Case No: 3305624/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms T Exton	v	North West Anglia NHS Foundation Trust

Heard at: Cambridge **On:** 15, 16, 17 & 18 July 2019

Before: Employment Judge Foxwell

Members: Mr C Davie and Mrs CA Smith

Appearances:
For the Claimant: Mr S Hines, Counsel.
For the Respondent: Mr A Sugarman, Counsel.

JUDGMENT having been sent to the parties on 7 August 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The respondent to this claim is the North West Anglia NHS Foundation Trust. The claimant, Ms Tracey Exton, began working for the respondent's predecessor on 1 April 2008. Initially she was employed as a health care assistant ("HCA") and joined the radiology department at Peterborough City Hospital ("PCH") in this capacity in 2009. In November 2010 she began a new role as an assistant practitioner ("AP") in magnetic resonance imaging ("MRI scanning"). APs undertake defined tasks under the supervision of a fully-qualified (or "independent") practitioner. Our understanding from the evidence is that there are relatively few APs and, because of the nature of their training and role, they are highly specialized; for example, the claimant was an AP in MRI scanning and could not work in other areas of radiology and imaging without further training.

2. The respondent operates two hospitals at Peterborough and Stamford respectively. PCH is the main hospital for North Cambridgeshire and South Lincolnshire. Stamford Hospital was described to us as a cottage hospital dealing with routine and non-acute conditions.

3. The claimant's employment ended on 11 January 2018 when she resigned without notice. She alleged at the time, and continues to allege that she had no choice but to resign because of the respondent's conduct. Having gone through early conciliation between 26 February 2018 and 2 March 2018, on 10 April 2018 she presented complaints of constructive unfair dismissal and disability

discrimination (failure to make reasonable adjustments) to the Tribunal. The condition she relies on as a qualifying disability is Bell's Palsy. This condition affects facial muscles and can alter facial appearance. The condition can also have psychological consequences and that is so in the claimant's case. The claimant was first diagnosed with this condition in 2013 and required about 6 months off work at that time. There has been at least one recurrence since. Medical evidence obtained as part of these proceedings – the report of Mr Ahmed, a consultant plastic, reconstructive and head & neck surgeon, dated 22 October 2018, states that in the claimant's case Bell's Palsy is likely to be a lifelong condition although the majority of people make a full recovery from it.

4. The respondent originally disputed that this condition was a qualifying disability but conceded the issue on 10 July 2019, shortly before this hearing was due to start.

The issues

5. The issues in the claim were considered at a telephone preliminary hearing before Employment Judge Laidler on 26 October 2018. The parties had drafted an agreed list of issues in advance of this preliminary hearing which is at pages 57-58 of the bundle. In broad terms the claimant's claims arise out of her relationship with Ms Karen Smith who is the section head for MRI scanning at the respondent. We shall deal with the structure of this department in more detail in our findings of fact. Four matters were identified as breaches of contract entitling the claimant to resign, these were taken directly from the claimant's grounds of claim as follows:

(i) Contrary to the agreement reached with the claimant on 12 October, permitting contact between the claimant and Ms Smith starting on 12 December;

(ii) Then refusing to work towards eliminating contact despite Mr Hosking accepting in a meeting on 12 October that the result would be that the claimant's disability would worsen;

(iii) Confirming in the meeting on 22 December that the respondent no longer considered itself bound by the 12 October agreement despite knowing that not adhering to the agreement would be injurious to the claimant's health and result in her not being able to work; and

(iv) Declaring it preferred to treat the claimant less favourably than Ms Smith, because of Ms Smith's mental health issues thereby demeaning the claimant's own disability.

Mr Hines identified two further breaches in his closing submissions to us, namely:

(v) In a meeting on 22 December 2017 David Hosking refusing to accept that he had admitted in a meeting on 14 December 2017 that the respondent had not complied with its duty of care; and

(vi) Nicola Leighton-Davies performing a *volte face* in the meeting on 22 December 2017 by denying that she had upheld the claimant's

grievance.

6. Mr Sugarman objected to the addition of these new claims given that both sides were legally represented when the issues were agreed. We have nevertheless considered them as they are part of the parties' narrative of key events.

7. The list of issues identified the question, *"What was the reason for dismissal if the claimant was dismissed?"* but did not set out the respondent's case on this. There is nothing in the grounds of resistance to indicate this either but Mr Sugarman argued in closing that there was a potentially fair reason for any dismissal (which was denied), namely "some other substantial reason". Mr Sugarman said that the substantial reason was the need to run an efficient and safe MRI service. We have considered this aspect of the respondent's case despite it also being a late addition to the issues in the case.

8. It was necessary for us to spend some time at the start of the case confirming the issues in the claimant's reasonable adjustments claim. In correspondence to the Tribunal her solicitors had described the relevant provision, criterion or practice ("PCP") as the *"practice of management creating staff rotas"* but it was clear from the adjustment contended for that the PCP was rostering Ms Smith in the same location and at the same time as the claimant. Accordingly, the PCP was re-formulated at the beginning of this hearing as *"putting in place work arrangements which required the claimant to work alongside Ms Smith"*. Mr Hines said that the claimant's case was that this placed her at a substantial disadvantage compared to non-disabled workers because of increased stress; he said that the claimant's susceptibility to the psychological and physical symptoms of her condition are exacerbated by stress. The adjustment contended for was for the respondent to ensure that the claimant and Ms Smith worked in different places or at different times.

9. Mr Sugarman confirmed that the respondent knew of the claimant's disability at the times material to this claim but denied that it had knowledge, actual or constructive, of the alleged substantial adverse effect.

The Hearing

10. The claim was listed for hearing over 4 days between 15-18 July 2019. The Tribunal timetabled the proceedings on the basis that the evidence and submissions relating to liability needed to be concluded by the end of the third hearing day. It also explained that there would be an early finish on day 2 because one of the tribunal members had a prior appointment. In fact the parties were able to conclude the oral evidence by the end of day 2 and the Tribunal received submissions on the morning of day 3.

11. We heard or received evidence from the following witnesses:

11.1 The claimant gave evidence and called no other witnesses. That is quite common in tribunal proceedings and we draw no inference from the number of witnesses a party calls.

11.2 The claimant relies on medico-legal reports prepared for these proceedings from Mr Omar Ahmed, Consultant Plastic,

Reconstructive, Head and Neck Surgeon, dated 22 October 2018 (pages 45 to 56) and Dr Aftab Laher, Consultant Clinical and Health Psychologist, dated 14 June 2019 (pages 303 to 350) which we have considered.

