer to request that she attend medical examination. She stated that, unless she heard from the Claimant or Mr. Rahman by 5pm 30 January, the Respondent would assume that the Claimant had no intention of attending an occupational health appointment and would consider her to be in breach of contract. Mr. Rahman responded that the Claimant was too unwell to attend an assessment, and had "*suffered a setback in her recovery*", affecting her functioning levels; and that he would speak to the Claimant and get back to Ms. Morrison.

107. On 1 February, Ms Morrison chased Mr. Rahman for a substantive response. He stated that he was due to see her the following week. In response, Ms. Morrison suggested a telephone assessment by the occupational health provider, which he accepted was "*constructive*".

108. On 9 February, Ms. Morrison chased Mr. Rahman for an update, but none was provided.

109. By letter dated 14 February 2018 (p436H-J), the Claimant was invited to a meeting on 5 March to discuss the future of her role and her return to work. The Claimant was offered the opportunity to choose her location for the meeting.

110. By email of 26 February 2018, the Claimant responded to the invitation, stating that she was too unwell to attend, due to her depression and anxiety. She produced no medical evidence to support the claim that she could not attend such a meeting.

111. The sickness absence meeting was re-arranged to 21 March 2018. The invitation letter warned the Claimant that the Respondent may have no option but to terminate her contract with notice on the basis of incapacity.

112. No response to this letter was received until 21 March 2018. Ms. Morrison sent an email explaining that the meeting was re-arranged to 28 March 2018.

113. On 21 March 2018, Mr. Rahman stated that the Claimant was unfit to attend meetings with the Chapel "*for the foreseeable future*" due to her symptoms. Their suggestion was for the hearing to be held in her absence; if any "*mitigations and statements*" were to be put forward, he would do so by 26 March. (p.436M).

114. There was no criticism by the Claimant or her Counsel about the tone or content of any of the correspondence from November 2017 onwards.

115. On 28 March 2018, the Claimant did not attend the meeting. No evidence or submissions had been made on her behalf.

116. For the Respondent, Ms. Morrison and Ms. Ratna attended the meeting. We accepted their evidence. The decision was taken to dismiss the Claimant. The reasons for this decision are set out in the evidence of Ms. Morrison, and recorded in the dismissal letter of 9 April 2018 (p.444). When questioned whether it was reasonable for the Respondent to dismiss her by that stage, the Claimant responded that by then she was very unwell.

117. We concluded that the decision to dismiss was taken for the reasons given by Ms. Morrison. Those reasons had nothing to do with the protected acts alleged, nor

with things arising in consequence of her physical disability. The reason for dismissal was a reason related to her capability to attend work.

118. The dismissal letter told the Claimant that she had seven days in which to appeal. No appeal was submitted until 4 May 2018, despite the fact that the Claimant still had legal advisers and was represented by Mr. Rahman. Mr. McAuley, Chief Officer of the General Assembly of Unitarian and Free Christian Churches, who is not employed by the Respondent and had not been involved with the Claimant's case to that point, declined to hear the appeal. At the time, at no stage did the Claimant allege that she missed the appeal deadline due to her depressive symptoms.

119. We find that she did not appeal in time because she had handed over communication with the Chapel to Mr. Rahman. It may be that she had some illness for all or part of the time during which she could have appealed, but this was not the reason that she could not appeal. She took a decision that she found it too stressful to communicate with the Respondent.

120. There was a good deal of cross-examination by Mr. Sprack about the Respondent's proposed re-structure of the Administration and Office Manager role. We found that the proposed re-structure had nothing to do with the Claimant's treatment or dismissal. Dr. Crispin's reaction appeared to be shock and her denial was patently truthful. We accepted Mr. Chiriyankandath's evidence that the meeting of 26 May 2016 was not a "*pretext*" (as alleged in cross-examination) to introduce his restructuring proposal of two separate part-time roles instead of a single Administrator and Office Manager role. We found that this was a longer term aim of the Staffing Committee as constituted at that time; its recommendations from November 2015 were not adopted by the Management Board in any event. At the meeting of 26 May 2016, the Respondent's witnesses were operating on the basis that at some point the Claimant would return to work on site full-time.

The Law

Disability Discrimination

121. In this case, two types of disability discrimination were alleged: failure to make reasonable adjustments (section 20-21 EA 2010) and unfavourable treatment in consequence of something arising from the Claimant's disability (section 15 EA 2010). The Tribunal directed itself to the relevant law as follows.

Duty to make reasonable adjustments

122. Given the carefully drawn statutory duty to make reasonable adjustments, it is helpful to set out the relevant statutory provisions at the outset:

"*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.

(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 a 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.

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 …"

123. Paragraph 20 of Schedule 8 EA 2010 provides a limitation on the duty where the Respondent lacks the requisite knowledge:

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

124. A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission 2011 ("The Code"). The Courts are obliged to take it into consideration whenever relevant. Chapter 6 is concerned with the duty to make reasonable adjustments, and emphasises that the duty is one requiring an employer to take positive steps to ensure disabled people can progress in employment. The Code includes:

124.1 The phrase "provision, criterion or practice" (which is not defined in the EA 2010) should be construed widely so as to include any formal or informal policies, rules, practices, arrangements, conditions, prerequisites, qualifications or provisions. It may include one-off decisions and actions. (paragraphs 4.5 and 6.10)

124.2 Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps".

124.3 Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage.

125. In *Carrera v United First Partners Research*, the Employment Appeal Tribunal held that a PCP did not require an element of compulsion; an expectation or assumption placed upon an employee may suffice. HHJ Eady gave the following guidance at paragraph 31-37:

125.1 The identification of the PCP was an important aspect of the Tribunal's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments.

125.2 It is important to be clear as to how the PCP is to be described in any particular case.

125.3 The protective nature of the legislation meant a liberal rather than an overly technical approach should be adopted to the meaning of "provision criterion or practice".

125.4 The Tribunal had taken an unduly narrow view of the Claimant's identification of the PCP, and that it should, instead, have adopted a real world view of what a requirement was in the context of the case.

126. 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:

126.1 the relevant provision, criterion or practice made by the employer; and/or

126.2 the relevant physical features of the premises occupied by the employer and/or the auxiliary aid required;

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

126.4 the nature and extent of the substantial disadvantage suffered by the Claimant.

127. The above steps follow the guidance provided in *Environment Agency v Rowan* [2008] IRLR 20 at paragraph 27.

128. Substantial disadvantage is such disadvantage as is more than minor or trivial. The Code (at paragraph 6.16) emphasises that the purpose of the comparison is to determine whether the disadvantage arises in consequence of the disability and that, unlike direct or indirect discrimination, there is "*no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same*" as those of the disabled person.

129. In *Archibald v Fife*, the House of Lords held what steps are reasonable depends on the circumstances of the particular case, which the employment tribunal must establish (paragraph 43).

130. In applying *Archibald v Fife*, in *Chief Constable of South Yorkshire v Jelic* [2010] IRLR 744, the EAT held that the test of reasonableness was an objective one, for Employment Tribunals to decide. The EAT also emphasized that each case turned on its own facts.

131. Even where the duty is engaged, not all adjustments will be reasonable even where they overcome the disadvantage.

132. The Tribunal considered *Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216. Although there are numerous important points made in the leading judgment of Elias LJ, the following is a fair summary of it for our purposes in this case:

132.1 The nature of the comparison exercise under section 20 required the tribunal to ask: does the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person? The fact that they were treated equally and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage if the PCP bit harder on the disabled, or a category of them, than it did on

the able-bodied. The ET and the EAT had erred in holding that the s.20 duty had not been engaged because the policy applied equally to everyone (see paragraphs 46-48, 58, 63 of judgment).

132.2 There was no reason artificially to narrow the concept of what constituted a "step" within the meaning of s.20(3). The only question was whether it was reasonable for it to be taken. Although the proposed steps would have been, if taken, capable in principle of ameliorating the disadvantage resulting from the operation of the policy, the steps required to avoid or alleviate such disadvantages were not likely to be steps which a reasonable employer could be expected to take.

132.3 It may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.

133. When considering whether the Respondent has taken such steps as it was reasonable to have to take to avoid the substantial disadvantage, and various adjustments have been made, a holistic approach is required: *Burke v The College of Law* and another [2012] EWCA Civ. 37, at paragraphs 32-37, and *The Home Office (UK Visas and Immigration) v Kuranchie* UKEAT/0202/16/BA.

