Case Number: 3332151/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs Balbir Suri **v** **The Crown Prosecution Service**

Heard at: Watford Employment Tribunal **On**: 2 to 6 December 2019

Before: Employment Judge George
Members: Mrs L L Thompson
Mr P Miller

Appearances

For the Claimant: Miss A Stroud, counsel
For the Respondent: Mr C Milsom, counsel

RESERVED JUDGMENT

1. The claims of victimisation, unlawful detriment on health and safety grounds contrary to s.44 of the ERA, automatically unfair dismissal contrary to s.100 of the ERA and breach of contract are dismissed on withdrawal.

2. The claimant was not dismissed by the respondent. The claim of unfair dismissed fails and is dismissed.

3. The respondent were in breach of a duty to make reasonable adjustments in respect of the claimant's employment by holding a LTAR meeting at Hendon Magistrates Court on 27 April 2018.

4. Save as set out in paragraph 2 above, the claims of breach of a duty to make reasonable adjustments fail and are dismissed.

5. The claims of indirect disability discrimination fail and are dismissed.

6. The claim of direct disability discrimination fails and is dismissed.

7. The claims of discrimination arising in consequence of disability fail and are dismissed.

REASONS

1. The claimant, who was employed by the respondent most recently as a Crown Prosecutor between 4 January 1988 and 11 May 2018 brought claims by her claim form which was presented on 19 August 2018 following a period of conciliation which lasted from 22 June 2018 to 10 July 2018. As originally pleaded, the following claims were brought: unfair dismissal (both under ss.98 and 100 of the Employment Rights Act 1996 – hereafter referred to as the ERA), disability discrimination (contrary to ss.13, 15, 19, 20 and 21 of the Equality Act 2010 – hereafter referred to as the EQA), victimisation (contrary to s.27 of the EQA), breach of contract (the right to notice), and detriment on health and safety grounds under s.44 of the ERA. The respondent defended the claim by a response received on 27 September 2018.

2. The claim was case managed by EJ Heal on 10 January 2019 when both parties were ordered to provide particulars of their respective cases. This led to the particulars provided by the claimant (page 59 of the bundle) and the respondent (page 61 of the bundle). In her particulars, the claimant indicated that she wished to withdraw the claims of victimisation, unlawful detriment on health and safety grounds contrary to s.44 of the ERA, automatically unfair dismissal contrary to s.100 of the ERA and breach of contract. Those claims are dismissed on withdrawal by this judgment.

3. The claimant is accepted by the respondent to be disabled by reason of spondylothesis, a degenerative back condition which she had for a number of years prior to the events with which the tribunal has been concerned.

4. The claimant was diagnosed by her GP to have Post Traumatic Stress Disorder (PTSD) in December 2018. A joint expert's report into that condition was ordered by EJ Manley on 30 September 2019. The report of Dr Chiedu Obuaya dated 7 November 2019 (following an assessment of the claimant which took place on 18 October 2019) is at page 390A and following of the joint bundle of documents.

5. It was clarified by Mr Milsom at the outset of the hearing that, following receipt of that report, the respondent conceded that the claimant was, at all material times, disabled by reason of PTSD. He further confirmed that the respondent did not rely upon the defence set out in s.15(2) of the EQA that they did not have knowledge of the disability. However, the respondent does not concede that they had knowledge of the substantial disadvantage(s) to which it is alleged the claimant was put as a result of the provisions, criteria and practices (hereafter PCPs) which she relies on for the purposes of her claim

of a breach of the duty to make reasonable adjustments. That is the extent of the issue as to knowledge of disability which it falls to this tribunal to decide.

6. Miss Stroud had drafted a List of Issues which incorporated the particulars provided by both parties and the updated position on knowledge and, following minor amendment, that was agreed to be a decision-making template for the tribunal. Those issues are incorporated into this reserved judgment, below.

7. The claimant gave evidence in support of her claim and adopted a witness statement upon which she was cross-examined. The respondent called the following witnesses: Philip Fernandez – the claimant's line manager at the relevant period; Patrick Harwood – Senior HR Business Partner; and Keith Milburn – Area Business Manager. They likewise adopted their witness statements in evidence and were cross examined upon them. We also had the benefit of a joint bundle of documents which ran to page 426.

The Issues

Express Dismissal

8. Was the claimant coerced into resigning and did this amount to a dismissal? The respondent says that claimant resigned.

Unfair Constructive Dismissal

9. If the claimant resigned, did the respondent fundamentally breach the claimant's contract of employment in that:

   a. It failed to implement the reasonable adjustments set out at paragraph 10(a)-(e) below:

   b. On 27 April 2018 Philip Fernandez made the claimant believe that if she did not return to work then she would be (relatively imminently) dismissed;

   c. On 27 April 2018 Philip Fernandez also said to the claimant (in answer to her question about whether she would lose her job) *"that's what happens when you are dismissed."*

   d. If so, did the claimant resign in response to such breach as she may prove?

   e. Did the claimant waive any proven breach?

   f. If the claimant was dismissed, what was the reason for the dismissal? The respondent asserts that it was capability or some other substantial reason.

g. If the dismissal was unfair, did the claimant contribute to it by culpable conduct by:

i. Refusing all reasonable proposals that would enable her to return to work in any capacity at any time;
ii. Not alerting the respondent to alleged coercion by her line manager, through its grievance procedure, attendance management procedure or otherwise;
iii. Unreasonably failing to engage with the decision manager as part of the respondent's attendance management procedure;
iv. Unreasonably failing to engage with the respondent's HR business partners;
v. Failing to appeal against her dismissal; and/or
vi. Affirming her intention to terminate her employment (by resignation) on 10, 11, 12, 23 & 31 May 2018.

h. Does the respondent prove that there was a percentage chance of a fair dismissal in any event? If so, what is the percentage and when would dismissal have taken place?

Indirect discrimination because of disability (disability relied upon - PTSD)

10. Did the respondent apply the following provision, criteria and/or practice generally, namely:

a. The requirement that the claimant attend meetings at Hendon Magistrates Court;
i. *Causing the claimant mental anguish and trauma;*[1]
ii. To ensure that formal work-related meetings are held at a suitable venue;

b. The requirement that the claimant was expected to commence a phased return within six months;
i. *Causing the claimant distress as it was against medical advice and a failure to comply would result in her dismissal;*
ii. To achieve business efficacy; rehabilitate the claimant back into work; maintain employee attendance in the workplace;

c. The practice of accepting resignations regardless of the content of the resignation letter;
i. *Causing the claimant loss of employment (as her resignation was accepted) despite it obviously being written whilst of unsound mind;*

[1] Ms Stroud had structured the list of issues relating to indirect discrimination so that under each individual PCP the sub-paragraph denoted by "i" was the particular disadvantage to which the claimant alleged she had been put and the group would be put and the sub-paragraph denoted by "ii" was the legitimate aim relied upon by the respondent. We adopt the same format.

ii. To achieve business efficacy; effective workplace planning; ensuring certainty regarding employees' service for the respondent and the employing department and employees.

d. The practice of not accepting requests to withdraw resignations;
   i. *Resulting in the claimant's loss of employment despite the resignation obviously being written whilst of unsound mind;*
   ii. To achieve business efficacy; effective workplace planning; ensuring certainty regarding employees' service for the respondent and the employing department and employees.

e. The practice of informing employees that their absence may result in the dismissal;
   i. *Resulting in the claimant's acute adverse reaction to this news due to her mental disability, leading to her resignation and loss of employment;*
   ii. To provide employees with complete information regarding the employer's attendance management process and/or are aware of all possible consequences of continued absence; ensuring fairness to employer and employee; maintaining attendance at the workplace.