11.3 The following witnesses gave evidence for the respondent:

11.3.1 *Gillian Hicks:* Mrs Hicks is the respondent's lead radiographer and is responsible for managing the whole imaging team, 200 people approximately. She originally appointed the claimant to the AP training programme in 2010.

11.3.2 *David Hosking:* Mr Hosking joined the respondent in June 2015 and is a principal operational radiographer. He is not part of, and does not work in the MRI team. He dealt with the claimant's sickness absence and return to work in 2017.

11.3.3 *Nicola Leighton-Davies:* Ms Leighton-Davies was the general manager of the respondent's cancer and diagnostics directorate between August 2016 and June 2019. She was present at a meeting with the claimant, Mrs Hicks and Mr Hosking on 22 December 2017 which was the last significant interaction before the claimant resigned. Ms Leighton-Davies had also investigated a grievance the claimant lodged in July 2017.

11.4 The respondent relied on a written statement from Karen Smith. Ms Smith has been employed by the respondent as an MRI superintendent since 2003. As noted above, she is the head of the MRI section and at times has had direct line management responsibility for the claimant. We explained to the parties that we attach less weight to evidence untested by cross examination. This is particularly so where a party decides not to call a witness who could otherwise have attended, which we understand to be the case here.

12. In addition to the evidence of these witnesses, we considered the documents to which we were taken in an agreed bundle comprising 381 pages. References to page numbers in these reasons relate to this bundle.

13. The documents at pages 360-381 were added by the respondent at the beginning of the hearing. These are a series of rotas and some photographs of the MRI department. There was no objection to their inclusion.

14. Both parties produced further documents during the hearing; in the claimant's case this was a diary of events she had kept over the years and in the respondent's rotas for periods earlier than those in the bundle. The parties agreed that these documents did not need to be formally admitted into evidence and they prepared a statement of agreed facts in respect of them which is as follows:

2014 Rota

In the 10 weeks following the claimant's return to work in February 2014:

- *she was not rota'd to work on the first weekend. She did work the 2nd weekend. She did not work the 3rd or 4th weekend. She then worked on 6 consecutive weekends, doing a total of 8 shifts;*

- *One of the claimant's colleagues in the same period worked 7 consecutive weekends, doing a total of 9 shifts, albeit one of those was a swap and one was overtime.*

The Diaries

The claimant has disclosed 3 diaries which contain a number of entries on different days relating to her employment, including but not limited to incidents involving Karen Smith. The entries in the diaries cover the periods:

- *28th May 2013 – 17th June 2014*

- *14th August 2015 – 7th June 2016*

- *30th August 2017 – 5th January 2018*

10 On the third hearing day, just before submissions were about to start, Mr Hines applied to introduce two further documents, both photographs, into evidence. These were said to show places where Ms Smith could have relocated within PCH to avoid being in the MRI section when the claimant was working there. Mr Sugarman objected. We refused permission to introduce this evidence at that stage as we were not satisfied that it could not have been obtained and produced sooner. We also thought that the prejudice to the respondent, whose witnesses had given evidence and had gone so could not be questioned on the new documents, outweighed that to the claimant. Mr Hines had acknowledged that the claimant would have to be recalled to give evidence about these further documents and one or more of the respondent's witnesses would also have needed to be recalled so that these points could be put. We regarded this as disproportionate.

11 Finally, the Tribunal received written closing submissions from both counsel which they supplemented orally. Both counsel referred extensively to the case law in their written submissions, but we do not consider this to be a case where the relevant legal principles are in dispute. They are summarised below.

The legal framework

Constructive dismissal

12 An employee who claims to have been constructively dismissed must show that her employer acted in repudiatory breach of contract. Furthermore, she must show that she resigned in response to this breach and not for some other reason (although the breach need only be a reason and not the reason for her resignation). It is open to an employer to prove that the employee affirmed the contract despite the breach, perhaps by delay or taking some other step to

confirm the contract.

13 In this case the claimant relies on an alleged breach of the implied term of trust and confidence. A breach of this term occurs where an employer conducts itself without reasonable cause in a manner calculated, or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see **Mahmud v BCCI [1997] IRLR 462**). A breach of this implied term is likely to be repudiatory.

14 The claimant's claim that her employer acted in breach of the implied term of trust and confidence is based on the *'last straw doctrine'*, the name of which is derived from the old saying *"the last straw that broke the camel's back"*. This doctrine provides that a series of acts by the employer can amount cumulatively to a breach of the implied term of trust and confidence even though each act when looked at individually might not have been serious enough to constitute a repudiatory breach of contract. Inherent in the concept of a last straw is that there was one final act which led to the dismissal (*'the last straw'*) and the nature of this was considered in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** where the Court of Appeal held that the last straw need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of trust and confidence. If the act relied on as the final straw is entirely innocuous however then it is insufficient to activate earlier acts which may have been, or may have contributed to a repudiatory breach.

15 The question whether a repudiatory breach of contract has occurred must be judged objectively (**Buckland v Bournemouth University Higher Education Corporation [2010] ICR 908**); this requires the Tribunal to assess whether a breach of contract has occurred on the evidence before it. Neither the fact that an employee reasonably believes there to have been a breach nor that the employer believes it acted reasonably in the circumstances is determinative of this: the test is not one of 'reasonableness' but simply of whether a breach has occurred. Of course, where parties are acting reasonably it is less likely that there will have been a breach of contract when judged objectively but this is not necessarily so.

16 The Court of Appeal considered the characteristics of a repudiatory breach of contract in the case of **Tullett Prebon plc & ors v BGC Brokers LP & ors [2011] IRLR 420**. Maurice Kay LJ, who delivered the leading judgment held as follows at paragraphs 19 and 20:

> *"The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693, at page 698F, per Lord Denning MR, who added:*
>
> > *"The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).*
>
> *In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case*

of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61):

> *"… the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."*

17 This is the test we have applied in deciding the claimant's claim of constructive dismissal.

18 A breach of contract cannot be 'cured' by subsequent reasonable behaviour on the part of an employer: the right of an employee to resign in response to a repudiatory breach only ends when she has acted in a way which affirms the contract despite the breach (for example by delay). That said, in **Assamoi v Spirit Pub Company (Services) Ltd [2011] UKEAT 50**, a distinction was drawn between steps taken to prevent a matter escalating to a breach of the implied term of mutual trust and confidence and attempting to cure a breach which had already occurred.

19 The claimant's claim of constructive dismissal turns, therefore, on the following basic questions:

19.1 When judged objectively, did the respondent act in repudiatory breach of contract?

19.2 Did the claimant resign because of this breach (the breach need only be a reason for her resignation)?

19.3 At the time of her resignation had the claimant lost the right to resign for this breach because of her earlier affirmation of the contract?