134. In *Finnigan v Chief Constable of Northumbria Police* [2014] 1 WLR 445 at [29] the court emphasised the importance of defining the PCP. The PCP:

"… *represents the base position before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone, but excludes the adjustments. The adjustments are the steps which a service provider or public authority takes in discharge of its statutory duty to change the [PCP]. By definition, therefore, the [PCP] does not include the adjustments*."

135. We note that the Code of Practice on Employment refers, at paragraph 6.28, to the practicability of the step as being one of the factors to be taken into account when deciding whether taking that step is reasonable. The presence of an existing policy or practice is a factor to be taken into account when assessing whether taking a particular step is practicable: see *Linsley v HMRC* UKEAT 0150/18.

<u>Discrimination arising from disability</u>

136. Section 15 EA provides:

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

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

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

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

137. In the case of section 15(1) discrimination, it is the treatment, rather than the PCP, which has to be justified.

138. The Equality and Human Rights Commission's Code of Practice on Employment states that the consequence of a disability "*includes anything which is the result, effect or outcome of a disabled person's disability*": see para 5.9.

Justification defence: Proportionality

139. Section 15(2)(b) requires the putative discriminator A to show that "the treatment" of B is a proportionate means of achieving a legitimate aim. The focus is therefore upon "the treatment"; and the starting point therefore must be that the tribunal should apply s.15(2)(b) by identifying the act or omission which constitutes unfavourable treatment and asking whether that act or omission is a proportionate means of achieving a legitimate aim: *Buchanan v Commissioner of Police for the Metropolis* [2016] IRLR 918.

140. The correct test for assessing whether treatment is proportionate was explained in *Akerman Livingstone v Aster Communities* [2015] 2 WLR 721:

140.1 Is the objective sufficiently important to justify limiting a fundamental right?

140.2 Is the measure rationally connected to the objective?

140.3 Are the means chosen no more than is necessary to accomplish the objective?

140.4 Are the disadvantages caused disproportionate to the aims pursued? Put in context, does the treatment strike a fair balance between the employer's needs to accomplish its objective and the disadvantages thereby caused to the Claimant as a disabled person?

141. The judgment of the Court of Appeal in *Hardys & Hansons plc v Lax [2005] IRLR 726*, *[2005] ICR 1565*, concerned an appeal relating to a complaint of indirect discrimination on the grounds of sex. The Court held that it is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. The Court emphasised that there is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal.

Detriment

142. The Tribunal applied the established definition of detriment, which is set out in *Shamoon v Chief Constable of the RUC* [2003] UKHL 11, ICR 337 at paragraphs 34-35. In short:

> "*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment"*."

143. A party does not discriminate if the impugned decision or action is taken in order to protect itself in litigation. If that action, from the employee's point of view, could be regarded as undue pressure to give up her claim, then it could amount to detrimental treatment because she brought a Claim. The focus should be on the detriment caused to the Claimant rather than on the employer's purpose in so acting: see *Derbyshire v St. Helens MBC* [2007] ICR 841.

Burden of proof in discrimination cases

144. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ. 142 and *Madarassy v Nomura* [2007] ICR 867.

145. In respect of the application of these provisions in complaints of breach of the duty to make reasonable adjustments, in *Project Management Institute v Latif* [2007] IRLR 579 (Elias P, as he then was, presiding) the EAT held at paras 44, 53-54 that:-

145.1. The burden of proof remains on the Claimant to prove the threshold conditions (i.e. those matters identified in *Rowan*) without which the duty to adjust is not engaged. These are matters of fact in which the employer is unlikely to have knowledge or information not available to the Claimant.

145.2. Where the threshold conditions have been established, the burden only passes to the respondent if a potentially reasonable adjustment has been identified.

145.3. This does not require the Claimant to set out the detail of the adjustment for the burden to shift, provided the respondent can understand the broad nature of the adjustment proposed and has sufficient detail to deal with the question of reasonableness.

145.4. If no potentially reasonable adjustment has been identified, the burden does not shift to the respondent.

146. In short, if the burden shifts, the employer must show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

Jurisdiction: Time Limits

147. Section 123 EA 2010 provides so far as relevant that:

"(1) … proceedings on a complaint … may not be brought after the end of –

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

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

…

(3) For the purposes of this section –

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

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

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

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

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

148. One of the complaints in this case is of the failure to comply with the duty to make reasonable adjustments imposed by section 20 EA 2010. To determine when the failure is to be treated as occurring, section 123(4) EA 2010 must be applied. The proper application of these provisions has been recently considered in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ. 640 at paragraphs 11-15:

148.1. Applying subsection 123(4)(b), the failure to comply with the duty is to be treated as occurring on the expiry of the period in which the employer might reasonably have been expected to make the adjustments.

148.2. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began.

148.3. The period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time.

149. The principles to be applied in the application of section 123(1) EA 2010 have recently been summarised in *the Morgan* case:

149.1. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal must have regard.

149.2. If a claimant gives no direct evidence about why she did not bring her claims sooner a Tribunal is not obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended: *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 25.

149.3. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:

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

(b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

See *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 19.

Submissions

150. We received written submissions from Counsel for the parties. These were supplemented by oral submissions. It would not be proportionate to set out the oral submissions here, given that the bulk of them are within the written submissions. Each submission was taken into account, even if we do not address each submission separately below.

151. During the Claimant's submissions, the issues were narrowed by the withdrawal of the allegation that the Claimant had a mental impairment amounting to a disability (issue 4) and the withdrawal of issue 7e.

Conclusions

152. Applying our findings of fact and the above principles of law to the remaining issues, we have reached the following conclusions. As a matter of good practice, if not law, the complaints of failures to make reasonable adjustments should be considered before complaints brought under section 15 EA 2010.

Issues 11-25: Duty to make reasonable adjustments: sections 20-21 EA 2010

153. Mr. Salter submitted that the substantial disadvantage must be because of the disability. This is inaccurate. The duty is engaged where a PCP places the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. We did, however, agree with a number of Mr. Salter's arguments, including that the adjustments made in this case were reasonable steps to attempt to reduce any disadvantage arising from each PCP. The duty is breached, however, where there are one or more reasonable adjustments that have a prospect of reducing the substantial disadvantage which are not made.

Issues 11-12: What were the PCPs?

154. We found that during the relevant period from February 2016 until her dismissal, the Respondent did operate a practice of not having written procedures or policies concerning its responsibilities as employer and/or of not consulting those that did exist in the office manual that existed (and which the Claimant was supposed to update from home after 19 July 2016). This PCP encompassed lack of, or a failure to consult on, a health and safety at work policy, a sickness management policy, and an Equality and Diversity Policy.

155. As set out in the findings of fact above, the Respondent had a provision or working practice that the office should be staffed Monday to Friday each week. This was part of the Respondent's case. This is not inconsistent with our conclusion (see below) that the Claimant was permitted by her contract to work two days per month from home nor our finding of fact that, as a matter of practice, under the supervision of the former permanent Minister (that is, before the appointment of Reverend Dean) the Claimant had worked at home on one day per week. We note that the Tribunal need only decide whether the unadjusted PCP puts the Claimant at a more than minor disadvantage.

Issues 13-16: What if any substantial disadvantage did the Claimant suffer as a result of the PCPs?

156. This question has been considered by looking at each PCP separately.

PCP issue 12a: The Respondent's practice of operating with no written procedures or policies

157. The Claimant submitted that the PCP at issue 12a resulted in substantial disadvantage, because the parties had no written framework to work within. In particular, the Claimant had requested a permanent adjustment to two days

working at home; and the Claimant's uncertainty would have been alleviated by a written policy to provide a framework for such decisions.

158. The list of issues alleges that the PCPs at issues 12a and 12b have resulted in an "*ad-hoc"* approach to dealing with the Claimant's disability, depriving her of certainty or security in respect of her position, increasing her anxiety and depression.

159. We concluded that, even without having the written procedures referred to, the Respondent dealt with the Claimant's disability in a rational way, proceeding on the evidence presented by the Claimant or obtained by them or sought by them. This is demonstrated by the findings of fact.

160. We did not find that there was an "ad hoc" approach to dealing with the Claimant's disability. It is not the law that an employer cannot comply with the duty to make reasonable adjustments where it has failed to put in place written policies or procedures which are or may be relevant to disabled employees such as those whom have anxiety or depressive symptoms. Each case must be looked at on its facts.