11. Does the application of these provisions at paragraph 10(a)-(e) put other disabled people with PTSD at a particular disadvantage when compared with persons who do not have this protected characteristic?

12. Did the application of these provisions put the claimant at the disadvantages set out at sub-paragraph (i) of each of paragraph 10(a)-(e) above?

13. Has the respondent shown that the treatment was a proportionate means of achieving any of the legitimate aims set out at sub-paragraph (ii) of each of paragraph 10(a)-(e) above?

Reasonable adjustments (disability relied upon - PTSD)

14. Did the respondent apply the provision, criteria and/or practice generally, as set out above at paragraph 10(a)-(e)?

15. Does the application of these provisions at paragraph 10(a)-(e) put the claimant to a substantial disadvantage compared with people who are not disabled by the impairment of PTSD when compared with persons who do not have this protected characteristic? The claimant relied on the disadvantages set out at sub-paragraph (i) of each of paragraphs 10(a)-(e) respectively.

16. Did the respondent take such steps as were reasonable for it to have to take to avoid these disadvantages? The claimant argues that the following steps would have been reasonable adjustments*:*

a. permitting the claimant to attend meetings at home or on neutral ground away from Hendon Magistrates Court;
b. Disapplying the absence parameters in the respondent's attendance management policy or postponing the trigger points to late May/early June 2018 when the claimant was due to be re-assessed by occupational health.
c. Contacting resigning employees to ensure that they mean and intend to resign.

17. Did the respondent not know, or could it not have been reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantages set out above?

Direct discrimination because of disability and/or perceived disability (both impairments are relied upon)

18. Did the respondent subject the claimant to the following treatment falling within s.39 of the EQA, namely 'refusing to permit the claimant to withdraw her resignation?

19. If so, was the respondent's treatment of the claimant less favourable than it treated or would treat comparators? The claimant relies on a hypothetical comparator.

20. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude, in the absence of any other explanation, that the difference in treatment was because of the protected characteristic of disability?

21. If so, what is the respondent's explanation for the treatment complained of? Does it prove a non-discriminatory reason for any proven treatment? The respondent says that it decided the resignation was valid; there had been discussion about whether the claimant really wanted to resign and she said yes.

Discrimination arising from disability (PTSD)

22. The 'something arising in consequence of the claimant's disability' are the claimant's refusal to return to work early and/or her absences on:

28 November 2017 – 27 December 2017 (Work-related stress, neck and back pain)
18 December 2017 – 5 February 2018 (Neck pain – awaiting specialist assessment)
7 February 2018 – 9 March 2018 (ongoing treatment for neck/back pain)
6 March 2018 – 6 May 2018 (PTSD)

6 May 2018 – 6 June 2018 (PTSD)

23. Did the respondent treat the claimant unfavourably by:

    a. Pressuring her to return to work early?
    b. Refusing to allow her to withdraw her resignation?

24. Can the respondent show that the treatment is a proportionate means of achieving a legitimate aim in that it:

    a. In respect of paragraph 23(a),
        i. Rehabilitated the claimant back in to work;
        ii. Maintained attendance at the workplace;
        iii. Ensured employees performed their work duties;
        iv. Ensured adequate staff levels;
        v. Ensured performance of CPS functions.

    b. In respect of paragraph 23(b).
        i. Was a fair and consistent application of the respondent's resignation and termination policy;
        ii. Promoted business efficacy;
        iii. Promoted effective workforce planning;
        iv. Ensure certainty regarding employees' service for the respondent, the employing department and employees

The Law

25. For the purposes of the unfair dismissal claim, the relevant sections of the Employment Rights Act 1996 are ss.95(1) and 98.

"Section 95: Circumstances in which an employee is dismissed

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

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"Section 98 Employment Rights Act 1996

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

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

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

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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."

26. In the present case, the claimant resigned but she argues that she only did so because she had been told that she would be dismissed and therefore this amounts to dismissal by the employer: effectively an enforced resignation. It is well established that if an employee is told expressly that they have no future with the employer and are invited to resign then they

are to be regarded as having been dismissed. The question for the tribunal is who, in reality, terminated the contract.

27. The section 95(1) ERA definition of dismissal is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intended to be bound by one or more of the essential terms of the contract (otherwise referred to as a repudiatory breach), then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned, then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.

28. The sections of the EQA which are most relevant to the claims are ss.13(1), 15, 19, 20, 21 and 27 as well as s.136 which sets out the applicable burden of proof in discrimination and victimization claims. The protected characteristic of disability is defined in s.6 EqA 2010 and has been interpreted in to include perceived disability, in relation to claims of direct discrimination.

29. Section 13(1) of the EQA defines direct discrimination in the following way,

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

30. Section 15 EqA defines discrimination arising from disability as follows:

"(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."

31. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. Another might be a requirement that an employee take annual leave to attend medical appointments for a disabling condition; they need regular absences for medical treatment in consequence of their disability and they are required to take annual leave to do that. It should not be forgotten that the treatment must be unfavourable (rather than less

favourable) nor that the defence of justification is available in claims of s.15 discrimination.

> "In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."
>
> EHRC Employment Code paragraph 5.6

32. The structure of the obligation upon an employer to make reasonable adjustments in relation to disabled employees is found in ss. 20, 21, 39 and 136 and Schedule 8 EqA 2010.

32.1. By s.39(5) the duty to make reasonable adjustments is applied to employers;

32.2. By s.20(3) that duty includes the requirement where a PCP applied by or on behalf of the employer[2] puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment[3] in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

32.3. By s.21 a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

32.4. By s.39(2) an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment or indeed (although this was not specifically referred to by the claimant) in the way he affords the employee access to promotion or transfer.

32.5. By s.136 if there are facts from which the tribunal could decide, in absence of any other explanation, that the employer contravened the Act then the tribunal must hold that the contravention occurred unless the employer shows that it did not do so. The equivalent provision of the Disability Discrimination Act 1995 (DDA 1995), which was repealed with effect from 1 October 2010 upon the coming into force of the EqA 2010, was interpreted in Project Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only

[2] By reason of Sch 8 para. 2(1)(a)

[3] By reason of Sch 8 paras. 2(3) and 5

establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

32.6. Sch 8 para. 20 provides that the employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage in question.

32. It is clear from paragraph 4.5 of the EHRC Employment Code that the term PCP should interpreted widely so as to include "any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions." The breadth of the concept has also been emphasised in cases such as British Airways plc v Starmer [2005] IRLR 862 EAT. However, in Nottingham City Transport Ltd v Harvey UKEAT/0032/12, in the context of a flawed disciplinary process, the EAT (Langstaff J) held that although the words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, to be a "practice" falling within the definition of a PCP:

> "18. … there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustments, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."

33. The requirement on the employer is, in the words of s.20, to take "such steps as it is reasonable to have to take to avoid the disadvantage". The test for a breach of the duty to make reasonable adjustments is an objective one and thus does not depend solely upon the subjective opinion of the respondent based upon, for example, the information or medical evidence available to it.