Unfair dismissal

20 Consideration of unfair dismissal arises only if the claimant establishes that she was dismissed within the definition in section 95 of the Employment Rights Act 1996. *"Dismissal*" includes constructive dismissal.

21 If an employee has been dismissed it is for the employer to establish the reason for dismissal and that it is a potentially fair reason within the categories set out in section 98 of the Employment Rights Act 1996. In this case the respondent asserts that, if the claimant was dismissed, it was for *'some other substantial reason'* ("SOSR"). SOSR is a residual category of potentially fair reason for dismissal separate from the named grounds in section 98 of the Act.

22 It is for an employer to establish a reason for dismissal that is substantial. In this case the respondent asserts as part of its alternative case that the reason was the need to run an efficient and safe MRI service. We are conscious that an employer may assert SOSR for what is in fact a capability or conduct dismissal in the hope of circumventing the procedural safeguards for dismissals on those grounds and that, therefore, any substantial reason advanced must be

scrutinized with care.

23 If the Tribunal is satisfied that the employer has established a potentially fair reason for dismissal, it is for the Tribunal to decide whether it was in fact fair to dismiss for that reason by applying the test of fairness contained in section 98(4) of the Act which provides as follows:

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

24 There is no burden of proof on either party in respect of this test. While it is the case that the Tribunal must consider the reasonableness of the employer's reason for dismissal when applying this test rather than substituting its own view, in the context of a dismissal for SOSR the Tribunal is entitled to consider the background to the decision when assessing this.

Failure to make reasonable adjustments

25 The relevant parts of Section 20 of the Equality Act 2010 provide as follows and should be read in conjunction with section 21 and Schedule 8 to the Act:

> *"(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."*

26 Accordingly, a claim of failure to make reasonable adjustments requires a Tribunal to consider a number of questions. Firstly, it must identify a provision, criterion or practice (which really means no more than a way of doing things) of the claimant's employer which is in issue. Secondly, it needs to consider who the non-disabled comparators are. Thirdly, it needs to identify the nature and extent of the disadvantage the claimant has suffered or will suffer in comparison with the comparators. Only then can the Tribunal go on to judge whether any proposed adjustment is reasonable (**Environment Agency v Rowan [2008] ICR 218***).*

27 Even if all of these questions are resolved in the claimant's favour, liability will not arise unless the employer knew or ought to have known that the claimant was disabled and that she was liable to be affected in the manner alleged (**Secretary of State for Work & Pensions v Alam [2010] ICR 665**). Whether an employer had actual knowledge of both these matters is a factual question to be resolved on the evidence. Whether an employer who lacks actual knowledge ought to have known requires an assessment of the evidence by the Tribunal.

28 If the duty to make reasonable adjustments arises it does not require an employer to make every adjustment that could conceivably be made, only those which are reasonable. Reasonableness is a matter for the Tribunal to assess objectively; accordingly, the mere fact that the employer considers its approach to be reasonable does not make it so (**Smith v Churchills Stairlifts Plc [2006] IRLR 41**). An adjustment is unlikely to be reasonable if it will not address the employee's disadvantage.

29 In summary, therefore, the questions which a Tribunal must address in determining a reasonable adjustments claim are as follows:

29.1 What is the relevant PCP?

29.2 Who is the claimant comparing herself with or is a comparator unnecessary?

29.3 What is the adverse effect on the claimant of the PCP?

29.4 Is the effect substantial?

29.5 Did the employer know that the claimant was disabled and that she was likely to be affected as she describes?

29.6 If the answer to (5) is 'no', ought the employer to have known these things?

29.7 Is there an adjustment which, judged objectively, ought reasonably to have been made to reduce or eliminate the adverse effect?

The burden of proof under the Equality Act

30 Section 136 of the 2010 Act provides as follows:

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision".*

31 These provisions require a claimant to prove facts consistent with her

claim: that is facts which, in the absence of an adequate explanation, could lead a Tribunal to conclude that the respondent has committed an act of unlawful discrimination. 'Facts' for this purpose include not only primary facts but also the inferences which it is reasonable to draw from the primary facts. If the claimant does this then the burden of proof shifts to the respondent to prove that it did not commit the unlawful act in question (**Igen v Wong [2005] IRLR 258**). The Respondent's explanation at this stage must be supported by cogent evidence showing that the Claimant's treatment was in no sense whatsoever because of the protected characteristic.

32 We have borne this two-stage test in mind when deciding the claimant's claims. We have also borne the principles set out in the Annex to the judgment of Peter Gibson LJ in *Igen v Wong* firmly in mind. We have not however separated out our findings under the two stages in the reasons which appear below. We have reminded ourselves that detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

The drawing of inferences in discrimination claims

33 An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We are aware that discrimination may be unconscious and people rarely admit even to themselves that such considerations have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if they played a part (see **Anya v University of Oxford [2001] IRLR 377**). We have considered the guidance given by Elias J (as he then was) on this in the case of **Law Society v Bahl [2003] IRLR 640** (approved by the Court of Appeal at **[2004] IRLR 799**): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a Tribunal may infer discrimination from unexplained unreasonable behaviour (**Madarassy v Nomura International plc [2007] IRLR 246**).

34 A Tribunal must have regard to any relevant Code of Practice when considering a claim and may draw an adverse inference from a respondent's failure to follow the Code.

The time limit for claims under the Equality Act

35 The time limit for claims under the Equality Act is contained in Section 123 which provides as follows:

> *"(1) Subject to section 140A proceedings on a complaint within section 120 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 purpose 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 P does an act inconsistent with doing it, or

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

36 It can be seen from this provision that time does not begin to run in respect of acts continuing over a period until that period has ended. This might suggest that a failure to make a reasonable adjustment is a continuing act but, as was explained by the Court of Appeal in **Kingston upon Hull CC v Matuszowicz [2009] ICR 1170**, the correct position is that a failure to make a reasonable adjustment is an omission which is deemed to have been done either when the omission was decided upon or, if there is no evidence of a deliberate decision, when the omitted act might reasonably have been expected to be done (there is contrary authority at EAT level but we are bound by the decision of the Court of Appeal). This can give rise to a situation where the primary time limit for a claim for failure to make reasonable adjustments has expired at a time when the Claimant could not have reasonably known this. In such a case a Tribunal is likely to be willing to allow a reasonable extension of time on just and equitable grounds (see **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050**).

