EMPLOYMENT TRIBUNALS

Claimant: **Ms S Besirevic**

Respondent: **Birmingham City Council**

Heard at: **Midlands West** **On:** **2 3 4 (1/2 day) 5 6 9 11 16 17 December 2019 and 18 December 2019 and 3 January 2020 (in Chambers)**

Before: **Employment Judge Woffenden**
Members: **Mrs DP Hill**
Mr J Sharma

Representation
Claimant: Mr A Macmillan of Counsel
Respondent: Ms S Garner of Counsel

RESERVED LIABILITY JUDGMENT

1 The claimant was not unfairly dismissed.

2 The claimant's claim of direct disability discrimination fails and is dismissed.

3 The claimant's claim of discrimination arising from disability fails and is dismissed.

4 The claimant's claim that the respondent has failed to comply with a duty to make reasonable adjustments fails and is dismissed.

REASONS

Introduction

1 The claimant was employed by the respondent (a local authority) as a case management clerk from 31 May 2013 .By a letter of 11 January 2018 she resigned .By a claim form presented on 7 February 2018, following a period of

early conciliation from 27 October 2017 to 11 December 2017, the claimant brought complaints of disability discrimination and constructive unfair dismissal.

2 Following an open preliminary hearing before Employment Judge Coughlin on 22 June 2019 a number of allegations made by the claimant as set out in a Scott Schedule were struck out.

3 Mr. Macmillan confirmed to us during the hearing that of the remaining allegations in the Scott Schedule some were now relied on by way of background only .In relation to the claim of constructive unfair dismissal he said the claimant relied on the allegations in the Scott Schedule which she alleged amounted to acts of unlawful disability discrimination (whether or not they were found to be discriminatory) and that he had added to the Scott Schedule the respondent failing to take into consideration the claimant's email of 13 November 2017 concerning factual inaccuracies in an Occupational Health ('OH') referral of 8 November 2017, as became apparent in the subsequent report she received (which matters were not alleged to be discriminatory). Ms. Garner confirmed she did not agree that those additions had been pleaded by the claimant. On 2 December 2019 the parties prepared an amended Scott Schedule ('The Amended Scott Schedule').

4 The respondent's representatives had written to the tribunal on 14 September 2018 that, '*based on the information provided in the GP letter the respondent concedes the issue of disability as the claimant suffered from shoulder bursitis from October 2014'*. However, the claimant's claim form had referred to shoulder bursitis diagnosed in October 2014 and '*neck back and head pains which were sustained following a climbing accident on 8 August 2015*.'At a case management hearing on 14 January 2019 the respondent's counsel (then Mr. Ahmed) could not confirm what the physical impairment was by virtue of which the respondent had conceded disability or why the concession had been made with effect from the date of diagnosis of bursitis by the claimant's GP. The respondent was given until 21 January 2019 to explain from what date and why it had made the concession that the claimant was a disabled person. The respondent wrote to the tribunal conceding the claimant was a disabled person from 3 December 2015 until or after her resignation on 11 January 2018 because of the condition of a bursal sided tear of a supraspinatus, on her left shoulder.

5 During discussion of the draft list of issues (which included the issue of disability) Ms. Garner confirmed the respondent conceded disability from December 2015 and in respect of the impairments of bursitis to left shoulder and complications following an injury to the claimant's thoracic spine. Mr. Macmillan restated the claimant's position that she was disabled from October 2014 but said he had to take instructions about the physical impairment(s) relied on. He later confirmed that it was alleged that from October 2014 the claimant was a disabled person because she had bursitis and from August 2015, she was a disabled person because she had bursitis **and** spinal complications. We also discussed and agreed the reasonable adjustments required by the claimant who confirmed that she would need breaks every two hours.

Claims and Issues

6 We decided that the hearing should address liability only. An amended list of issues for determination by the tribunal was prepared and agreed by the parties on 12 December 2019 as follows:

Time Limits/Limitation Issues

6.1 Were all of the Claimant's complaints presented within the time limit set out in sections 123(1) (a) of the Equality Act 2010('EqA')?

a. If not:
    i. Was there an act or conduct extending over a period (s.123 (3) (a) EqA)? or
    i. If and to the extent that the allegation is that the Respondent failed to do something, was there an act on the part of the Respondent that was inconsistent with that failure; or had a period of time in which the Respondent could reasonably be expected to have dealt with that matter expired?
b. If there was no such act or omission, should time for presentation of the claim be extended on a 'just and equitable basis'?

6.2 The constructive dismissal claim is prima facie in time. The final act of discrimination alleged is 17 August 2017 and, taking into account the provisions of s.140B(3) and s.140B(4) and the fact that the Claimant sought early conciliation on 27 October 2017 and the ACAS certificate was issued on 11 December 2017, time for presentation of the claim expired on 10 January 2018. The claim was presented on 7 February 2018. Which events are on their face therefore out of time, and should they be allowed given the relevant legal tests referred to at (1) above?

Constructive unfair dismissal

6.3 Was the Claimant dismissed, i.e.

6.3.1 Was there a fundamental breach of the contract of employment, and/or did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? In particular, was there conduct accruing prior to the 'last straw' which is pleaded as being the Respondent's OH Management Referral form of 8 November 2017, and which the Claimant wished to clarify includes the lack of response to her 13 November 2017 email to Mr Emmins pointing out factual inaccuracies.

6.3.2 If so, did the claimant affirm the contract of employment before resigning?

6.3.3 If not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be *the* reason for the resignation)?

6.4 The conduct the claimant relies on as breaching the trust and confidence term is the accumulation of those matters which are set out in the Scott Schedule (as amended following the June 19 deposit and strike out orders affecting a number of those allegations). Furthermore, the claimant relies upon the 'last straw' principle, which is the respondent failing to take into consideration the claimant's 13 November 2017 email concerning factual inaccuracies in the Management OH Referral document of 8 November 2017, as became apparent in the 21 November 2017 OH report.