34. Victimisation is defined in s.27 of the EQA to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The then applicable provision of the Race Relations Act 1976 was considered by the House of Lords in The Chief

Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL. The wording of the applicable definition has changed somewhat between the RRA and the EQA . However Khan is still of relevance in considering what is meant by the requirement that the act complained of be done "because of" a prohibited act. Lord Nicholls said this, at paragraph 29 of the report,

> "The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact"

35. Therefore, when deciding whether or not the claimant suffered victimisation the tribunal first needs to decide whether or not he did a protected act. Next the tribunal needs to go on to consider whether he suffered a detriment and finally we should look at the mental element. What, subjectively, was the reason that the respondents acted as they did.

36. We bear in mind that s.136 of the EQA applies to discrimination and victimisation cases (it's effect in claims of a breach of the duty to make reasonable adjustments is set out in paragraph 32.5 above). If we find that the claimant has proved facts from which we could conclude, in the absence of any other explanation, that the respondents discriminated against or victimised the claimant as alleged then we must hold that the contravention occurred unless the respondent can show that they did not discriminate against or victimise the claimant.

37. We also bear in mind that there is rarely direct evidence of why a person acts in a particular way, particularly in discrimination cases. A person's subjective reasons for doing an act must be judged from all the surrounding circumstances including direct oral evidence and from such inferences as it is proper to draw from supporting evidence and documentary evidence.

Findings of Fact

38. On 24 October 2017, the claimant was working as a Crown prosecutor in Hendon Magistrates Court when a defendant whom she was prosecuting became increasingly agitated and angry when his application for a restraining order to be discharged was rejected. When he was let out of the dock, he punched a legal adviser who fell to the ground and then lifted a chair above his head. The claimant, whose mobility is limited because of her back condition, reasonably thought that he was going to throw the chair at her and froze with fear. The legal adviser intervened, and the defendant swung the chair so that it hit the protective glass of the public gallery. He ran out of the court room, but the claimant thought that she might be attacked. The incident led to the defendant being convicted of a public order offence. The claimant gave an early account in a statement to the police (page 102).

39. Following the incident, the claimant told her line manager, Mr Fernandez, by telephone (see the claimant's statement para.9) and he enabled her to leave work that day. We find the claimant's account that this was on the same day as the incident more credible than Mr Fernandez's recollection that it might have been the following day. She was shaken and kept visualizing the incident.

40. She was at that time working Monday to Wednesday so had the following day off work and returned on 30 October 2017. Unfortunately, she had a delayed reaction to the violent incident in which she had been involved. We think that it is important to record that she was involved and not merely as a witness. The police report of 30 November 2017 evidences that the defendant was charged with two offences including using threatening words and behaviour contrary to s.4.1 of the Public Order Act 1986 and page 120 makes clear that it is the claimant who was the victim of that offence. She started the period of sickness absence from which she didn't return on 28 November 2017. Her absence was covered by a series of sicknotes which initially stated her condition to be "work related stress, neck and back pain" (page 382).

41. The claimant's evidence which we accept was that the first specific symptom of PTSD was a pain up the right-hand side of her face (C para.17) which developed into intense pain and stiffness down her neck and shoulders. The dentist alerted her to possibility of trauma being linked to the pain and her GP diagnosed PTSD and arranged for her to see a counsellor. She told Mr Fernandez about this diagnosis by email (page 128) on 21 December 2017. The sick note for 18 December 2017 to 5 February 2018 refers to "Nick Pain ?cause – Awaiting specialist assessment". The respondent accepts that they were aware of a diagnosis of PTSD from that point.

42. Mr Fernandez was managing the claimant's absence under the respondent's Attendance Management Policy (hereafter the AMP) page 259. The policy defines long term absence as being that which reaches 28 consecutive calendar days (page 283 para 132). The policy states that there are two types of meeting during long term absence: informal reviews and long-term absence review meetings (para 137). Mr Fernandez relies upon telephone calls as being the informal reviews but did not document them or copy them to the employee as required by paragraph 80 of the policy.

43. We can see from some of the emails between Mr Fernandez and GS (the HR Advisor for CPS London North – magistrates court) that Mr Fernandez had spoken to the claimant on or close to 19 December (p.125), 14 January 2018 (p.136), 22 January 2018 (p.133), and 20 April 2018 (p.168). The sick notes are dated 7 February 2018 (page 385), 6 March 2018 (page 386 for 2 months), 6 May 2018. Mr Fernandez and the claimant met on 31 January and 27 April.

44. The claimant's evidence was that Mr Fernandez was only in contact with her when sick notes were submitted. If he was in contact with her at the time of sick notes (as the claimant says) and when the emails evidence a conversation then that suggests longer gaps between contact than Mr Fernandez remembers. His recollection is that there were intervening calls which he did not document but we have not heard clear evidence about what was discussed and find the claimant's evidence on this point consistent with the documentary evidence and therefore more credible than that of Mr Fernandez. Our conclusion is that there were some periods, notably between late January/early February and late April when there was relatively little communication, possibly because that is the period when the OH referral was made (28 February 2018) and the report was awaited (dated 28 March 2018 received by Mr Fernandez (hereafter referred to as PF) on 3 April 2018).

45. The policy stipulates that formal review meetings must take place as a minimum when an employee has been absent for 3 months and then every 3 months thereafter (page 286). One possible outcome of a formal review meeting is that the absence can be supported and there should be an informal review in a month's time. According to para 287 of the absence management policy,

> "If a return to work is not likely within a reasonable timescale and the absence cannot continue to be supported, the manager should seek advice from the HR Advisor as to whether the employee is likely to meet the criteria for ill health retirement or whether redeployment or dismissal is appropriate."

46. Decisions on dismissal can only be taken by a manager with the relevant level of authority. This involves a final formal attendance meeting with the employee (para 157). The decision maker has to be satisfied of all of the matters set out in paragraph 166 (which include that all reasonable adjustments have been made) before a decision to dismiss can be made but the decision maker may decide not to redeploy or dismiss (para 161) in which case the AMP will continue.

47. We can see from an exchange of emails between GS and PF on 19 and 20 December 2017 (before PF knew of the diagnosis of PTSD) – page 124 and 125 and between 11 January (page 137) and 30 January (page 132) that GS encouraged PF to apply the time limits stipulated by the policy. PF argued that the first Long Term Absence Review meeting (hereafter referred to as a LTAR meeting) should be postponed because further information was needed about the claimant's medical position from her consultant and her GP. We note that, although there had been a diagnosis of PTSD, PF had apparently been informed that the claimant's medical advisers are were still, at that time, investigating whether the neck pain was connected with her physical disability (see also PF paragraph 12). The psychological impairment is being treated with counselling.

48. There was a LTAR meeting on 31 January 2018. This was held at the claimant's house and her daughter and husband were in attendance. This is an approach sanctioned by the AMP, in particular paragraph 139 which provides that "Review meetings do not have to be held in the workplace; they can be held where the employee feels comfortable e.g. their home or other location."

49. At the last minute, the note taker was unavailable, so PF took the notes himself (page 139). Both the claimant and PF in their several ways gave evidence that these notes and those of the 2nd LTAR meeting (page 171) were incomplete. Neither alleged that the notes contained statements which had not been made but both alleged that the notes were not comprehensive and that, because of omissions, the notes did not reflect the tone of the meeting. In particular there was a marked difference in their evidence about what took place during the 2nd LTAR meeting.