37 If a claim is presented out of time the Tribunal may nevertheless extend time for bringing it if it considers that in all the circumstances it is just and equitable to do so. Should we find that this claim or aspects of it have been presented out of time, we have considered two cases concerning the just and equitable extension of time. Firstly, **Robertson v Bexley Community Centre [2003] IRLR 434** in which the Court of Appeal emphasised that time limits are usually exercised strictly in employment cases and that there is no presumption for exercising the Tribunal's discretion in a claimant's favour unless there are grounds for not doing so, rather the Court thought that this would be the exception rather than the rule. Secondly, **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327** in which the Court of Appeal emphasised that none of the *dicta* in **Robertson** fettered the Tribunal's judicial discretion when considering this point. In our judgment the important thing for us is to weigh all the circumstances and reach a just conclusion whilst bearing in mind that it is for a claimant to establish the Tribunal's jurisdiction.

Findings of fact

38 We make the following findings unanimously and on the balance of probabilities.

39 The MRI department is part of the Imaging Team headed by Mrs Hicks;

beneath her are a deputy and various section heads. Karen Smith is one of the section heads. The MRI department comprises independent practitioners ("IPs") who are qualified radiographers, and APs who work under the supervision of IPs. Additional support is provided by HCAs.

40 The respondent has three MRI scanners. At Peterborough there is a 1.5 tesla (1.5T) machine and a 3 tesla (3T) machine (the higher the number the more powerful the machine). In late 2016 or early 2017 a 1.5 tesla machine was installed at Stamford. The machines require cooling because of the heating effect of the MRI scanning process. The 3T scanner requires more cooling than the 1.5T machines.

41 IPs and APs are allocated to machines and locations by rota. The rota was prepared by Ms Smith until she began a period of sickness absence in September 2014. When she returned to work in April 2015 this responsibility was formally transferred to her then deputy Andrew Adams; Mr Adams had been preparing the rotas in her absence.

42 IPs and APs are rostered to work twelve and a half hour shifts and there is one such shift each day; imaging is not a 24 hour operation. Weekend shifts are also allocated at both locations. Ms Smith has administrative responsibilities as section head and is required to oversee clinical activity. She works normal office hours Monday to Friday but can be required to step in to cover clinical work.

43 The claimant's principle place of work was PCH but she could be required to work at Stamford on occasion under the terms of her contract (page 128). There is no evidence to show that this ever occurred.

44 It is the claimant's case that she began to experience problems in her relationship with Ms Smith in 2012 despite having got on well before then. She said that Ms Smith's behaviour had turned into outright bullying by 2013. Ms Smith denies bullying the claimant in her written statement but she says that there was a change in their relationship when the claimant began an NVQ3 during 2013. It was in that year that the claimant suffered her first episode of Bell's Palsy. We do not underestimate what a frightening experience this must have been. Unfortunately, she also experienced relationship breakdown in 2013, so this was undoubtedly a difficult and stressful year for her.

45 The claimant was signed off work in September 2013 because of the onset of her condition and remained absent from work until February 2014. It is common ground that the claimant's relationship with Ms Smith was poor when she returned to work. Once again, the claimant describes this treatment as bullying and Ms Smith denies this. In fact, in an email dated 17 June 2014 to Mrs Hicks, Ms Smith described the problems she was having with the claimant, she said that the claimant's treatment of her was *"unpleasant and unwarranted"* (pages 171D-E).

46 Mrs Hicks' evidence was that she thought that the claimant's problems in her relationship with Ms Smith began in 2014. She was certainly made aware of them then because she arranged mediation between the two, but we accept the claimant's evidence that these problems had arisen before then.

47 We do not know, and find it unnecessary to decide, whether it was a case

of Ms Smith bullying the claimant or *vice versa*; what is clear is that the women found their relationship with each other difficult.

48 Mrs Hicks investigated the claimant's complaints of bullying by Ms Smith in 2014. The investigation was not limited to the claimant's complaints but included at least one other member of staff. Mrs Hicks did not find evidence of 'bullying' (which we understand to mean the misuse of power or influence to harass or undermine an individual) but concluded that, as between the claimant and Ms Smith, it was a case of two people going through health issues who could not see each other's perspectives. We accept her evidence and the probable accuracy of that conclusion.

49 It is notable but unfortunate that from September 2014, shortly after the mediation, Ms Smith was signed off work with severe depression. She did not return to work until April 2015 and when she did she was no longer required to manage day to day operational activities; this was done by Mr Adams.

50 The MRI Service was under pressure in 2014: the parties agree that the team was short-staffed and this was made worse when one team member was away for extended leave. The claimant was rostered to work six consecutive weekends at that time but we find that this was not unusual for team members then. This pressure of work did nothing to help relations between the claimant and Ms Smith.

51 We were not told of any particular problems in 2015 after Ms Smith's return to work: she and the claimant continued to work in the same location. The one difference was that Andrew Adams now dealt with rostering and other similar operational issues.

52 Mr Adams left the respondent in March 2016 and his role was taken over by Victoria Underwood and Robert Myles. Ms Underwood took over line management responsibility for the claimant from Mr Adams.

53 The claimant referred in her witness statement to an event in June 2016 concerning a request for annual leave over a weekend which she found frustrating and she attributed this to Ms Smith. The leave was granted in part only and at the last moment: the claimant was still required to work on the Sunday. We do not find that this episode evidences Ms Smith bullying the claimant as the claimant herself states that Victoria Underwood accepted that she was responsible for not dealing with her leave request promptly and apologised to her for this directly. The claimant had copied her emails requesting this leave to Ms Smith and those complaining when the request was not dealt with. She nevertheless is critical of Ms Smith for asking her what this was all about: this appears inconsistent to us whereas Ms Smith's action is consistent with those of a manager going about her duties.

54 A month or so later, on 22 July 2016 Ms Underwood emailed Mrs Hicks and her deputy, Rachel Nolan concerning the claimant (pages 181AA-181A). She expressed concern that the claimant had a *"vendetta"* against Ms Smith and described her attitude to Ms Smith as *"awful"* and as something which needed to be addressed. This email demonstrates to us that Ms Underwood was finding the claimant difficult to manage and was genuinely concerned about her attitude towards Ms Smith.

55 The claimant had an appraisal by Ms Underwood on 30 August 2016. Ms Underwood's comments were largely positive but under the heading *'What have they learned and what could they have done differently?'* she wrote:

> *"It has been explained to Tracey that the stressors are known about and that the management team are trying to find solutions to make for a better working environment. The bookings have been reviewed and altered in order to increase inpatient capacity but have taken a little while to take effect due to pre-booked patients. A whiteboard form has also been introduced to identify issues within the 1.5T environment and issues are fed back in management meetings. Tracey has also asked to be rostered in the 3T more often which has been happening in order to give her some breathing space from the 1.5T as this is the main scanner that the APs work in due to their scope of practice. I have discussed with Tracey how her attitude affects other team members when it is negative, thus causing more stressors to both the 1.5T team and the management team. Although reluctant she has taken this observation on board."*

56 The claimant confirmed that she was happy with this appraisal by email dated 11 September 2016 (page 181F). We note too that as part of a health and safety self-assessment the claimant said that there were no health issues affecting work or potentially affecting work that she wished to report (page 181E).