161. Moreover, it is necessary to identify when the duty to make reasonable adjustments arises. In other words, it is necessary to identify when the PCP puts the Claimant at a substantial disadvantage in relation to a non-disabled hypothetical comparator who could attend the office to work from Monday to Friday. On the facts in this case, the allegation of failure to make a reasonable adjustment relying on the PCP at issue 12a related to the period after the Claimant requested to work from home for two days per week on a permanent basis. No such written request was made until 27 September 2017, by which point the Claimant realised that she had not recovered enough to work on site more than three days per week; shortly before that, the Claimant's solicitor had requested that the Claimant be permitted to work from home on one day per week.

162. Although no request by an employee is required before a particular reasonable adjustment should be made (even if unspecified by the employee), we concluded that this PCP (absence of written procedures) did not subject the Claimant to the substantial disadvantage alleged until September 2017 at the earliest; if it were otherwise, we found that the permanent adjustment sought (the adjustment of the Claimant's working arrangements to permit her to work at home from two days per week) would have been requested (or the absence of it complained about) before this time.

163. Furthermore, on the facts in this case, we concluded that the PCP alleged at issue 12a did not put the Claimant at a more than minor or trivial disadvantage in relation to a relevant matter for the following reasons.

164. Section 20(3) of the Equality Act 2010 imposes a requirement on the employer, where a provision criterion and a practice puts a disabled person at a substantial

disadvantage in relation to a relevant matter, to take such steps as it is reasonable to have to take to avoid, "the disadvantage". It is clear that this requires a correlation between the disadvantage in question and the steps taken to alleviate that disadvantage. In order for the Tribunal to analyse the position correctly, it must have in mind the particular disadvantage that is being relied upon, otherwise the analysis as to the reasonableness of the step taken may be misdirected: see, for example, *Linsley v HMRC* UKEAT 0150/18 at para 31.

165. It is necessary for this Tribunal to identify the nature of the disadvantage to the Claimant arising from the PCP. The evidence of the disadvantage was set out in the report of Mr. Rahman, referred to at paragraph 62 of the Claimant's statement, which is as follows:

"Mr Rahman's report reiterates my problem with the lack of formalised home working arrangements by stating:
"reports that difficulty with their organisation's reported disinclination in formalising home working arrangements. In the context of her persistent and substantial symptoms of generalised anxiety, she has found that the lack of written confirmation of home working arrangements represents a factor which is exacerbating her symptoms of anxiety and sense of instability. In short, Ms Conduit is fearful that the that her current home working arrangements, which is assisting her to better manage and overcome the disadvantages associated with the effects of her disability, could be arbitrarily rescinded or reneged at any time. Ms Conduit is of the view that the capricious nature of her home working arrangements represents a core source of her stress which continues render her feeling more vulnerable and anxious.""

166. It can be seen from this extract of the report of Mr. Rahman that his evidence (relied upon by the Claimant) was not that the Respondent lacked written procedures or a policy framework, nor that the Respondent's lack of such written procedures or framework caused the stress and anxiety felt by the Claimant. His evidence in the report is that the disadvantage – the stress and anxiety – arises from the fact that the Claimant's working arrangement at that time (the pattern of three days working on site, two days working at home) is temporary not permanent.

167. The source of the stress and anxiety is stated by Mr. Rahman to be one of the reasonable adjustments made by the employer, not the PCPs alleged. It is the unadjusted PCP which must cause the substantial disadvantage and, by definition, this does not include adjustments made: see *Finnigan* at paragraph 29.

168. In addition, there was no medical evidence before us, nor before the Respondent, to establish the required correlation between the lack of written procedures, the physical impairment forming the disability and increased symptoms of anxiety and depression.

169. If there was any disadvantage at all to the Claimant caused by the lack of written procedures or policies, we considered that it was minor. We found that the Claimant knew from her return to work in February 2016 that she could not work five days per week on site (even though she believed at first that she would recover sufficiently from the injury and operation to do so), and she accepted that the office needed cover from Monday to Friday each week. The Claimant always knew that the adjusted working pattern was temporary and would be reviewed.

170. Further, the practicability of making an adjustment is a relevant factor in deciding whether it is reasonable. We concluded that it was a reasonable adjustment, and a prudent step, for this Respondent to put in place a trial period to see whether this adjusted work pattern, with other workers being used, could meet the Respondent's PCP at issue 12b, which was essentially a requirement for the office to be staffed for sufficient hours during the working week. We have taken into account the guidance in the EHRC Code and, in particular, the size, the nature, and the resources of this employer.

171. In respect of the substantial disadvantage alleged in issues 15 and 16, there is a degree of unreality about these allegations. The PCP at issue 12a did not result in the alleged delays, nor was there evidence that the alleged delays in making physical adjustments resulted in the Claimant going off sick with stress between 9 May and 13 June 2016.

172. Furthermore, the disadvantage alleged at issue 16 was not caused by the PCP at issue 12a. There is no correlation between this and the lack of written procedures.

173. Moreover, it is apparent from the facts found that the Respondent had no idea that the Claimant wished or needed to use her wheelchair to access her work premises; this was never mentioned to it despite specific questions being put to the Claimant on several occasions as to what if any further adjustment was required. We accepted the Respondent's submissions on this point.

174. Moreover, the Tribunal concluded that making the office site and access to it entirely wheelchair accessible would not have been a reasonable adjustment. In particular, the Claimant's failure to request this demonstrates that the adjustments made by the Respondent to the premises discharged the duty to make reasonable adjustments, coupled with the other adjustments enabling her to work from home for part of the week.

Issue 12b: PCP: Provision that the office is staffed five days per week

175. In respect of the PCP at issue 12b, we agree with Mr. Sprack that this did put the Claimant at a substantial disadvantage. The duty to make reasonable adjustments was engaged.
176. The substantial disadvantage in respect of this PCP was that the Claimant found it more difficult to attend for work at the office each day than a non-disabled hypothetical comparator in the same role, due to her impaired mobility.

177. However, the Tribunal concluded that from the Claimant's return to work in February 2016 until March 2018 (save for the period from 1 June to 19 July 2016), the Respondent discharged the duty to make reasonable adjustments. When the duty was engaged, adjustments were made within a reasonable time in the circumstances of the case, including amendment to the Claimant's working pattern, as set out in the findings of fact above.

178. Breaking the differing periods down, we have concluded as follows.

February 2016 to 1 June 2016

179. After her return to work in February 2016, the Claimant was permitted to work at home for three days per week. In addition, during her sickness absence prior to February 2016, the Respondent had provided her with auxiliary aids, in the form of a mobile phone and IPAD for home use. We found that these were reasonable adjustments and the Claimant had no complaint about this period up to April 2016

180. We repeat the findings of fact set out at paragraphs 42-45 above. Up to the April 2016 Board meeting, the Claimant had taken the responsibility of having the physical adjustments made, had not indicated any detriment to her due to delay in those adjustments being made, and had not made any complaint about her employer at all. In addition, the Claimant stated in cross-examination that she was the best person to obtain the workplace risk assessment and accepted that up to mid-May 2016, all requests by her had been agreed by the Respondent.

181. Furthermore, once the Staff Committee learned of the delay in making the physical alterations and the proposed assessment, Ms Frankel pursued these matters. The physical adjustments of the addition of handrails were made as soon as practicable thereafter; the evidence that we have heard and read leads to the inference that there were probably failings by the builder to complete the work before about midJune 2016 despite his instructions (demonstrated in our findings of fact at paragraph 46 above).

182. In short, we found that the Respondent was not liable for any delay in making the physical adjustments.

183. The duty to make reasonable adjustments is not breached as soon as it arises: see *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ. 640 at paragraphs 11-15 above. Whether there is a breach of the duty is factspecific. The Claimant led no evidence to show that the remaining physical adjustments were not made within a reasonable time, which is probably explained by the fact that the adjustments were made within about two months of the Claimant bringing to the Respondent's attention that they were yet to be made and Ms. Frankel then intervening to push matters forward for the Respondent.

1 June to 19 July 2016

184. We concluded that the Respondent had failed to discharge the duty to make reasonable adjustments.

185. In respect of this period, the Respondent's case was inconsistent: it had prohibited working from home altogether after 1 June 2016, a point at which it had no medical advice and when it was mistaken as to the effect of the Claimant's contract (which permitted working at home for two days per month), yet, from 19 July 2016, it allowed working at home for two days each week on a temporary basis pending review, after the Claimant's solicitor raised the contractual entitlement point and after evidence from the GP had been considered.