50. PF described the claimant as being a shadow of her former self at this LTAR meeting on 31 January 2018 (PF para.15). The meeting had been scheduled to take place at Hendon Magistrates Court (p.131) but, according to PF, the claimant requested it to be held elsewhere. The claimant's evidence mirrored this and she added (her para 19) that she could not face going back to Hendon so soon after the incident.

51. We accept that this genuinely was the reason why the claimant did not wish to have that meeting at Hendon. PF's evidence was that he understood her reason to be more to do with physical pain and we note that in the early stages of her absence the pain in her neck and back (whether that was an exacerbation of her existing condition as she says in para 3 of her impact statement at page 390 or pain as a free-standing symptom of PTSD) did major in the sick notes, rather than the psychological injury. PF had the information available to him that the claimant had suffered the trauma and was diagnosed with PTSD. Our view is that he genuinely believed that physical pain was the reason why Hendon was inappropriate but that this was because of an inadequate enquiry by him of the claimant's reasons. He did not seem to have reference to the policy on handling an employee with mental health problems and there is no evidence that HR volunteered advice on adjusting his approach to managing the absence of an individual with mental health problems.

52. On 28 March 2018 Dr Emslie, the OH physician, reported. The OH referral did not ask for his opinion on whether she was fit to attend a LTAR meeting or whether she needed any adjustments for such a meeting. In a case involving a diagnosed mental health condition our experience is that this would be good practice. His recommendations and advice are that PTSD is very treatable but that she would need "further care pathways in order to improve her resilience to allow her to return to work". He suggested "psychotopic medication, EMDR [Eye Movement Desensitisation and Reprocessing] and other treatments" and that with those care pathways a

further 2 to 3 months of treatment would be required before she would be well enough to engage in vocational rehabilitation programme. He suggested, by way of particularisation of that programme, that she would benefit from supervised visits to Court initially as a visitor, additional line management supervision and that her Court cases be reviewed from a risk perspective.

53. It is clear to us that Dr Emslie recommended the following stages:

    53.1. The claimant should take his report to her G.P.;

    53.2. She should give consideration to treatment recommended in line with NICE guidelines and those might include psychotropic medication and EMDR;

    53.3. After 2 to 3 months of that treatment she should be well enough to engage in vocational rehabilitation.

54. In other words, he does not say that she will be fit to return to work (even if only for vocational rehabilitee) in 2 to 3 months of the date of the assessment but following 2 to 3 months of treatment.

55. The invitation to the second LTAR meeting was sent on 20 April (page 169). The meeting was arranged for 27 April 2018 at Hendon Magistrates court. The conversation to arrange this must have taken place on or shortly before 20 April (page 168 is the email referring to a conversation). In her statement (C para 26) she described that location as “unthinkable for me”. She said “I did not want to attend and I protested to PF. However, he insisted that the meeting went ahead at Hendon Court”. She was unable to secure trade union representation but does not appear to have asked for the meeting to be postponed to enable her to get trade union representation and was accompanied by a colleague (who has not given evidence before the tribunal).

56. On the converse, PF’s statement evidence (paragraph 20 & 21) was that he had not been insistent on the Hendon venue and could easily have changed to a different courthouse. In cross-examination he refuted the suggestion that the claimant had made clear in the telephone call prior to the second LTAR meeting that she was extremely unhappy at meeting in Hendon.

57. Miss Stroud relied upon statements recorded as having been made during the meeting itself as leading to the inference that the claimant had made it clear in the telephone call that she did not want to meet in Hendon: “coming back here brings back all the same feelings” “I fear coming here – I have lost weight because I walk everywhere”. The claimant’s own account of the telephone conversation to set up the second LTAR meeting was not very detailed.

58. By contrast, PF described discussing different possible venues (other courtrooms) and his account was that Hendon had been agreed on. Two common pieces of evidence were that PF had said that the claimant's home was not suitable because he was not confident of finding a notetaker who was known to her and he thought that she would be uncomfortable with a stranger in her house. He does not seem to have had any basis for that fear and did not ask her for her views about that. It was also common ground that the claimant suggested meeting in the coffee shop across the road from the magistrates court and PF dismissed that as unsuitable on grounds of lack of privacy.

59. While we agree that a coffee shop is unsuitable for a meeting of this sort, we think that the fact that the claimant proposed it rather than meeting in the CPS office within the magistrates court should have caused PF to make enquiries as to why she was making the suggestion. A further piece of information available to him which should have led to further enquiries was the advice from Dr Emslie that prior to returning to work the claimant would need supervised visits to a court.

60. We accept PF's evidence that the claimant did not make plain that she couldn't bear the thought of a meeting at Hendon. We think he had been sympathetic towards her prior to this point and it would be inconsistent with that for him to force her to attend a meeting at a venue which she had stated to be unsuitable for her. We accept that he genuinely thought that the physical condition was more of a determining factor in accessibility than the mental condition. However, he was sufficiently concerned about her emotional state not to want to introduce a stranger into her home, her suggestion about the coffee shop should have provoked further enquiry and there was sufficient in the OH report to alert him to the probability that her mental health condition (which was the reason for her absence) might mean that she would experience problems returning to that venue. Essentially, he was put on enquiry by that information and had he made the enquiries he should have made of the claimant she would have said that that venue would cause her unacceptable distress. Our conclusion is that she did not volunteer that information in the telephone call.

61. Their respective accounts of the meeting of 27 April 2018 differ greatly. There is some common ground. We find that the claimant's view of the occupational health report was that the conclusion that she was suffering from a mental health condition frightened her. She was upset at being labelled as a mental health patient. She was scared and confused at the prognosis of returning to work because she did not feel ready or able to contemplate that. She quite understandably wanted to take her GP's advice on the recommendations which included pharmaceutical treatment because the OH physician had assessed her on the telephone and her GP, who had clinical care for her knew her full medical history. She was right to consult her GP who confirmed that the pharmaceutical options would not be suitable because of medication she

took for her back. PF concurred that the claimant was unhappy with the OH report's conclusions.

62. The main factual dispute about the meeting is that the claimant's account is that she was being pressured to give a specific date on which she would return to work and told that if she could not, then the case would be referred to a decision maker who would make a decision about whether to dismiss her within 5 working days of the 27 April 2017. PF denies this. His account is that the claimant dismissed all proposals for a return to work, did not agree with the conclusions of the OH report and could not envisage returning to work for the respondent (PF para 24).

63. The notes record a number of statements by the claimant throughout the meeting about her views on a return to work.

63.1. That counselling has not been very helpful

63.2. I still feel really anxious – I have been crying all morning – coming back here brings back all the same feelings – the thought of work makes me feel … I didn't ask for this to happen."

63.3. "will wait to see her own GP for further advice"

63.4. "She is often all consumed with worry and stress. She does not sleep well. She has been up since 1 am today at the thought of having to come here. She started yoga to help with pain and stress."

63.5. PF "we need to find the best way forward – Any steps that we can take to get you back to work sooner rather than later."

63.6. BS [the claimant] states that she is not ready to come back to work and cannot give anymore at this stage. She will await Union stance but cannot see herself coming back now.