57 At the beginning of 2017 Ms Smith began spending the bulk of her time at Stamford training staff on the new 1.5T MRI scanner which had just been installed there.

58 In March 2017 the claimant had a recurrence of Bell's Palsy and she began a period of sickness absence because of this on 3 March 2017. The claimant told us, and we accept, that the temperature of the 3T scanner control room affected her condition. She had been spending more time there following the request she made in her appraisal in 2016. The claimant was referred to occupational health and saw Dr Stephen Moore who she had seen at the time of her previous episode. His report followed an assessment on 10 April 2017. The claimant told Dr Moore that her symptoms were affected by the low temperature and by stress. Dr Moore recommended that the claimant avoid cold air flows and referred to her identifying *"subjective workplace stressors"* which he said could exacerbate the low mood and low self-esteem which can accompany Bell's Palsy. He recommended a stress risk assessment and said that re-deployment be considered if avoiding exposure to cold air flows was not thought reasonably practicable to implement.

59 Stepping back from this evidence, we find that the probable principal cause of the recurrence of the claimant's condition in March 2017 was exposure to the cold air flow in the 3T control room. The claimant had asked to spend more time working there and this was an unexpected consequence. The claimant's general sense of being under stress was a contributing factor but she makes no specific complaints about Ms Smith's conduct towards her in the months before this absence and Ms Smith was based in a different location (Stamford) from her at that time.

60 The respondent's evidence was that the temperature and air flow in the 3T

control room could not be adjusted because of the operational requirements of the machine. We accept that and note that the claimant is not claiming that adjusting these environmental factors would have been a reasonable adjustment.

61 David Hosking was asked to manage the claimant's sickness absence. We have not seen the respondent's sickness absence management policy but there is no suggestion that this was in any way inappropriate or oppressive. Mr Hosking held his first review meeting with the claimant on 25 April 2017 and followed this up in writing on the 27 April 2017 (page 196). We find that this letter contains an accurate summary of the meeting. Mr Hosking and the claimant discussed the contents of Dr Moore's report. Mr Hosking said with regard to the issue of workplace stressors that he had arranged to meet the MRI operational team to discuss progress on trainees, the Stamford installation and the support available between the two sites. He said that there would be a further meeting in 4 weeks' time and drew the claimant's attention to the fact that she would move to half pay in September if not back at work before then.

62 The claimant's and Mr Hosking's evidence was that this was a positive and constructive meeting. Mr Hosking told us that the claimant said to him that she felt that she might not be able to continue working in MRI because of the air flow issue and he sought to reassure her that re-deployment would only be progressed if this was not possible. We accept that evidence.

63 A second absence review took place on 15 June 2017 and on this occasion Mr Hosking was accompanied by an HR advisor. The parties agree that this was also a positive meeting. Mr Hosking told us that the claimant looked better than before, much more herself he said. Mr Hosking confirmed the outcome of the meeting by letter dated 16 June 2017 (page 199) and we find this to be an accurate record. He noted that the claimant had seen a specialist and had been given an encouraging prognosis. He stated that working at Stamford had been ruled out as the claimant was currently not driving. He discussed a phased return to work and combining it with leave to avoid the claimant receiving reduced pay during this period. He concluded by saying that a formal meeting would be arranged to go through the plan for a phased return. It appears, therefore, that the parties were optimistic that the claimant would get back to work soon at that stage.

64 Unfortunately, the claimant's condition deteriorated after this meeting and it was not possible for her to begin a phased return as had originally been contemplated.

65 There was some email contact between Mr Hosking and the claimant in early July 2017 and one issue she raised was the possibility of being re-deployed as an AP in bone density scanning. Mr Hosking said that this was being considered but would not be possible soon. He said that the respondent was still looking for ways to get the claimant back to work. It is clear from this correspondence that the practical problem affecting the claimant at work was the temperature and air flow in the MRI scanner control rooms; there is no mention of work place bullying.

66 Mr Hosking wrote to the claimant on 14 July 2017 inviting her to a formal review meeting on 31 July 2017. He notified the claimant of a right to be accompanied under the respondent's policy (page 203).

67 On 17 July 2017 the claimant submitted a written grievance raising three broad issues; bullying, air conditioning issues in the 3T control room, and *"lack of progress"* (pages 204-206). The allegations of bullying concerned Ms Smith and were to a large extent historical; for example, the claimant's first bullet point under this head concerns the period from May 2012 to September 2013 and there are references to further incidents in 2014. The only current allegation against Ms Smith was put in very general terms in the last bullet point under this head which read; *"From the time Karen* [Smith] *returned to work up until now there have been issues with Karen treating me unfairly"*. This allegation was unparticularised. The grievance was acknowledged promptly.

68 The third sickness review meeting took place on 31 July 2017. Mr Hosking was accompanied by an HR Advisor and the claimant had a workplace colleague with her. Mr Hosking summarised the meeting in his letter of 3 August 2017 (pages 211-212) and we find that this is an accurate summary. The claimant provided a further fit note in the meeting in which her GP signed her off work until 26 September 2017. She also mentioned her grievance; Mr Hosking was unaware of this until then. There was some discussion about rotas: Mr Hosking told the claimant that it was not possible to change the air flow in the 3T control room and suggested working in the 1.5T control room at PCH but the claimant said this was stressful due to workload and interruptions from inpatient enquiries. Mr Hosking said that adjustments could be made to address these points and that a stress risk assessment would be done. He also informed the claimant of the date she would move to half pay (15 August 2017). There was some discussion about whether the claimant's grievance could be dealt with informally under stage 1 of the respondent's grievance procedure but the claimant felt that it was too complex for this.

69 On 21 August 2017 Susan Caranese, an HR Officer emailed the claimant to arrange a meeting to discuss the formal grievance process (page 214). This meeting took place on 30 August 2017.

70 The claimant submitted a further fit note on 20 September 2017 signing her off work until 20 October 2017 because of Bell's Palsy and stress (page 219).