186. We found that this inconsistency demonstrated that allowing the Claimant to work at home for two days per week on a temporary basis from 1 June 2016, pending review and occupational health advice, would have been a reasonable adjustment (or adjustments). In particular, this was for the following reasons:

186.1. Despite the nature and size of the organisation, the Claimant had been working at home for one day per week anyway under the previous line management, and her contract provided that she could work at home for two days per month, for reasons we explain below. These facts demonstrated that it was not essential for the Claimant to be in the office every day from Monday to Friday.

186.2. The Respondent agreed to the Claimant working from home for two days per week from 19 July 2016 as a temporary adjustment. There was no sustainable reason put forward as to why the requirement of the Respondent to have the office covered from Monday to Friday prevented the same adjustment being made from 1 June 2016.

186.3. Although the Claimant was the only full-time employee of the Respondent, there were other part-time employees or volunteers. We heard evidence that these did cover some administrative duties of the Claimant's role. We heard no evidence that these other workers or volunteers could not, between them, cover part or all of the two days when the Claimant would be working at home during this two month period.

186.4. The Respondent had agreed with the Claimant's proposal that the office would be closed to visitors from 11am to 1pm each day, Monday to Friday, to enable the Claimant to get on with administrative work without interruptions. This was evidence that the Claimant's duties could be rearranged to some extent, and that the office could be closed to visitors for certain periods. The Tribunal concluded that the provision of a sign could have facilitated the temporary adjustment of the Claimant working at home from 1 June 2016 - 19 July 2016, such as a notice on the office door giving its opening hours and a notice directing delivery drivers or

contractors to a telephone number for attention, if the office was not occupied.

186.5. Subsequently, the Respondent permitted the Claimant to work at home for two days per week from 19 July 2016 until her dismissal in March 2018.

19 July 2016 until dismissal

187. From 19 July 2016, the Respondent made all the adjustments requested by the Claimant (save for the request to make the adjustment of the working pattern permanent) until her dismissal. Moreover, the Respondent was flexible, offering to make any other adjustments required up to dismissal in 2018.

188. The temporary adjustment to the working arrangement adjustment was kept under review after 19 July 2016. This was reasonable in the circumstances of this case, particularly ahead of the occupational health assessment.

189. Having taken into account the EHRC Code, and the relevant authorities and Equality Act 2010 provisions, we concluded that the duty to make reasonable adjustments did not require an adjustment to make the arrangement of the Claimant working from home two days per week a permanent adjustment. This was for the following reasons:

189.1. The nature of this small organisation, in which the Claimant was the only full-time employee, except the Minister. The Reverend Dean, quite properly given her work, would not be on site each day, or for hours at a time, and was not based in the office when she was on site, but in the Manse.

189.2. The type and the range of the actual and prospective users of the Chapel site.

189.3. The nature of the various visitors who need assistance at the Chapel, including prospective users of the Chapel or the Hall, meant that it was not reasonable for the Claimant to be based at home for 40% of her working time.

189.4. The organisation of the Chapel, with a part-time, voluntary, Board of Members, had a real need for an Administrator and/or Office Manager to be on site for most of the working week to function as the public face of the Chapel, and for the office to be staffed for most, if not all, of the working week.

190. Mr. Sprack contended that the Respondent had sufficient resources to make the temporary adjustment into a permanent adjustment, apparently by reference to its financial position from late 2017- March 2018. We did not agree. The Chapel needed to have funds in reserve to make repairs and to maintain such a collection of buildings, which given their ages and the nature of a Chapel building, would

probably require more maintenance than modern properties; the cost of roof replacement was given as an example in evidence, which we accepted.

191. In any event, the Tribunal could not accept that money alone could resolve the issue of whether this temporary adjustment should be made permanent, where the working arrangement of the single full-time Administrator and Office Manager employee was in issue. The fact that, taking a snapshot of the accounts of the Respondent, it had over one million pounds in its account in 2018, did not make the proposed adjustment a reasonable one. To conflate the ability to make every possible adjustment (such as by employing an assistant administration manager to be on site two days each week when the Claimant was working at home) that could be made with the duty to make reasonable adjustments is a misunderstanding of the purpose and effect of sections 20-21 EA 2010.

192. As Baroness Hale explained in *First Group Plc v Paulley* [2017] UKSC 4 at paragraph 94, the object of the duty to make reasonable adjustments is to "level the playing field"; it is designed to produce equality of results rather than equality of treatment. Employing another person (or persons) to ensure that the Respondent's requirement to have an administrative employee in the office throughout the working week was fulfilled is doing more than levelling the playing field.

Issues 17-19: Physical features and workplace adaptations

193. The Claimant contended in the List of Issues that parts of the building are not wheelchair accessible.

194. The first Claim (at pp14-21) does not allege that any particular physical feature of the premises put the Claimant at a substantial disadvantage. It is not sufficient to allege that "The Chapel is not fully accessible" (see paragraph 12 details of the first claim, p.16, and paragraph 9 of the Claimant's witness statement), because that does not allege what physical feature puts the Claimant at a disadvantage.

195. Moreover, the Tribunal heard no real evidence that any specific feature put the Claimant at a substantial disadvantage. For example, neither the Claims nor the witness statement of the Claimant refer to the office being "very small", as alleged in the list of issues.

196. It is notable that the recommendations of Mr. Rahman (so far as relied on by the Claimant in paragraph 61 of her witness statement) make no mention of reasonable adjustments to any physical feature of the office or Chapel premises.

197. Further, this issue is raised in the Claimant's submissions (paragraph 40) with no argument in support, which perhaps demonstrates the weight attached to this issue by the Claimant.

198. In any event, in respect of the issue of adjustments to facilitate wheelchair access, we repeat the findings of fact set out at paragraph 48 above. We concluded that

there was no breach of the duty to make reasonable adjustments in respect of any period in respect of this alleged adjustment.

199. We concluded that, to the extent that the Claimant was put at a disadvantage by any physical feature of the premises, whether substantial or otherwise, this was addressed by the adaptations made including the installation of handrails and the lowering of a shelf.

200. As for issue 18, the duty to make reasonable adjustments does not require a risk assessment or other assessment to be made by an employer. In any event, the list of issues is incorrect in stating that "*no assessments have been carried out*". Assessments were carried out at various times, as shown in the findings of fact. These may not have been formal assessments by a consultant (whether an occupational health one or a risk assessor), but the findings of fact demonstrate when the employer carried out assessments.

201. Moreover, there could not be a referral to Access to Work, as explained by the Respondent's witnesses, because the Claimant was already back at work when the issue of adjustments was considered by the Respondent and the Claimant, and Access to Work did not carry out assessments in such a situation.

202. Furthermore, an assessment was conducted by an external body in about September 2017. This led to a new chair and foot rest being provided, despite the fact that the Claimant had never requested these adjustments. The provision of these auxiliary aids was the product of an assessment.

203. As for issue 19, the Claimant's submissions seek to change either this allegation, or the emphasis of the allegation. The complaint in the submissions is that the Respondent has delayed carrying out works that it was "*at least in part*" responsible for arranging. This shift tends to reinforce the Respondent's case that the Claimant had taken on, as part of her duties, the task of ensuring that the physical adjustments were made.

204. In any event, for the reasons given above (paragraphs 193-204), the Tribunal was satisfied that the Respondent completed the reasonable adjustments of physical adaptations within a reasonable time in the circumstances.

Issues 5 – 10: Disability Discrimination under section 15 Equality Act 2010

205. In respect of issue 6a (a particular of the "something arising" requirement), Mr. Salter agreed with the Tribunal that, given the true purpose of the list of issues was to decide the contentions between the parties and that it was a tool for the parties, this could be re-worded to be: "*The Claimant is unable to attend the office on site daily from Monday to Friday*".

Alleged unfavourable treatment

Issue 7b

206. The Tribunal considered the Respondent's submission that being made to work on a part-time basis and/or to work with no home working was not unfavourable treatment. It alleged that it was an informed decision based on medical evidence requiring a reduction in hours. We concluded that this was not an answer to whether the prevention of the Claimant working at home (which she had been doing since February 2016) was unfavourable treatment. If this argument was to succeed, it would need to be as a proportionality defence; it related to the alleged reason for the treatment, rather than the treatment itself.

207. Using the re-worded particular of the "something arising" at issue 6a, set out above, the Tribunal concluded that the decision of the Respondent that, from 1 June 2016, the Claimant would not be permitted to work at home and would only be paid for the days worked in the office, was unfavourable treatment of the Claimant. The detriment to the Claimant included the earnings lost during the two days in which she could have performed some work at home.