63.7. In response to a suggestion from PF that she work from home half a day at a time she said "not at this time" "maybe in 1 to 2 months but not at this stage."

63.8. Comments on OH report "Cannot accept his proposal that BS return to work, even on a phased return. Unhappy with the report content and proposal."

64. Although the claimant clearly did say that she may be able to consider working from home in 1 to 2 months our view, taking into account her oral evidence about the meeting, is that overall, she came across on 27 April 2017 as not being ready to consider a return to work at that time. Orally, her evidence was that she didn't know if she would have been ready to return in May or June 2017. The comment in the notes probably meant that in a further one or two months she might be able to discuss the possibility of home

working but she told us several times that she said to PF that she was not ready to come back to work. That was what he understood her to say.

65. The notes record him saying "We need to find the best way forward – Any steps that we can take to get you back to work sooner rather than later." This is an unexceptional way to put it. We also note that (page 174) PF said he would take advice from HR and that,

    65.1. BS should receive a letter in about 5 days.

    65.2. On enquiry by the companion PF confirmed that this (presumably the letter) would not be an Attendance Improvement Notice and

    65.3. "The purpose of this meeting is to consider sustainability of working and whether there are any viable alternatives. If there are no alternatives the HR will advise on the dismissal process."

66. PF's opening to the meeting set out that there were a number of options which needed to be considered which were designed to get the claimant back to work. The respondent makes the point that the claimant's account has developed through her claim form and statement to the point where her evidence was that she was pressured for a specific date (that not having been part of her case previously) and told she could expect a dismissal letter within 5 days of the meeting. Neither of those statements were made to her by PF. The notes of the meeting show that he was following the policy. The claimant's own evidence referred to him setting out options with a view to her returning to work. The respondent has to warn the employee that dismissal is a potential outcome. That is included in the invite (page 169) and that to the first meeting (page 131).

67. Our view is that PF did not say anything inappropriate in the way he encouraged the claimant to consider ways of returning to work and the options available when she felt able to. We reject the allegation that PF said "that's what happens when you are dismissed". Such a phrase is inconsistent with his generally supportive approach within the terms of the policy. Anything he said was probably consistent with warning the claimant about possible outcomes. We find that PF genuinely and reasonably came away with the view that the claimant was not able to consider a return to work at all and doubted the OH report's opinion that 2 to 3 months of treatment would enable her to consider a return to work. These were the bases of his decision that the case should go a decision maker to consider whether the claimant's sickness absence could continue to be supported of whether redeployment or dismissal was appropriate (page 177 is the outcome letter).

68. The claimant attempted to resign by a letter dated 3 May 2018 which was inadvertently sent to an incorrect email address. It is addressed to PF (page 175). He, in ignorance of that letter, sent the outcome letter from the 2nd LTAR meeting (p.177) which told the claimant that her case was being referred to a

decision maker (see above). This caused the claimant to telephone PF and that was when she found out that he had not had the letter of 3 May.

69. It is common ground that in that telephone call of 11 May 2018 PF asked the claimant to reconsider. Her words were that he said "are you sure it's what you want to do". In oral evidence she said that she could not recall anything else about the conversation on 11 May 2018. When asked about PF's evidence that she had told him that she had spoken with her family, she was unable to recall whether he said that but told us that she had discussed the decision with her husband and daughter. PF's oral evidence was that he had been shocked by the claimant telling him that she had resigned and that he had gone beyond asking her whether she was sure. He told her that she should go back and discuss it again with her family and reconsider and if she was still in the same mind to send her resignation to him in writing.

70. The resignation letter was resent to the correct email address on 11 May 2017 at 19.45. PF acknowledged receipt on 14 May 2018 which was the following Monday. The resignation letter was therefore not sent immediately after the telephone call.

71. In the resignation letter the claimant makes a number of complaints about her treatment. She accepted that she does not include a complaint that she has been forced to resign or that she has been told that she will be dismissed or is resigning in expectation of a dismissal letter. Her complaints include:

    71.1. That she has been the victim of a workplace injury which was not her fault;

    71.2. That, following the incident, there has been an overwhelming change to her life which means that she is unable to work because of the physical and psychological impact of the incident;

    71.3. She was not protected at work and is anxious about returning to work as a prosecutor in court in the absence of suitable protection;

    71.4. She is unhappy about the opinion of the OH physician which she regards as being at odds with her GP;

    71.5. She refers to her excellent career after 29 years with the CPS having been unfairly halted through no fault of her own.

72. The explanation which she gives for her decision is "due to the factors above and subsequent actions I feel that I am compelled to resign and will be seeking legal advice in due course."

73. The letter is lucid and logical. Although the claimant has vividly described to us that she felt in a state of turmoil when writing it, in our view there is nothing on its face that would cause a reasonable reader to be concerned that the decision to resign was not one that she was competent to make. She accepted in cross-examination that she was competent to make the decision

and there is nothing in the expert evidence at page 390A to support an argument that she lacked mental capacity.

74. She doesn't criticise PF in that letter or say what "subsequent actions" are. She clearly expected more from the respondent than the bare acknowledgment of receipt because the following day, 12 May 2018 she wrote to EB. Again, none of the complaints are a criticism of PF. She includes her letter of resignation and in this email (p.197) she does not suggest that she did not mean to resign. That is also true of the next letter at p.216. In her 12 May 2018 mail to EB she again refers to being the victim of crime and being left with PTSD saying "I ponder on the thought on the protection and support I should have received whilst executing my job." She refers to being ignored "Every action has a consequence, and I feel I am dealing with the consequences whilst the action was ignored – for me this is unacceptable, hence I did feel coerced to make the decision to resign."

75. Our conclusion is that at the point of writing this letter the claimant's explanation for her decision was that she feels compelled to resign rather than continue working for an employer who has failed to protect her and ignored the consequence to her of a work place injury. She doesn't use the words "trust and confidence" but she expresses the sentiment that she doesn't trust them to protect her.

76. It is only when she writes on 31 May 2018 (page 216) to PS and MS that she says,

> "Following from the point of the incident to now, I have had no support from HR, nor my union – despite several attempts to find a solution. I have not been told what my options are, and following my last OH meeting I was then "threatened" with a possible action of dismissal. The fact of the matter is, that at the point of being told this, I am suffering from PTSD and anxiety and it was these feelings that drove me to submit my resignation letter. The resignation letter was a result of stress and anxiety towards this situation, something I felt I was driven to under these circumstances."

77. Although the claimant told us in evidence that she resigned because she was of the view that she had to do so to avoid leaving by dismissal, following what she had been told by PF on 27 April 2017, it took from 3 May to 31 May 2018 and 4 separate communications before the claimant mentioned that as a reason for resignation. The question for us is at the time she actually resigned on 11 May what were the reasons for her action? We accept that the claimant's fear that she would be dismissed by a decision maker was an effective cause of her decision to resign but there were a number of effective causes set out in the letters as we have found above (para.71 above). We think that everything set out in all of those letters was operating on her mind.

78. We do not think that the claimant resigned because she had had the LTAR 2nd at Hendon Magistrates court. There is no evidence that she took the fact

that the meeting had been at Hendon into account when deciding to resign at all. She was not directly critical of PF immediately after her resignation and on 2 June 2018 wrote to Patrick Harwood (p.224) defending PF and saying "Phil Fernandez has been the only person who has supported me throughout my sick leave and has been a commendable line manager and I have no issues with him."