71 Ms Leighton-Davies was assigned to deal with the claimant's grievance and they met on 27 September 2017. Ms Leighton-Davies told us that she conducted interviews with other members of staff as part of her investigation but the notes of these are not in the bundle nor is this referred to in her statement, which surprised us. Nevertheless, we accept her evidence that she asked others about the claimant's allegations before reaching a conclusion on them. She told us that she did not speak to Ms Smith as she felt she had sufficient information from other sources.

72 The claimant attended a stress risk assessment with Mr Hosking on 12 October 2017. She completed a self-assessment as part of this (pages 223-224) in which she referred to the air conditioning in the 3T room and pressure of work in the 1.5T room at PCH as sources of stress. She also alleged that *"the bullying issue with Ms Smith had never been resolved"*. She was still waiting for the grievance decision at this stage. Our impression is that this was a positive and constructive process; the claimant recalls Mr Hosking saying, *"If things don't change you will get ill again"*, and we find that he said words to that effect. The

claimant also had an assessment by Ms Underwood, her line-manager as part of this process (page 228).

73 On 13 October 2017 Mr Hosking emailed the claimant setting out what they had agreed at the assessment. He wrote that it had been agreed that the claimant would not work on the 3T scanner because the air flow could not be changed. He said that it was agreed that the claimant would begin a phased return over 6-8 weeks on the 1.5T machine and he reassured her that the level of enquiries had reduced. A possible return to work date of 1 November 2017 was identified. When referring to workplace stressors Mr Hosking wrote as follows:

> *"The main stressor that you identified is working with or being in contact with Ms Smith. We have agreed that you could be rostered to opposite shifts or sites to avoid contact."*

74 The claimant's case is that this was an agreement to keep her and Ms Smith apart to the extent that they would not be working in the MRI department at Peterborough at the same time. The respondent's case is that this meant that the claimant and Ms Smith would never be rostered to work together on the same machine (either the 1.5T or 3T): each machine requires two practitioners. The respondent's case is that those familiar with radiography know that a *"shift"* relates to the machine to which a person is allocated and not to a particular time slot in the day or week.

75 We find that the claimant believed the agreement to be one in which she would be kept physically separate from Ms Smith whereas Mr Hosking thought that separate shifts meant not being allocated to the same machine. We find that he felt confident in making this promise because Ms Smith did clinical shifts infrequently due to her administrative duties and because he thought that she was still spending a large part of her time in Stamford. This latter belief was wrong as the Stamford project had been winding down from about September 2017.

76 The context of Mr Hosking's proposals was Dr Moore's report of 11 September 2017 (pages 215-216) in which he said that the claimant's main problem was now perceived work-related stress. One of Dr Moore's recommendations was re-introducing the claimant to work via a *"lighter work load"* to build her resilience and confidence. We find that Mr Hosking thought that his offer would reassure the claimant and was deliverable in the short-term. We accept the respondent's case however that it would have been impractical to exclude Ms Smith from the MRI department in Peterborough on days when the claimant was rostered to work there: Ms Smith had overall responsibility for the section and was required to provide clinical advice and oversight as required. She bore overall responsibility for patient safety. We accept the respondent's evidence that the Care Quality Commission (CQC) would have been critical of any such arrangement for these reasons.

77 Had the claimant been able to assess what Mr Hosking had written objectively she would have realised that what he appeared to be offering her was impractical, but we find that the claimant was not able to assess this objectively at the time. It is also unfortunate that Mr Hosking's choice of words served to reinforce her belief that the respondent had agreed to keep her and Ms Smith apart by not allowing them to work in the MRI department at PCH at the same

time.

78 The respondent's plan was based on the premise that Ms Smith worked principally in the administrative office and the claimant in one of the control rooms, where she was generally not alone. We were shown photographs of these areas and it seemed to us that there would have been no requirement for the claimant and Ms Smith to come into contact regularly, particularly as we heard that Ms Smith tended to keep the door to her office closed.

79 We reject the claimant's case that Ms Smith could have "hot-desked" in other locations on days when the claimant was also at work. The claimant suggested the radiology corridor as a possibility but we find that this contained treatment rooms and not administrative spaces. We accept the respondent's evidence that space (clinical and administrative) was at a premium at PCH and that hot-desking would have been inappropriate for Ms Smith in any case because of her need to be close to the people she supervised and their patients.

80 The claimant was still awaiting a grievance outcome and Mr Hosking chased this up on her behalf on 23 October 2017. The claimant had a further meeting with Ms Leighton-Davies on 30 October 2017 which focused on her return to work. By this time the claimant had learned that Ms Underwood, her line manager, was being seconded to another hospital and would be away for some months: Ms Leighton-Davies suggested that Rob Miles take over as the claimant's line manager (he job-shared operational responsibilities with Ms Underwood) but the claimant was unhappy with this as she felt that Mr Miles was too close to Ms Smith. Ms Leighton-Davies suggested David Truman as an alternative but the claimant felt that this would not work as he was in a different department. It was unclear to us how this issue of line management was to be resolved in these circumstances.

81 The claimant was due to return to work on 1 November 2017 but emailed that day to say that she did not feel strong enough to do so (page 231). She said that she was not re-assured that she would be returning to an adequate environment for her health and that she was still waiting for a grievance outcome (page 235). She mentioned that she had been in contact with her solicitors.

82 On 6 November 2017 Ms Leighton-Davies sent the claimant a grievance outcome (pages 236-237). It is unnecessary for us to deal with her conclusions on air temperature and delaying the sickness management process as these are not relied on as components of a breach of contract or in the claim under the Equality Act 2010. As far as bullying is concerned, Ms Leighton-Davies said as follows (page 237):

> *"Response – there was sufficient evidence to support the view that you have felt that you were being bullied and had raised your concern. I also found evidence stating that management had responded in a positive way by confirming that there would be a change in line management and an agreement had been made to undertake the stress risk management tool, which would act as a baseline and provide a means of assessing the situation going forward. I accept you should have been given more reassurance that conversations regarding the details and clarifications that you needed would have taken place, either immediately before or on your return to work."*

83 Under the heading *"Conclusions"* Ms Leighton-Davies wrote:

> *"In conclusion, I acknowledged the complexities around this case and the length of time it has taken to reach this stage. I confirm that I uphold the elements of your grievance and I apologise again for the undue stress that this situation has caused you."*

84 The claimant's evidence is that she understood this letter to uphold her grievance that she had been bullied by Ms Smith. It is clear from her email of 8 November 2017 that this is what she thought at the time (page 240). Ms Leighton-Davies told us that she had not upheld this allegation but by her finding that the claimant felt she had been bullied she had sought to reassure the claimant that she regarded the complaint as genuine rather than malicious.