208. The Tribunal went on to consider whether the unfavourable treatment was a proportionate means of achieving a legitimate aim. The Respondent's pleaded case (p.50, paragraphs 58-61 of the first ET3) included only the legitimate aims at issue 10b and, taking a generous interpretation, issue 10a. The Respondent's final submissions before us (paragraph 27) did not identify which of the legitimate aims were relied upon in respect of this unfavourable treatment, apparently relying on all of them.

209. However, the substance of the Respondent's submissions on proportionality in respect of this treatment is set out at paragraph 26(b)(ii) of Mr. Salter's written submissions. Here it is argued, in effect, that the legitimate aim was to ensure that medical advice was adhered to, specifically with regard to the Claimant being advised to return to work on a phased return basis.

210. In any event, we rejected the Respondent's justification defence in respect of the legitimate aims alleged at both 10a and 10b of the list of issues for the following reasons.

211. First, we concluded these were not the Respondent's legitimate aims for the arrangement that existed from 1 June to 19 July 2016. Neither was a legitimate aim stated in the witness statement of Dr. Crispin. Her evidence was that Ms. Fenton, employment consultant, had advised that the Respondent's only contractual responsibility had been to pay the Claimant for 28 weeks of Statutory Sick Pay, and that it should stop paying the Claimant "*immediately*" and ask for an updated medical report. The aim was, therefore, to stop the Claimant being paid further in excess of her contractual entitlement.

212. Secondly, the medical advice is not accurately summarised at 10b of the List of Issues. The GP's Fit Certificate dated 19 May 2016 stated that the GP supported

the adjustment of the Claimant working at home on as many days as possible to help with the transition back to work and any other support that the Respondent could offer her (p238); and when the decision to prevent the Claimant working at home was made, the Respondent had yet to ask the GP the specific questions set out in its letter of 31 May 2016 (p.247).

213. Moreover, in response to that letter of 31 May 2016, the GP explained that the Claimant was very keen to return to work full-time, and that working from home on some days would be helpful, with appropriate support in place (p.278). Although this letter advised a phased return to work, this has to be read in the context of the questions that the GP was asked, which included whether the Claimant would be able to return to work full-time 5 days a week at the Chapel; the letter does not ask the GP about a phased return to work more generally. Moreover, the letter specifically stated that the "*needs of the job require it to be based at the Chapel*". Further, the responses of the GP have to be read in the context of the remainder of the GP's letter, which includes that the Claimant could work at home, has difficulty in travelling long distances, is awaiting a blue badge, and can undertake all her daily living activities at home. Taking all of this context into account, the GP's advice about a phased return to work is directed to the question of whether she could work five days per week at the office; the phased return advice is directed at that requirement (not the question of whether she is able to work from home).

214. Thirdly, the Claimant's contractual terms permitted her to work from home up to two days each month, for reasons we set out below in our examination of the unlawful deduction from wages claim. Even if we are wrong in our interpretation of the contractual terms, and the Respondent's interpretation is correct, the Respondent clearly had envisaged that the Claimant could work at home for up to two days per month. The blanket ban on working at home was more than was necessary to meet the alleged legitimate aims in any event.

215. Fourthly, the Tribunal found that the facts about the working arrangements at the site agreed to by the Respondent demonstrated that the blanket ban on working at home was not necessary and that there were possible alternatives. Certain agreed working arrangements demonstrated that the required balancing exercise between any legitimate aim and the measure adopted had not been carried out before the ban was imposed. In this case, under the line management of the previous Minister and Management Board Chair, the Claimant had routinely worked one day at home each week. Furthermore, subsequent to this meeting, a practice had been agreed whereby the Claimant put the equivalent of a "do not disturb" sign on the door of the office for two hours each day (11am – 1pm). The Tribunal concluded that a similar notice could be put up to explain that the office was not staffed on a particular day if cover was not available.

216. Fifthly, in respect of the aim at issue 10a, this aim is not correctly expressed in issue 10a. The Respondent's evidence showed that up to 19 July 2016, including over this period 1 June to 19 July, its aim was that she should be fit to return to work fulltime at the office.

217. The Tribunal recognised that the Respondent had not carried out any assessment of the Claimant's work to establish precisely what tasks could be undertaken at home, and what support may be needed to facilitate this and whether this was a reasonable adjustment, before putting in place the ban on home working.

218. In respect of the other alleged legitimate aims which feature in the List of Issues, these were not pleaded as justification for this unfavourable treatment. A party cannot expand their case by the sidewind of a List of Issues; and given the fact-sensitive nature of the investigation required when proportionality is raised as a defence to this type of disability discrimination, such an approach would be particularly unfair and contrary to a just disposal of the complaint. In any event, we consider that the reasons listed above sufficiently explain why those aims do not amount to a defence in respect of this period of unfavourable treatment.

219. Further, in respect of the aim stated at issue 10c, we found that this was not an accurate reflection of the Claimant's wishes. We concluded that the Claimant wished for a phased return to work at the office on the Chapel site, which is apparent from the notes of the meeting of 26 May 2016 (at p241-243 and at p.251-253) and in the GP letter (p278).

220. In respect of the remaining alleged unfavourable treatment, the Tribunal concluded as follows:

Issue 7a:

221. We concluded that there was no such unfavourable treatment at the meeting on 26 May 2016. Our relevant findings of fact are at paragraphs 53-56 above.

Issue 7c:

222. In the circumstances of this case, and in the context in which the completion of time-sheets was requested, this was not unfavourable treatment. A reasonable worker would not have considered this to be to her detriment, given that this arrangement was designed to see what if any further reasonable adjustment could be made and whether the temporary working arrangement (with two days worked from home) would be made permanent. The Claimant and Mr. Rahman confirmed that this step was understandable and a reasonable step where the Respondent was trying to assess the effectiveness of working from home. Further, the caretaker (Huggie) and Erich, who assisted with administration, had also been asked to complete time sheets in September 2016 (see pp326-329).

Issue 7d

223. The Tribunal concluded that the treatment alleged at Issue 7d was not unfavourable. Essentially, we accepted the Respondent's arguments on this point.

224. We directed ourselves to the EHRC Code of Practice on Employment (2011). We accept that necessary adjustments should be implemented in a timely fashion (para 6.32 Code). In this case, the adjustment of allowing the Claimant to work from home for two days was made on 19 July 2016.

225. Having made that adjustment, there was no evidence that the practice of requiring the office to be staffed five days per week (Monday to Friday) caused substantial disadvantage to the Claimant because of her disability – namely her physical impairment.

226. Moreover, the statutory wording within the Equality Act 2010 does not distinguish between temporary or permanent adjustments. The statutory question is whether, if the duty is engaged, the adjustments made are reasonable, not whether they are "temporary" or "permanent". Indeed, those terms suggest a binary choice, which does not reflect the facts of many cases. For instance, there may be permanent but episodic adjustments, such as where a worker has episodic mental illness; or a series of temporary adjustments for a worker with life-changing injuries who is gradually recovering, or a series of temporary adjustments for a worker who has a lifelimiting illness whose condition is deteriorating.

227. We concluded that the adjustment had to be temporary whilst the Respondent assessed what limitations there were likely to be going forward on her ability to work in the Administrator role, including on site. Experience shows that some injuries can be slow to heal; and it may not be in an employee's interest to seek a once and for all adjustment if her condition were to improve over time, even if this was unlikely.

228. In any event, we found that this treatment did not occur in consequence of the "something arising" identified at Issue 6a, whether as re-worded above or not. This was an adjustment sought by the Claimant and which had been put in place to facilitate the Claimant working from home, so that she could continue to be paid her full wages.

Issue 7f

229. It was admitted that dismissal is unfavourable treatment.

230. The Respondent submitted that the dismissal in this case did not arise in consequence of either of the matters set out in issues 6a or 6b. We accepted that submission. The Claimant was dismissed for the reasons given by Ms. Morrison and set out above in the findings of fact, particularly the prolonged absence from work, the failure to attend or re-arrange any form of occupational health assessment, and her failure to attend the ill-health review on 28 March 2018 combined with the absence of any evidence to indicate when she would be fit enough to return to work (with or without adjustments).

231. There was no medical evidence that this episode of depression was caused by the admitted disability.

232. In any event, if we are wrong in our assessment of causation, we concluded that the decision to dismiss was proportionate in the circumstances.

233. The Respondent had proved the legitimate aim of its business needs to have the Administrator role of their sole employee (other than the Minister) carried out in full and the need to provide a physical presence at the office from Monday to Friday.