79. This escalation of letters of concern through the hierarchy led to Patrick Harwood being asked to investigate. The original letter dated 3 May (resent on 11 May) seems to us to have been a letter of resignation and not to seek any particular outcome. The final letter of 31 May 2018 includes a statement that the claimant will be submitting a grievance in due course. One the one hand the content of the 12 May and 31 May letters do set out a series of complaints about the way the claimant says she was treated at work. On the other the 31 May letter states that a grievance will follow which tends to suggest that the writer does not regard that letter as a grievance itself.

80. Mr Harwood's email of 1 June (page.221B) referred to the claimant's email of 31 May 2018 and was therefore in response to all of her complaints. He did not speak to PF or the claimant but did a paper investigation. His conclusions were that the claimant had been the victim of an extremely harrowing incident but that whatever safeguards are put in place that would not necessarily cover all eventualities – effectively saying that the respondent cannot guarantee the safety of its employees who are court based. He set out his understanding of the support provided to the claimant during her absence and argued that the respondent had provided all necessary support. In the penultimate paragraph he said words to the effect that his view is that her resignation was premature.

81. This email crossed with one from the claimant sent 10 minutes earlier (page 221A). In her statement she says (paragraph 46) that by this email she withdrew her resignation and stated that it had been submitted under duress and haste as a result of her PTSD. In the email she also says that she reacted upon "a potential dismissal as stated in the most recent OH letter" which presumably she meant the outcome letter from the second LTAR meeting. She states "potential" dismissal which is consistent with what she wrote to PS and MS the previous day (page.216 see para.78 above) and that is not consistent with her oral evidence that she had been told to expect a dismissal letter and felt compelled to resign before such a letter could be sent.

82. Absent from the witness statement account is the claimant's oral evidence that prior to sending her letter withdrawing her resignation she had had advice from the TU to the effect that there was only one OH report; that (if she was reinstated) there was the prospect of another OH report before it would go to a decision maker and that the case might involve a recommendation for Ill Health Retirement. This seems to us to explain the two alternatives in the final paragraph of the email seeking to withdraw her resignation where the claimant says (page 221A)

"I would request that a meeting should be arranged with yourself, in the presence of a union member, in order to ascertain the options available (either a plan to return to work or consideration of financial recompense)".

83. It seems to us that the trade union representative had explained to the claimant what the procedure would be prior to a meeting with the decision maker and that ill health retirement might be considered although all this was conditional upon the claimant being reinstated.

84. The decision about whether or not to accept the withdrawal of resignation or reinstate was made by Keith Milburn. The claimant resigned with immediate effect on 11 May and that was the effective date of termination as was accepted by and on behalf of her. Therefore, her withdrawal of resignation came 3 weeks after the end of her employment. Technically, she was seeking reinstatement. The Resignation and Termination Policy (page 344 @ 345) states (para 1.5) that staff have no right to withdraw notice although, "in exceptional circumstances, the ABM/HRA and HRBP may look sympathetically on such a request."

85. Mr Milburn's evidence was that at the time he understood that paragraph only to apply to those who resigned on notice and sought to withdraw that resignation prior to the termination of employment. He gave clear evidence that he believed that he had the power to agree to reinstate the claimant. His oral evidence to us was that he now thought that the paragraph was of more general application. He gave the example of a resignation tendered in the heat of the moment as being one which the service might agree to reinstate. At the time (according to his witness statement para 13) he was applying para 7.14.3 (page 353B) which states that "unless specified at the date of resignation, there is no entitlement of reemployment or reinstatement".

86. His decision not to reinstate was communicated by email of 8 June (page 237- 238). This email does read as though he simply applied the policy that, as someone who has resigned, the claimant needs to reapply. There is no sense in that email that he has applied his judgment to the decision. However, we accept that as a matter of fact he did applied his mind to the decision and carried out the mental processes which he describes in paragraph 14 to 16 of his statement. He took into account the factors set out in in Mr Harwoods email (page 222) which included that the claimant alleged that she was not in a fit state of mind when she made the decision to resign and

"reasonable alternative working arrangements were offered to her by her line manager, which she has clearly declined – in which case why would we accept her withdrawal, only to potentially be forced into a situation where we would need to consider dismissal?"

87. It was suggested to Mr Milburn that he had treated the claimant less favourably than he would have treated someone who had resigned in haste, for example, when angry. However, we do not think that his use of that example can provide useful evidence from which to judge how he would have treated a suitable non-disabled comparator.

Conclusions on the issues

88. We conclude that the claimant was not coerced into resigning. The highest that the claimant's case on this can reasonably be put is that fear that she might be dismissed was one of the reasons for her resignation. Our findings are that she was told that there were a number of options to be considered with a view to getting the claimant back to work and if there were no alternatives then HR would advise on dismissal which was a potential outcome. The letters of invitation make clear that dismissal was only a potential outcome and the claimant's own correspondence (see paragraph 76 and 81) shows that this was understood by her to be the case at the time – even if she anticipated that it was a likely outcome. This is not sufficient for a finding that it was effectively Mr Fernandez, on behalf of the respondent, who terminated the employment. As we have found, his encouragement to the claimant to consider ways of returning to work was not inappropriate (see para.67 above).

89. Consideration of the constructive dismissal claim requires us first to consider the alleged breaches of the duty to make reasonable adjustments (see issue at para.9.a. above).

<u>Breach of the duty to make reasonable adjustments/Indirect disability discrimination</u>

90. We deal first with issue 10.a. & 14 above: the requirement that the claimant attend meetings at Hendon Magistrates Court. Although the AMP envisages flexibility about where the LTAR meetings take place, in respect of the meeting of 27 April 2017 the respondent arranged for it to take place at Hendon, although alternatives were discussed. We are satisfied that this was a PCP of the respondent which they potentially could have applied to others.

91. Our finding is that the requirement that she attend the second LTAR meeting at Hendon caused the claimant to become upset and tearful. She was anxious in anticipation of the meeting and said so during it. This is not the heights of the language alleged by the claimant who says that she suffered mental anguish and trauma. She was not comfortable in the meeting. "Substantial" in the context of substantial disadvantage (within s.20(3) EQA) means more than minor or trivial (s.212(1) EQA). On that basis we accept that she suffered substantial disadvantage although not precisely the disadvantage alleged.

92. The respondent had constructive knowledge of the substantial disadvantage. Mr Fernandez was put on enquiry by the claimant's request to have the meeting in the coffee shop over the road, the fact of her diagnosis of PTSD and the information contained in the OH report of the likelihood that the claimant would suffer significant emotional upset were she to have to attend a meeting at Hendon magistrates court.

93. Did the respondent take all reasonable steps to avoid the disadvantage? It is alleged that they should have ensured that the formal work-related meeting should be held at the suitable venue. We find that by not making reasonable enquiries PF was unaware of the degree of upset it caused the claimant to have a meeting in Hendon and he himself said that had he known he would have made alternative arrangements. It is clear that the meeting could reasonably have been held elsewhere. This allegation of a breach of the duty to make reasonable adjustments succeeds.