85 In our judgment Ms Leighton-Davies' outcome letter is unequivocal in stating that the claimant's grievances were upheld. The claimant's grievance was not that she felt bullied but that she had been bullied and we find it was reasonable for her to conclude that the respondent had accepted this given the wording of Ms Leighton-Davies' letter. Despite this wording, we accept Ms Leighton-Davies' evidence that she had not in fact concluded that the claimant had been bullied and had not intended to give this impression. She nevertheless did.

86 The claimant began a phased return to work on 8 December 2017. By agreement with Mr Hosking she was permitted to pick shifts which suited her. The claimant was at work on 8 and 9 December 2017 and she told us that these shifts went well, better than she had expected. Mr Hosking made a point of checking on the claimant to see whether everything was alright when she was first back.

87 In the claimant's first week back at work, that is the week commencing 4 December 2017, Ms Smith was signed off work sick. The claimant's third shift was scheduled for Tuesday, 12 December 2017. When she came in Mr Hosking met her and told her that Ms Smith was in work that day. Mr Hosking told us that he did this as a matter of courtesy as the claimant had not seen Ms Smith for many months. The claimant's evidence is that she referred to the agreement to keep her and Ms Smith apart, but Mr Hosking simply shrugged and said, *"the best laid plans…."*. Mr Hosking denied shrugging and thought it unlikely that he would have said anything unsympathetic. Our impression of Mr Hosking is that he is a compassionate and empathetic person and we think it less than likely that he said or did anything dismissive of the claimant's concerns. We note the claimant's evidence that she was feeling unwell that day and when she complained of this to Mr Hosking he told her to go home. We find it probable that she misconstrued his concern for her as indifference.

88 The claimant came into work on 14 December 2017 to look at the rotas to organise shifts for the following week. The rotas showed Ms Smith as being in the office on Monday to Wednesday, in Stamford on Thursday and on annual leave on Friday. The claimant's case is that she then realised that the respondent did not intend to abide by the agreement as she understood it to be, namely to keep her and Ms Smith apart, as one or more of her shifts would have overlapped with Ms Smith's time in the office. The claimant spoke to Mr Hosking

that day and he suggested that she should go to Stamford or sign on for weekend shifts. The claimant said that she could not do the former because she was still having difficulty driving and that it was unreasonable for her to have to do weekend shifts simply to avoid Ms Smith.

89 The claimant alleges that Mr Hosking referred to a duty of care to Ms Smith and then agreed with her that no duty of care had been shown to her. Mr Hosking agrees that he raised the possibility of doing shifts in Stamford or at weekends but denies that he agreed that the respondent had failed in its duty of care to the claimant. We accept his evidence; we find it unlikely that he would have made such an admission, at its highest he may have acknowledged that the claimant felt that way.

90 The claimant did not work any shifts after this but had telephone contact with Ms Leighton-Davies over the next few days in which it was agreed that there would be a further meeting on 22 December 2017.

91 The claimant attended the meeting on 22 December 2017 with her father. Ms Leighton-Davies, Mrs Hicks and Mr Hosking were present for the respondent together with an HR Officer, Nicola Lee. There are no minutes, the respondent says because this was intended to be an informal meeting to overcome any difficulties in the claimant's return to work. We accept that explanation but the claimant felt that the meeting ought to have been minuted and we have sympathy with that view given the number of senior employees present for the respondent.

92 There are notes of the meeting prepared by Ms Lee, the HR advisor after the event at page 252 and accounts from Mr Hosking and Mrs Hicks at pages 251 and 253 respectively.

93 The parties agree that it was a short meeting. The claimant acknowledges that she became angry and left. Her case is that Mrs Hicks was the principal spokesperson in the meeting and she made it clear that the respondent would not be bound by the agreement she had made with Mr Hosking that she and Ms Smith would be kept apart. She also says that Ms Leighton-Davies told her that she had not upheld her allegation of bullying contrary to what was said in the letter of 6 November 2017, and that Mr Hosking denied agreeing that the respondent had acted in breach of its duty of care. She says that, when she asked why Ms Smith could not simply be moved to Stamford when she was at work, Mrs Hicks had replied that the respondent could not discriminate against Ms Smith who had her own health issues. The claimant said she found this response shocking because it appeared to put Ms Smith's needs above hers.

94 The respondent does not dispute the broad themes of the meeting: Ms Leighton-Davies agrees that she told the claimant that she had not upheld her bullying grievance; Mr Hosking said that he had not acknowledged a breach of a duty of care. We think it probable that Mrs Hicks asked the claimant about doing shifts at Stamford and there is no dispute that she mentioned a duty of care to Ms Smith; the claimant inferred from this that Ms Smith's needs were being prioritised over her own. There was some evidence that the claimant may have been aggressive in this meeting. We are sure she was angry and upset and we need go no further in our findings on that.

95 Within a very short while of the meeting ending the claimant emailed

Ms Leighton-Davies saying as follows (page 254):

> *"Hi Nicky*
>
> *I am writing this email as I have just spoken to my solicitor and he advised I email you. Just to confirm, I will not be attending work for the foreseeable future after today's meeting.*
>
> *I handed in a doctor's note that covers me until the end of January but I am talking to my doctor on Wednesday.*
>
> *Following the so-called meeting it is apparent that you are all only concerned with Karen's wellbeing and there's no duty of care to me.*
>
> *You'll be hearing from [my solicitor]"*

96 There was then no further contact between the parties until the claimant submitted her resignation on 11 January 2018 (page 294). The respondent asked the claimant to attend a meeting to discuss this but the claimant declined to do so and it is unnecessary for us to explore that passage of events any further.

97 The claimant told us in evidence that she had applied to the police for what is known as a 'board pass' in December 2017. This pass would have made her eligible for jobs in the police. Mrs Hicks' unchallenged evidence was that the claimant had been volunteering with the police prior to that and we note that she was offered a role as a police call handler in late January 2018 which she took up at the beginning of March 2018 having completed the necessary checks.

Conclusions

98 In this section of our reasons we set out our conclusions on the issues having regard to the findings of facts set out above. We start with the complaint under the Equality Act 2010.

Failure to make reasonable adjustments

99 We find that the way in which the respondent organised work in its MRI departments at PCH and Stamford required the claimant to work at times with Ms Smith in the sense of working in the same geographical location (rather than the respondent's narrower concept of the same room). We find therefore that the PCP that the claimant contends for is established.

100 Based on the evidence of Dr Laher we find that the claimant was at a substantial disadvantage because of this requirement compared to non-disabled workers because of her condition. This arose from her perception that she had been bullied by Ms Smith. This perception exacerbated her stress which was both a cause and consequence of her condition. Following an examination, Dr Laher concluded that the claimant had an adjustment disorder with anxiety and depression which meant that she suffered marked distress disproportionate to the severity or intensity of the stressor.