234. The measure taken – dismissal – was rationally related to those legitimate aims, because the Respondent could not sustain a further, unknown, period where its sole Employee was not at work. The Respondent needed to recruit another employee who could further those aims; such a small organisation could not keep going with temporary replacements given that the Administrator was in reality the person in charge of administrative matters and was the person who would work in the office for the most amount of time.

235. Carrying out the necessary balancing exercise, the measure was proportionate. The Administrator was a key link to the wider Community; she was the public face of the Chapel. This post-holder liaised with licensees and hirers, whether the school and dance school, or those who rented space for other, shorter, engagements. She met prospective users of the Chapel. She had at least some management responsibility, including in respect of directing contractors.

Issue 8

236. In respect of issue 8, we did not find that the requirement to complete time sheets amounted to capability or disciplinary proceedings through the "back door". The Respondent was trying to establish precisely what duties the Claimant could perform at home, and what duties she could only perform in the office, not whether she performed such duties in a satisfactory way.

237. Clearly, dismissal is unfavourable treatment. We agreed with Mr. Salter's submissions that the Claimant was not dismissed because of her need for rest by not having to travel into the office, but because of her prolonged absence from work coupled with the factors raised at paragraphs 100 -117 and 230 above.

238. In any event, we concluded that it was proportionate for the Respondent to dismiss the Claimant in the circumstances.

Issue 6b – did this cause any unfavourable treatment?

239. In respect of issue 6b, it was alleged that the Claimant was required to use her wheelchair when suffering with pain, weakness or depleted energy levels. There was no evidence as to how often this would mean that she would need to use her wheelchair. Her witness statement stated that she had to use it "*sometimes*"

(paragraph 18) and suggested that she would need to use it at work if she worked five days per week; none of the Respondent's witnesses had seen her use it until the Judicial Mediation, because she mobilised with a walking stick on the Chapel site and had driven from home after her back surgery. We concluded that she used the wheelchair on only limited occasions, when she could not mobilise with a stick, such as when making significant travels on public transport or by street.

240. In any event, we concluded that none of the unfavourable treatment relied upon within issue 7 was caused by the requirement to use a wheelchair at certain times. There was no evidence of the Claimant experiencing disadvantage or difficulty caused by wheelchair use or issues of wheelchair access.

Issues 26-27: Victimisation, section 27 Equality Act 2010

Detriments on 27 September 2017

241. In respect of issue 26 (protected acts), the presentation of the first ET1 (on 21 October 2016) was clearly a protected act. From the remainder of the acts listed in the list of issues, we concluded that the acts at 26(e) to (g) were all protected acts. These were the protected acts occurring up to September 2017.

242. We accepted that the comments made to the Claimant had the effect on her that she alleged in evidence. We repeat the findings of fact at paragraphs 92 to 95 above. We concluded that the statements identified in our findings were made by Mr. Fenton because of the protected act of issuing the first Claim, which included Dr. Crispin as Second Respondent.

243. The Tribunal concluded that the Claimant suffered a detriment on 27 September 2017 as a result of the remarks made to her by Mr. Fenton.

244. We concluded that the comments complained of (summarised at issue 27a) were most ill-considered. But our focus was on the effect that these remarks had on the Claimant and whether it was detrimental. We found that in the circumstances of this Claimant, these comments placed undue pressure on her to withdraw her claim. Applying *Shamoon*, we found that a reasonable worker would or might find such comments to be a detriment. In particular:

244.1. There was no evidence that any members of the congregation were in fact scared of her. The statement that members were scared of her was not true. We found that this placed pressure on her, not least because there was a small congregation (less than 50 persons). Any complainant in the Claimant's position would feel at least to some pressure at the thought of scaring one of them. We were satisfied that this Claimant did feel undue pressure from his comments including this one.

244.2. These comments were made by Mr. Fenton at a time when, to his knowledge, the Claimant was vulnerable due to her mental state.

244.3. The comment that she was doing herself "*no favours*" by pursuing the Claim is clear evidence that Mr. Fenton was unduly pressuring the Claimant by arguing that she would be better off by dropping the Claim.

244.4. As we have noted, the congregation was relatively small. We find it likely that the Claimant would be known to all members of the congregation, at least to some degree. These remarks were bound to make the Claimant anxious that she would be the target of disapproval if she continued with the first Claim.

Dismissal

245. The Claimant was not dismissed because of any protected act. We have concluded that she was dismissed for the reasons set out in the evidence of Ms. Morrison and the dismissal letter. We repeat the findings of fact at paragraphs 116117 above, and our conclusions in respect of the complaint of unfair dismissal below. At the time of the dismissal, we note that the Claimant had ceased to communicate with her employer directly, had not put evidence for consideration at the sickness absence meeting, and had raised no alternative to dismissal.

Alleged detriments at issues 7(a) and (c) and issue 8 (alleged disciplinary/capability proceedings through the "back door").

246. We have explained our conclusions in respect of these detriments above at paragraphs 221-222 and 236-238.

247. Given these conclusions, and the relevant findings of fact on which they were based, we concluded that these alleged detriments were not caused in any way by the alleged acts.

Issues 27-29: Unlawful deduction from wages

248. We were persuaded by Mr. Sprack's submissions that there was an unlawful deduction from wages for the period from 1 June to 19 July 2016. Our reasons are as follows.

249. Clause 4 of the Claimant's written contract (p129) could be read as being ambiguous: it could mean that either the Claimant must agree in advance the specific days to be worked at home with her line manager, or, possibly, it could mean that she could only work at home at all with the agreement of her line manager.

250. In Chitty on Contract, Vol 1, 13-077, the following is explained:

"A word or phrase in a contract may be open to more than one potential meaning or interpretation. In such a case the court will consider the language used and ascertain what a reasonable person, that is a person who has all the background

knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled (but is not obliged) to prefer the construction which is consistent with business common sense and to reject the other."

251. On a fair reading of this clause, a reasonable person, with all the relevant background knowledge available to the parties at the time this contract was made, would interpret it to mean the Claimant had permission to work at home on two days per month, but that she must agree with her line manager in advance the specific days to be worked at home. This is because the wording of the clause is permissive: "*you may work at home for one or two days each month*,". This permission is not made conditional on the agreement of the line manager; the permission is to work at home for up to two days per month. The term provides that only the days of the month are to be agreed in advance. We conclude this is the correct interpretation partly because, given the permissive part of the term ("*you may*"), the principle of working at home does not need to be agreed "*in advance*" with the line manager. The clause does not make working at home conditional on agreement with the line manager; it does not state "if agreed" or some such provision.

252. Moreover, this interpretation probably reflects the intention of the parties at the time this contract was made, given the circumstances in this case. The line manager was the Minister, for day-to-day matters. The Minister was not on the Chapel site each day of the week. Therefore, it would be in the interests of the Respondent for the days of the month to be agreed when the Claimant could work at home.

253. Further, the contract was drawn up by the Respondent with the help of advisers. This provision for home working was added by the Management Board at the request of the Claimant. It is the Respondent's document. We agree with Mr. Sprack that that ambiguity should, as a last resort, be construed more strongly against the party who made the document. This principle of construction is confirmed by Chitty on Contract, Vol 1, at 13-095.

254. In any event, as the evidence showed, the Claimant worked from home for one day per week with the consent of the former Minister, so it is difficult to accept that the Respondent did not intend the meaning that we have given to this clause.

255. The Claimant was, therefore, contractually entitled to be paid when she did work from home for two days each month.

256. The Claimant did not authorise such deduction from her salary.

257. In the event, because of our findings above in respect of disability discrimination, no separate award will be required under this head.

Issues 31-34: Unfair dismissal

258. The complaint based on section 104 was misconceived. Quite properly, it was withdrawn at the outset of the hearing.

259. The reason or principal reason for dismissal was a reason relating to the capability of the employee. We accepted the evidence of Ms. Morrison and Ms. Ratna on the reason for dismissal.

260. We directed ourselves to the wording of section 98(4) ERA.

261. We concluded that the procedure adopted by the Respondent prior to dismissal was fair and reasonable in the circumstances, even if the Respondent lacked a sickness management procedure. There is no rule of law that the absence of such a procedure or policy converts a procedure which is within the band of reasonableness into one which falls outside it. It is all a question of fact.

262. On the facts found in this case, as set out at paragraphs 100-120 above, it is apparent that the Claimant was afforded every opportunity to present medical or other evidence, whether by herself or through a representative (who was neither an employee nor a trade union representative). The fact found show that the Claimant took no real steps (if any at all) to engage in the procedure leading up to her dismissal.