94. However, the correspondence after the claimant's resignation makes clear that there were a number of other causes of her anxiety and upset than simply having met in Hendon magistrates which is never mentioned in the correspondence. Our conclusion therefore is that had the meeting taken place elsewhere, the claimant would still have been suffering from the effects of her condition and the same information would have been provided to her. The expert's report (paragraph 66) states that it is clinically plausible that the claimant was not in an optimal state of mind when she resigned but does not provide evidence that any particular incident aggravated the symptoms of her PTSD.

95. We do not now need to make a finding about what effect if any it made on the claimant's state of mind to be in Hendon but our provisional thoughts are that it didn't impact on how she received Mr Fernandez's message. She did not seek to adjourn or halt the meeting and stayed talking about unrelated matters after the meeting.

96. The same factual allegation is raised in the alternative as an indirect discrimination claim (issue 10.a). We are not persuaded that the claimant has shown that this PCP would put other disabled people with PTSD at a particular disadvantage when compared with persons who do not have that characteristic and therefore this allegations fails as an indirect discrimination claim.

97. As to issue 10.b. (and 14) the requirement that the claimant was expected to commence a phased return within six months: this allegation was put on the basis that Mr Fernandez was putting pressure on the claimant to commit to a return to work within a particular period against medical advice. This is inconsistent with our findings of fact. The claimant was not required to effect a phased return within six months of the start of her absence. Mr Fernandez was not requiring the claimant to go against medical advice – which was that she would be fit to return to work following 2 to 3 months of treatment

(paragraph 54 above). Therefore, to encourage the claimant to think positively about the OH advice and the possibility of returning to work within the timescale the physician envisaged was unexceptional.

98. Alternatively, it would not have been a reasonable adjustment for PF not to refer the claimant to a decision maker (see issue 16.b. above). There would have been a range of options open to such a decision maker at that stage. Indeed, within these proceedings the claimant has not criticized the decision of PF to refer to a decision maker on about 27 April 2018. There was no criticism of the fact of him holding the LTAR meetings. The trigger points in the policy determine when the LTAR meetings should take place and, at the instigation of PF, the first one was postponed in order to enable the claimant to have the relevant information about her prognosis. The reasonable adjustments claim is based upon the allegation that the claimant was disadvantaged by a requirement that she commence a phased return. We do not agree that postponement of the LTAS meetings (issue 16.b.) would would avoid any disadvantage by an alleged imposition of a return to work.

99. Issue 10.c. is the practice of accepting resignations regardless of the content of the resignation letter. As a matter of contract law, once the resignation has been communicated to the employer the employment is at an end. It is not for the employer to choose whether or not to accept the resignation. Therefore, this alleged PCP is not proven: the respondent could not adopt such a PCP or choose to not accept resignations. Both the allegation of breach of a duty to make reasonable adjustments and the indirect discrimination claim based upon that alleged PCP fail as a result. Nevertheless, it is worth recording that we do not find that the resignation was "obviously […] written whilst of unsound mind" so even were the premise of the claim valid, we do not accept that the substantial disadvantage alleged was suffered by the claimant. Her employer was terminated because she resigned voluntarily.

100. Furthermore, to the extent that this alleged PCP is relied upon as leading to a breach of the duty to make reasonable adjustments (issue 16.c.) where the alleged substantial disadvantage could have been alleviated by contacting resigning employees to ensure that they mean and intend to resign, we find that PF he did all that could reasonably have been expected to do, once he was aware of the resignation. He didn't contact the claimant but did encourage her to reconsider when she rang him. He also urged her to talk again to her family. The implication of the adjustment contended for is that the respondent should do this with every resigning employee and that would seem to be an onerous and unnecessary obligation.

101. Issue 10.d.: The practice of not accepting requests to withdraw resignations. On the face of it the respondent has a policy by which the circumstances in which resignations can be withdrawn are limited to exceptional circumstances. There is confusion about whether that policy was applied to the claimant. As a matter of fact, KM did exercise judgment about whether or

not to reinstate the claimant. Ignoring the specific wording of this PCP and looking at the issue as it has been aired before us there was a general policy that employees should not be reinstated or reengaged as of right but the fact that KM considered the case shows that it is a policy that permits of exception. Potentially the respondent applied a PCP to the claimant of not reinstating employees whose employment has been terminated by resignation as of right. We think it right that we should not take the wording of the PCP too literally in those circumstances.

102. Did this PCP put the claimant to the substantial disadvantage of loss of employment despite the resignation obviously being written whilst of unsound mind? As we have set out above (para.99) we do not find that the claimant's letter of resignation was obviously written while of unsound mind (see our findings set out at para.73 above). The claimant had the opportunity not to resign when she realised that Mr Fernandez had not received her first email. She repeated her decision to resign. She had a number of reasons to do so (see paragraph 71 above) and we accept that she was, in part, upset at the perceived lack of support by the respondent following the incident. Although a fear that she would be dismissed was part of her reasons for resignation that does not mean that it was obviously illogical for her to take that step.

103. In our view there was a logical way in which the Claimant went about what she decided to do. She may have decided that she had made a mistake but there were many reasons why she resigned and some of them were perfectly sensible: fear of not being protected in the courtroom; feeling she'd had no support; thinking that she would not be able to do her job in the courtroom in the future. We are not persuaded that the claimant has been disadvantaged in any way in comparison to a non-disabled person who had also resigned and regretted that decision.

104. Alternatively, the decision not to reinstate the claimant would not have been a reasonable adjustment given that she did not put her application for reinstatement unequivocally on the basis that she envisaged returning to work within a reasonable time. She expressed herself as interested in being reinstated potentially to be able to apply for ill health retirement (see paragraph 82 and 83 above).

105. Insofar as this allegation is put as one of indirect discrimination, we are not persuaded that people suffering from PTSD would be put to the particular disadvantage of loss of employment due to their letter of resignation being written whilst of unsound mind. There is no evidence before us from which we could make such an inference which would be speculative.

106. Issue 10.e: alleged practice of informing employees that their absence may result in dismissal. There was a practice of telling employees at an appropriate stage in the process that their employment was at risk. The claimant does appear to us to have place more emphasis on the risk of dismissal than was intended by PF. However, he did not tell her that it was

an inevitable outcome: her oral evidence that that was she had thought is inconsistent with contemporaneous documents. Although it is possible that the claimant, as a person with mental health condition might be likely to fix on the risk of dismissal and not hear the nuance of the message such a possibility is not confined to people with mental health issues. We are therefore not persuaded that the claimant suffered a substantial disadvantage compared with non-disabled people. Even so, our view is that it is important that an appropriately worded warning should be given at the stage that had been reached with the claimant in the AMP and we do not think that there was a failure to take all reasonable steps in this case.
Taking the letters and the meeting as a whole the respondent's actions did provide that appropriate warning.

107. Consequently, we find for the reasons set out above that the claims of indirect disability discrimination fail and that the only claim of breach of the duty to make reasonable adjustments which succeeds is that based upon the requirement that the second LTAR meeting should take place at Hendon Magistrates Court.

Constructive dismissal

108. Of the matters relied upon as amounting to a fundamental breach of contract (issue 9.a. to c. above):
    a. We have found one breach of a duty to make reasonable adjustments namely by holding the second LTAR meeting at Hendon Magistrates Court;
    b. Our findings of fact about what happened on 27 April 2018 meant that the other alleged breaches of contract did not happen as alleged. We have found that Mr Fernandez he did not do anything which made the claimant believe that she would relatively imminently be dismissed (see our findings at paragraphs 66 to 68 above). We have specifically rejected the allegation that Mr Fernandez said "that's what happens when you are dismissed". Essentially, our finding is that he explained the policy in appropriate terms.