101 We find on the evidence that the respondent knew of this substantial

adverse effect. The claimant's antipathy to Ms Smith and insistence on being kept apart was disproportionate in our judgment, given the limited interaction between the women and Ms Smith's senior position in the department compared with the claimant's more junior one, but Mr Hosking took steps to reassure the claimant that she would be kept separate from Ms Smith as far as possible. He informed her on the first day that her shift coincided with one of Ms Smith's, that Ms Smith was there. He suggested that the claimant consider weekend shifts or shifts at Stamford to avoid Ms Smith.

102 So, we find that the primary elements of a reasonable adjustments claim have been established on the evidence. Nevertheless, when judged objectively we do not find that the adjustment contended for, keeping Ms Smith out of the department when the claimant was there, was a reasonable one. Ms Smith was the section head and needed to be in the department regularly to deal with administration and to provide advice and guidance on clinical issues, including covering clinics from time to time. Hot desking elsewhere in the hospital or attempting to work from Stamford where there are no administrative facilities would not have achieved this. No other adjustment was proposed as reasonable by the claimant.

103 It is possible that the respondent's proposed adjustment, that is keeping the claimant on a separate machine from any that Ms Smith was working on, may have worked but this was never tested.

104 For these reasons the claim of failure to make a reasonable adjustment fails on the facts but it is necessary for us to deal with a jurisdictional issue affecting this claim. We are satisfied that the claim was presented out of time: the claimant knew beyond doubt in the meeting on 22 December 2017 that the respondent would not arrange rotas as she wished, that is when the final date of the act or omission occurred and we find therefore that the primary time limit expired on 21 March 2018. Early conciliation took place within this period, over a period of four days – those four days need to be added to the primary time limit taking us to the 26 March 2018. This claim was presented on 10 April 2018. Given the shortness of this delay and the fact that the claimant has another in-time claim we would have found it just and equitable to extend time for this claim had it succeeded notwithstanding the fact that the claimant was in receipt of legal advice at all material times. These findings simply deals with this issue and does not change the fact that the claim under the Equality Act 2010 fails.

Constructive dismissal

105 We reject the claimant's case that the respondent acted in repudiatory breach of contract in respect of the agreement reached following the risk assessment on 12 October 2017. No agreement was reached then in our judgment because what each party thought had been agreed was different (the parties were not *ad idem*). On an objective analysis only Mr Hosking's interpretation of the 'agreement could have worked given the structure of shifts in the MRI department (one long shift each day).

106 When the claimant worked on the same shift as Ms Smith on 12 December 2017 albeit briefly, this was with cause. The needs of the service and the respondent's understanding of the agreement was such that they could and needed to be in the same geographical location in our judgment.

107 Similarly, when the claimant was told on 22 December 2017 what the respondent thought the agreement meant, while this was distressing for her, it was treatment with cause. We do not find that Mr Hosking agreed to eliminate contact between Ms Smith and the claimant, rather he was attempting to minimise contact and to limit it to controlled circumstances.

108 We do not find that the respondent preferred to treat the claimant less favorably then Ms Smith because of Ms Smith's condition. It seems more probable to us that the reference was about balancing the needs of different workers with competing issues.

109 These findings mean that the breaches in the agreed list of issues are not established on the facts.

110 We turn to the additional issues. We do not find that the claimant's allegation that David Hosking had wrongfully denied accepting a breach of duty of care is established on the facts.

111 We find that the apparent *volte face* by Ms Leighton-Davies on 22 December 2017 when she stated that the bullying grievance had not been upheld did undermine trust and confidence and was not done with cause. While Ms Leighton-Davies was accurate when saying this to the claimant and the treatment was with cause in that sense, her statement was in complete contradiction to what she had written before. We acknowledge that Ms Leighton-Davies may not have appreciated this in the meeting, but nevertheless we are sure that this came as a blow to the claimant. The mischief was the failure to set out the grievance decision clearly and accurately in the first instance.

112 We are conscious that this was not an issue referred to in the agreed list of issues but raised only in closing submissions and that Mr Sugarman objected to this. We have had regard to the cases on lists of issues: they are simply case management tools although it is usual to rely on a list of issues drafted by professionally represented parties. Ultimately, we consider our task is to deal with cases justly. The allegation that the claimant's grievance had originally been upheld is at paragraph 18 of the grounds of claim. There is no reference to the *volte face* in the grounds of claim but the parties' evidence addresses this and it was dealt with in cross examination and submissions. The respondent was plainly aware of this issue from the outset as it is dealt with in Mr Hosking's note of the meeting at page 251 of the bundle. We are therefore satisfied that it is in accordance with the overriding objective to treat this as an issue in the case. We do not think that it takes the respondent by surprise in any sense.

113 We have asked ourselves whether this established breach is a reason for the claimant's resignation. Plainly, the claimant had been exploring options in the police force prior to this breach occurring and that may be because she saw, so to speak, the writing on the wall. We are nevertheless satisfied that what happened in the meeting on 22 December 2017 and this component in particular were reasons for her resignation. In reaching this assessment we noted that it was not referred to in the grounds of claim, the claimant's email of 22 December 2017 or her letter of resignation, but it is mentioned shortly after that in her solicitor's letter of 17 January 2018 at page 297. This shows that the claimant gave instructions on this at the time and that therefore it was something

in her mind. So, while most aspects of the claimant's case on repudiatory breach of contract fail on the facts, this aspect succeeds.

114 We turn then to the question whether the respondent has established a potentially fair reason for dismissal. We are not satisfied that it has shown a substantial reason for dismissal on the evidence, rather all its evidence shows that it was trying to avoid dismissal at that time.

115 In those circumstances we make a finding of constructive and unfair dismissal and the claimant is entitled to a declaration to that effect. For all of that it is clear to us on the evidence that the claimant's position was becoming increasingly untenable giving her inability to work in close proximity to Ms Smith or to travel to Stamford. We think it more likely than not that she would have left to seek a new career within a short while of these events. We reached this view because of the claimant's police application which is reinforced by a reference at page 313 to her attending an interview as long ago as March 2017.

116 Accordingly, the claim under the Equality Act 2010 is dismissed, but the complaint of constructive unfair dismissal succeeds. The remedy to which the claimant is entitled will be decided at as further hearing.

_____
Employment Judge Foxwell

Date: …… 6/09/19…….

Judgment sent to the parties on
16/09/19
.....
J Moossavi
.....
For the Tribunal office