263. We concluded that the decision to dismiss was well within the band of reasonable responses because:

263.1. By the date of the dismissal, the Claimant had been absent with stress for six months. The size and the resources of this employer meant that it was not reasonable for it to continue to cover the Claimant's absence from such an important role within the organisation of RHUC on a temporary basis. The fact that she was the only full-time employee cannot be overemphasised, given that the Respondent did need to have a "public face" for visitors.

263.2. The Respondent needed to be in a position to recruit a new full time staff member to oversee the day to day running of the Chapel, for the reasons given in the dismissal letter at pp443-444. The temporary Administrator was due to be leaving; and other staff had moved on. Volunteers and former Board members had to perform various tasks of the Administrator, such as supervising contractors. This had rested on good will. It was reasonable for the Respondent to take the view that this reliance on good-will could only be a temporary arrangement.

263.3. The Claimant had failed to attend an occupational health appointment, because she stated that she was too ill to attend the meeting, despite offered adjustments. In addition, the Claimant stated that she was not well enough to attend the sickness absence meetings arranged in March 2018.

Given these matters, it was reasonable for and Ms. Ratna to conclude that the Claimant would not be well enough to return to work in the foreseeable future.

263.4. The Claimant provided no evidence or submissions to Ms. Morrison ahead of the sickness absence meeting to suggest that she was likely to be fit to return to work at some point.

263.5. The Claimant had been asked several times in 2017 whether she required any further adjustments at her work, and had been told that she needed nothing further.

The dismissal of the Claimant was neither outside the band of reasonableness nor disproportionate. On the contrary, this decision was well within the band of reasonableness and it was proportionate.

264. We found that by 28 March 2018, there was no realistic alternative to dismissal. The Claimant had failed to attend the absence meeting arranged on that date, despite warnings that a decision to dismiss could be made, and failed to submit any evidence or submissions in support of her continued employment.

Jurisdiction in respect of the complaints of disability discrimination

265. The List of Issues does not expressly raise an issue of jurisdiction, but the Tribunal has considered this question. This includes consideration of whether the complaints of disability discrimination were made in time. In particular, in the light of the point taken at Paragraph 36 of the Respondent's submissions, we have considered whether the alleged failure to make the reasonable adjustment at issue 20a (to allow the Claimant to work from home for two days per week) on a permanent basis and/or on a temporary basis subject to review was made in time.

266. Mr. Salter argued that the duty to make this reasonable adjustment crystallised on 26 May 2016, when the Respondent decided not to make this adjustment. We accept that this is correct. Section 123(3)(b) EA 2010 includes:

" For the purposes of this section –

(a) …;

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

267. The first ET1 was presented on 21 October 2016 and ACAS Conciliation took place between 25 August and 25 September 2016. On the face of the Respondent's own submissions and by the calculation of this Tribunal, this complaint was made within the statutory three month time-limit as extended by the Early Conciliation provisions.

268. We have examined whether the complaint under section 15 EA 2010 which otherwise succeeded was presented in time. The complaint involving the unfavourable treatment at issue 7b was presented in time, applying section 123(3)(b) EA 2010 and the Early Conciliation provisions. The unfavourable treatment was decided upon on 26 May 2016.

269. The complaint of victimisation arising from the comments of Mr. Fenton at the meeting of 27 September 2017 was presented outside of the primary limitation period, which expired on 26 December 2017. Given that the limitation period had already expired before an EC Certificate was applied for (on 3 January 2017), the Early Conciliation provisions did not extend the time for presentation of the second Claim. The second Claim was presented on 30 January 2018, almost five weeks out of time.

270. Applying the principles set out above, we concluded that this complaint was presented within such further period as was just and equitable in the circumstances. Our reasons are as follows:

270.1. The extension of time required was relatively short, amounting to around five weeks.

270.2. The Respondent did not suggest that it had suffered any prejudice by this delay, and did not raise the issue of jurisdiction at all. We concluded that the Respondent had suffered no prejudice by this period of delay. In particular, on the face of the Respondent's evidence, it is clear that the relevant facts were recorded in documentary evidence, including the notes of Mr. Fenton. Moreover, in respect of the words used by Mr. Fenton, there was no real factual dispute; he accepted making the comments relied upon by the Claimant. Further, in his oral evidence, Mr. Fenton clearly had a good recollection of the meeting of 27 September 2017 at which the comments were made.

270.3. The ET's discretion to extend time under the "just and equitable" test is the widest possible discretion. We concluded that the width of this discretion allowed us to take into account that the perpetrator of the remarks accepted that they were made, and that, on the face of the unchallenged evidence of the Claimant, the Claimant experienced detriment. Therefore, the merits of this complaint appeared to be strong.

270.4. The Claimant did not give direct evidence to explain the reason for this delay. But we do not consider that this carries a heavy or decisive weight on the facts in this case. The undisputed facts are that, at the time of this delay, the Claimant was absent sick due to stress-related symptoms, with her vulnerability being described in the report of Mr. Rahman. Moreover, as we have explained, the comments of Mr. Fenton at the meeting on 27 September 2017 did have a detrimental effect on the Claimant, compounding her stress symptoms.

Summary

271. For the reasons set out above, a complaint of disability discrimination under section 15 EA 2010 (issue 7b), a complaint of failure to make a reasonable adjustment between 1 June 2016 and 19 July 2016, the complaint of victimisation under section 27 EA 2010 (in respect of statements made by Mr. Fenton at the meeting on 27 September 2017), and the complaint of unlawful deduction from wages are upheld.

272. The provisional Preliminary Hearing, which was provisionally listed ahead of any remedies hearing required, will now proceed on 17 June 2019 (time estimate 2 hours), unless the parties, who worked well together during this hearing, can narrow the issues on remedy so that the costs (financial and otherwise) which are likely to arise due to the remedies hearing can be avoided.

Employment Judge Ross

Dated: 26 June 2019

Appendix 1
List of Issues

Disability

1. The Claimant is a disabled person within the meaning of s6 Equality Act 2010 (EqA).

2. The Claimant relies upon the physical impairment of spinal damage and paralysis from the knee down (foot drop) in the right leg. This has resulted in limited mobility. The Claimant can no longer walk unaided, bend down, lift most items or lift her arms above her body.

3. The Respondents concede that the Claimant's physical condition amounts to a disability and that they had knowledge of the Claimant's disability at the material time.

4. Did the Claimant's depressive illness with generalised anxiety amount to a disability EqA 2010, s6(1) as a condition that has a substantial and long-term effect on her ability to carry out normal day to day activities. Discrimination Arising from Disability

5. Was the Claimant treated unfavourably because of something which arose in consequence of her disability.

6. The Claimant will say that the 'somethings' which arose in consequence of her disability are that the Claimant:

   a. Is unable to travel for extended repeated periods without rest days from travel, and

   b. Requires her wheelchair to mobilize when suffering with pain, weakness or depleted energy levels

7. The Claimant will say that the unfavourable treatment was as follows:

   a. Being told by James Chiriyankandath at the ill health consultation on 26 May that due to her disability she was no longer capable of completing part of her job.

   b. Being made to work on a part time basis between 1 June 2016 and 19 July 2016 and/or to work with no home-working.

   c. Being expected to complete detailed time sheets both at home and in the office from 19 July 2016.

   d. Only being allowed to work from home for two days per week on a temporary basis and/or subject to frequent review.

   e. Being put under pressure at the meetings dated 26 May and 29 September (and frequently at weekly catch up meetings) regarding returning to the office 5 days per week and regarding her performance.

   f. Being dismissed by R1.

8. The Claimant will say that paras 7(a), 7(c) and 7(e) above amount to capability/disciplinary proceedings through the back door and arise as a consequence of her disability and are also an act of unfavourable treatment.

9. Were the above actions on the part of the Respondents a proportionate means of achieving a legitimate aim.

10. Whilst the following is disputed, the Respondents' will rely upon the following as being proportionate means of achieving a legitimate aim:

    a. Ensuring that when the Claimant was fit and able to return to work all reasonable adjustments had been made to accommodate her;

    b. Ensuring that medical advice was being adhered to, specifically with regards to the Claimant being advised to return to work on a phased return basis;

    c. Ensuring that the Claimant's express wish to return to work on a phased return basis was accommodated;

    d. Compiling sufficient information in order to give consideration to whether the Claimant working from home was reasonably practicable;

    e. Ensuring that the work the Respondent required the Claimant to undertake could be reasonably completed offsite and within a reasonable timescale;

    f. Ensuring that it was reasonably practicable for the Claimant's duties to be carried out in full at all times;

    g. Ensuring that the Respondent's business was not adversely affected by not having their sole full-time employee off site for a proportion of the week;

    h. Ensuring a physical presence at the Respondent site being that the Claimant is the only employee.