109. Did the respondent fundamentally breach her contract by the one breach of the duty to make reasonable adjustments which we have found proven? The claimant did not speak up and make plain that she couldn't bear the thought of a meeting at Hendon (see paragraph 60 above). The venue was not insisted on in the heat of her expressed objection. It made her uncomfortable. The actions of the respondent in this respect are not nearly serious enough to amount to a repudiatory breach of the employment contract. It was a single incident. It was not repeated. The claimant carried on with the meeting. So, although we accept that she was upset to be there, the fact that the meeting was held in Hendon was nothing likely as serious in its impact as she describes. We do not think that holding the meeting at Hendon was a repudiatory breach of contract.

110. Furthermore, the claimant did not resign as a result of the meeting being held at Hendon Magistrates Court (see paragraph 78 above). Therefore, the constructive dismissal claim fails because the act of the respondent did not amount to a repudiatory breach and, in the alternative, it played no part in the claimant's decision to resign.

111. In those circumstances, we do not need to go on to make findings on issues 9.e. to h. above.

Direct discrimination

112. The allegation was that the respondent had refused to permit the claimant to withdraw her resignation and by doing so treated her less favourably than it would have treated a non-disabled person in materially identical circumstances on grounds of her disabilities. When considering how a suitable comparator would have been treated, s.23(1) EQA provides that there must be no material difference between the circumstances relating to the two cases. The claimant's counsel argued that the hypothetical comparator should not be drawn too tightly and we agree that they should not be drawn so tightly that it defeats the purpose of the legislation. However, the cases must be sufficiently similar that all the circumstances which are relevant to the way in which the claimant was treated and the hypothetical comparator would have been treated must be the same or not materially different: Shamoon v Chief Constable of Ulster [2003] I.R.L.R. 285 HL.

113. In our view, the following circumstances are relevant to the way the claimant was treated.

    a. Her resignation was not in the heat of the moment: she sought to resign first by mail 6 days after the meeting which she seeks to blame for the state of mind which led to her resignation. She had the opportunity to change her mind once she found out that the resignation had not been received. By then she had had the outcome letter which should have cleared up any misconceptions lingering from the second LTAR meeting. She discussed the decision with her family and repeated her resignation. Over the next 3 weeks she referred to her resignation twice more and it was only after trade union advice that she reconsidered.
    b. She was not seeking to withdraw her resignation explicitly and unequivocally on the basis that she would be able to return to work within a reasonable period.
    c. She had been absent from work for a number of months and the medical advice suggested that she was likely to remain unfit to work for some time to come.

114. There is no evidence from which to infer that KM would have made any other decision in the case of a person who was not disabled with PTSD or

with spondylothesis but who had similar levels of absence, was not projected to be fit to return to work and had written similar letters following an apparently considered decision to resign. The direct discrimination claim is dismissed.

Discrimination arising from disability

115. There are two allegation of discrimination arising from disability contrary to s.15 EQA: (a) pressuring the claimant to return to work early and (b) refusing to allow her to withdraw her resignation.

116. Our findings are that Mr Fernandez did not pressure the claimant to return to work early (see paragraph 68). He explored possibilities for her to return to work. The allegation was not put on the basis that it was unfavourable treatment to refer the matter to a decision maker. Therefor the allegation under s.15 EQA of pressuring the claimant to return to work early is not made out because the claimant has not proved that the conduct alleged against the respondent happened.

117. We accept that one of the reasons why KM decided not to reinstate the claimant was the consideration that the respondent might be accepting the withdrawal of resignation "only to potentially be forced into a situation where we would need to consider dismissal" and that "reasonable alternative working arrangements were offered to [the claimant] by her line manager, which she has clearly declined". Setting aside whether the claimant actually declined alternatives, Mr Fernandez's reasonable view was that the claimant had refused to engage with the alternative ways of working – even at some point in the future.

118. The respondent argues that this argument does not amount to ""C's refusal to return to work early" or "her absences" (as the alleged 'something arising' is put in the issues at 22) because it is a consideration of possible future action under the AMP. It is argued by the respondent that, by this, the claimant has sought to expand her case beyond what was strictly pleaded.

119. We are mindful that the respondent should be able to know the case that they have to meet but in our view there is little or no meaningful difference between "refusing reasonable alternative working arrangements" (which is how the respondent views it) and "refusing to return to return to work early" (which is how the claimant views it). Within the factual context of the present case, the two parties are talking about the same thing. Our description of it would be closer to that of the respondent because the claimant was not asked to return to work *early*. Mr Fernandez was seeking to explore future working arrangements in line with OH recommendations.

120. We have concluded that part of the reason for KM's decision was the claimant's refusal to accept alternative working arrangements something which arose in consequence of the claimant's disability because it was due

to her being unfit for work through PTSD that she felt unable to contemplate a return to work for the respondent during her discussions with PF.

121. We therefore turn to whether the decision was a proportionate means of achieving a legitimate aim. The aim relied on was 24.b.

    a. A fair and consistent application of the respondent's resignation and termination policy;

    b. Promotion of business efficacy;

    c. Promotion of effective workforce planning;

    d. To ensure certainty regarding employees' service for the respondent, the employing department and employees.

122. We accept that those were KM's aims and they are legitimate aims. We notes the terms of the AMP policy where it sets out its objectives. We therefore consider the aspects relevant to whether the decision not to reinstate the claimant was reasonably necessary. It was certainly appropriate to achieve the aims of effective workforce planning and certainty. We are not persuaded that we have heard evidence from which we could infer that the decision not to reinstate would promote business efficacy.

123. A number of circumstances are relevant to whether the decision was *reasonably* necessary.

    124.1. The second LTAR was not held early (contrary to para.11 of the C's skeleton argument, which appears to be based upon a misreading of the OH advice. The claimant's counsel (paragraph 12 & 13) suggest that the KM decision was based on inaccurate representations took no account of the prematurity of LTAR and the impact on C as a person with PTSD of the process. This is based upon a misreading of the OH report. It did not envisage a particular timescale for return to work. The 2nd LTAR meeting was held at the time set by the policy.

    124.2. Mr Fernandez had judged that C was not likely to return to work within a reasonable timescale. This judgment was based, in part, upon her view that the OH recommendation for treatment was unacceptable. PF was concerned that this meant that there was no prospect within a reasonable timescale for treatment starting. This was a reasonable judgment to make.

    124.3. It is not clear that a decision maker would have decided to dismiss; however, from KM's perspective the judgment that the claimant had declined constructive attempts to discuss alternatives and when a limited amount of work might be possible was a reasonable one.

124.4. The claimant's application to withdraw her resignation did include the alternative of seeking financial compensation which sent a message that even at the time of the application, the claimant did not wholly commit to returning to work.

124. In all the circumstances, the decision not to reinstate was justified. Consequently, the s.15 EQA claim based upon the decision not to reinstate fails and is dismissed.

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Employment Judge George

Date: …28 February 2020 ……..

Sent to the parties on: 10/03/2020

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For the Tribunal Office