10. Can the Respondents establish that the measures taken to achieve the above aims were appropriate and proportionate?

Reasonable Adjustments

11. What were the provision, criterion or practices (PCPs) imposed by the Respondents, which the Claimant alleges placed her at a substantial disadvantage in comparison with other non-disabled persons?

<u>PCPs</u>

12. The Claimant relies upon the following PCPs:

    a. The Respondents' practice of operating with no written procedures/policies. No risk assessment, no work station assessment, no building assessment or referral to occupation health was carried out. The

Respondents do not have a Health and Safety policy, Sickness Absence policy or Equality and Diversity policy.

b. The Respondents' provision and/or working practice that the administrator's office is staffed 5 days per week.

Substantial Disadvantage

13. Is the disadvantage the Claimant suffered substantial?

14. The PCPs as set out in 12(a) and 12(b) have resulted in an ad-hoc approach to dealing with the Claimant's disability, a lack of consistency in dealing with her request for home working resulting in frequent temporary reviews and inconsistent decisions. The Claimant avers that the substantial disadvantage as a consequence is that she has been afforded no certainty/security regarding her position in the workplace and has suffered a deterioration in her mental health (increased anxiety and depression).

15. The PCP as set out in 12(a) above resulted in delays and/or failure in making physical changes to the workplace (hand bars, rails, lowering of shelves and no workstation assessment to date) resulting in the substantial disadvantage of Claimant not being able to do her job properly and going on sick leave with work related stress between 9 May and 13 June.

16. The PCP as set out in 12(a) above has resulted in a failure to carry out any assessment of the building for the purposes of making the building accessible. The substantial disadvantage caused by this is that the Claimant has had difficulty mobilizing at work and cannot use her wheelchair in the workplace.

Physical features (workplace adaptations)

17. Parts of the building are not wheelchair accessible. The front of the building is gravelled, the entrance to the Claimant's office has two steps and there are steps around many other parts of the building (access to the hall and vestry, between chapel and vestry, between chancel and chapel) and the Claimant's office is very small. The Claimant has to move around the building in order to do her job. The Respondents are aware that the Claimant needs to frequently mobilize using her wheelchair as confirmed in medical reports dated 4 May 2016 and 17 June 2016.

18. To date, no assessments have been carried out to assess the suitability of the workstation and/or accessibility of the building and there has been no referral to Access to Work.

19. The Claimant avers that she has been placed at a substantial disadvantage by the Claimants failure to make adequate adjustment to the physical features of the

workplace/building and that as a consequence, she cannot mobilize properly at work and cannot use her wheelchair in the workplace.

Reasonable adjustments

20. The Claimant will say that the Respondents failed to offer or discuss any of the following possible adjustments which would have prevented the substantial disadvantages as detailed in the above paragraphs.

    a. Working from home one or two days per week on a permanent basis and/or subject to review at reasonable intervals based on OH/medical assessments. The duty to consider homeworking arose from 26 May 2016 and a decision in this matter was taken on the same day and then reviewed on 19 July and again on 13 October. Prior to 26 May, homeworking had been agreed as part of a phased return to work only.

    b. Carrying out and completing any amendments to physical features within the workplace including building adaptations to make the workplace fully accessible, installing other aids including but not limited to rails, hand bars, lowered shelves and desk/chair adaptations subject to workstation and/or other suitable assessments. The duty to carry out adaptations to physical features arose from around February 2016 when the Claimant returned to work and a decision about these matters was taken in part on 11 May albeit was only partially actioned, a further decision was made on 26 May 2016.

21. If and when did the Respondent's duty to make reasonable adjustments arise?

22. Was the Respondent under a duty to make the above reasonable adjustment at para 20(a)?

    a. The Respondent will say that no evidence was provided or obtained to suggest that the Claimant not being permitted to work from home one or two days each week on a permanent basis placed her at a substantial disadvantage.
    b. The Respondent will say that working on site did not place the Claimant at any substantial disadvantage. The Claimant's requirement to work from home was a "preference" rather than a requirement.

23. Has the Respondents made the reasonable adjustments above at paras 20(a) and (b)?

24. In the event that the Tribunal find that the Claimant was substantially disadvantaged as a result of a PCP or a physical feature, which the Respondents deny, was it reasonable for the Respondents to have made those adjustments listed at paras 20(a) and (b)?

25. In the event that the Tribunal find that the Respondents failed to make a reasonable adjustment, which the Respondents deny, for what period of time did the Claimant suffer a substantial disadvantage?

Victimisation

Protected Acts

26. Did the Claimant do a protected act? The Claimant will say that the following constitute protected acts pursuant to s27 of EqA.

    a. Issuing proceedings under claim number 2208119/2016 and claim number 2200305/2018.

    b. Meeting dated 22 April with Deborah Frankel, Ken Levy and the Claimant where she asserted her right to work place adjustments and complained about a delay in implementing the same.

    c. Ill health assessment meeting with Dr Jane Crispin, James Chiriyankandath, Diane Fenton, Lorraine and the Claimant where the Claimant requested homeworking, a referral to OH and discussed workplace adaptations.

    d. The letter dated 17 June 2016 from the Claimants GP requesting reasonable adjustments.

    e. Letter from Claimants solicitor dated 21 June 2016 setting out that the Claimant is disabled within the meaning of s6 EqA and is consequently entitled to reasonable adjustments in accordance with s20 EqA.

    f. Letter from Claimant dated 21 June 2016 complaining about the Respondents decision not to agree home working as a reasonable adjustment.

    g. Letter from the Claimant's solicitor dated 28 July 2016 seeking a permanent rather than temporary decision on reasonable adjustments.

    h. Emails from the Claimant's solicitor dated 13 and 19 October seeking an updated decision on reasonable adjustments.

    i. The Claimant sought assistance from the Working Well Trust in April 2017 for support around her health.

    j. Letter from Mr Rhaman dated 12 May 2017 to the Respondent sent on the Claimant's behalf as a reasonable adjustment.

    k. A further request from Mr Rahman to attend the return to work meeting.

    l. The meeting of 20 June 2017 during which the Claimant highlighted the previously requested outstanding reasonable adjustments.

    m. An email from Mr Rahman dated 21 August 2017 which enclosed a suggested agenda for a proposed meeting for 23 August 2017.

n. The Report prepared by Mr Rahman on 13 September 2017 and submitted to the Respondent on 13 September 2017 by email.

o. The meeting of 27 September 2017 attended by the Claimant, Mr Rahman and the Respondent.

Detriments

27. Did the Claimant suffer a detriment because she did a protected act? The Claimant relies on the following alleged detriments:

a. On 27 September 2017 being told by Mr Fenton:

i. To cease with her claim under the Equality Act,

ii. She was told she was not doing herself any favours by pursuing a claim under the Equality Act,

iii. She was dismissed on 09.05.18.

b. The detriments as set out in paragraph 7(a), 7(c) and 7(e) and 8 above.

Unlawful Deduction of Wages

28. The Claimant will say that the reduction in her working hours and pay between 1 June and 19 July was unlawful and contrary to s13 Employment Rights Act 1996. The Claimant will say that the reduction in her hours in June was not part of a phased return to work.

28. Was the Claimant on either a statutory or contractual basis entitled to be paid a salary for days that she did not work? Specifically, was the Claimant entitled to be paid a salary on the days, under a phased return, that she did not work?

29. Did the Claimant authorise any alleged deduction in her salary?

30. Was the Claimant entitled to notice pay?

Unfair Dismissal

31. It appears to have been agreed between the parties that the Claimant was an employee from 01.12.09 until R1 dismissed her on 09.05.18.

32. What was the reason for which R1 dismissed C ?

33. Was the reason automatically unfair within the meaning of s. 104 of the Employment Rights Act 1996? In particular, was the only or principal reason for C's dismissal was the fact that she had brought proceedings to assert her right not to be discriminated against?

34. Was R1's dismissal of C unfair on ordinary principles under s98 of the ERA

1996? In particular

i. the Respondent acted unreasonably and disproportionately in dismissing the Claimant.

ii. it was not reasonable in all the circumstances, especially given the Respondent's size and administrative resources, for the Respondent to dismiss the claimant and;

iii. the dismissal fell outside the band of reasonable responses.