6.5 The respondent relies on the defence that if the claimant was dismissed it was a fair dismissal for reason of capability or for some other substantial reason.

Therefore, what was the principal reason for dismissal and was it a potentially fair one in accordance with ss98 (1) and (2) of ERA 1996; and, if so, was the dismissal fair or unfair in accordance with ERA s98(4) and, in particular, did the respondent in all respects act within the 'range of reasonable responses'.

Disability

6.6 Was the Claimant a disabled person in accordance with the Equality Act 2010 at all relevant times (October 2014 to 13 January 2018)? The Respondent concedes that the Claimant had a disability within the meaning of s.6 of the Equality Act 2010, being complications following a suspected thoracic spinal fracture and bursitis, from 4 December 2015.

S13 Direct discrimination

6.7 Has the Respondent subjected the Claimant to the following treatment: those matters set out in the post-strike out Amended Scott Schedule,
at **11 23, 24, 27, 29, 31.**

6.8 Was that 'less favourable treatment', i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated comparators in not materially different circumstances? The Claimant relies on the comparators referred to in the Scott Schedule.

6.9 If so, was this because of the Claimant's disability and/or because of the protected characteristic of disability more generally?

S15 discrimination from something arising in consequence of disability

6.10 Did the following things arise in consequence of the Claimant's disability: those matters set out in the Amended Scott Schedule at **11, 15, 16, 19, 21, 23, 24, and 28?**

6.11 Did the Respondent treat the Claimant unfavourably as follows: as set out in the narrative in the Amended Scott Schedule?

6.12 Did the Respondent treat the Claimant unfavourably in any of those ways because of any of those things?

6.13 Has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

S20&21

6.14 Did the Respondent not know, and could it not reasonably have been expected to know, the Claimant was a disabled person?

6.15 Did the Respondent have the following PCPs: those matters set out in the Amended Scott Schedule and numbered as: **1, 3, 6, 8, 9, 10, 11, 13, 14, 15, 16, 19, 21, 22, 27, 29, 31, and 32?**

6.16 Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in the ways described in the Amended Scott Schedule?

6.17 If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

6.18 If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant but such steps the Claimant alleges should have been taken are set out in the Amended Scott Schedule.

6.19 If so, would it have been reasonable for the Respondent to have taken those steps at any relevant time?

Procedure, documents and evidence heard

7 The tribunal heard evidence from the claimant. The tribunal heard from the following witnesses on behalf of the respondent: Christopher Johnson (a Legal Support Team manager, and the claimant's line manager from June to May 2014 and June 2015 to March 2017);Anthony Farmer (Head of practice management ,and Erin Simpson's and Christopher Johnson's line manager); Stuart Evans (Head of Service); Shuriah Meah (Finance Assistant ,Legal Services); and Erin Simpson (Practice Development Manager ,Quality and Complaints and the claimant's line manager from May 2014 to June 2015).

8 In addition, the respondent asked for leave to rely on a supplementary witness statement of Christopher Johnson (to which the claimant did not object). It had also served a witness statement from John Emmins. He was unable to attend as a witness due to ill health which arose during the hearing due to a neurological problem and resulted in his admission to hospital. The tribunal had already read his statement. There was no indication when he would be able to attend in person. The parties agreed that he could be asked questions in writing. Mr Macmillan drafted and put those questions to him in the presence of Ms Garner and the questions and answers were recorded in writing which we admitted as evidence.

9 There was an agreed bundle of documents of 850 pages. Various additional documents were included by consent during the hearing so that the final number of pages totalled 874.

10 The individual numbered allegations made by the claimant in Amended Scott Schedule are set out in the reasons below in bold.

Fact-findings

11 On 31 May 2013 the claimant commenced employment in the respondent's Legal Services Division as a case management clerk Grade 2 ('CMC'). Her line manager was Christopher Johnson. She was responsible for completing case management duties including scanning photocopying opening and closing cases and other administrative tasks. Under the job description for the post CMCs are required to '*lift and carry files between locations using appropriate manual handling equipment.*'

12 The claimant was keen to progress her career and increase her salary with the respondent. To that end she had no hesitation in challenging her managers if she disagreed with their decisions or what was recorded about her. She was not a tractable employee.

13 Every 4 to 6 weeks Christopher Johnson held 1:1 meetings with each employee he managed which he documented in typed notes. Although they were not verbatim they were contemporaneous documents and we found their contents cogent and persuasive evidence. He also held team meetings every Monday morning for about 30 minutes for which there was no agenda but the rota for that week and points raised by him or employees under any other business would be discussed.

14 The claimant had begun to suffer shoulder pain in December 2013.On 21 January 2014 she was absent from work for one day because a bus door had shut on her. She saw her GP that day. Her GP's letter of 25 September 2018 ('the GP's Letter') written to the claimant (though we were not provided with her email to her GP of 19 September 2018 which generated it) confirmed that during that consultation she had referred to her shoulders for the first time.

15 Christopher Johnson recorded in the note of a return to work interview with the claimant the next day that she had '*injuries to her back*', was still in a bit of pain but would continue to work and was on medication from her GP.

16 On 13 March 2014 the claimant told her team (including Christopher Johnson) in an email that she had cleared the property records collection area shelves of bundles resulting in 42 boxes to go into storage. This was within 6 hours of this (spare capacity) task being given to the team.

17 The respondent had a flexitime scheme in place from October 2004 permitting employees a measure of choice in the times when they started and finished work 'The Flexitime Scheme'). There were set periods, known as "core time", when employees had to be in work. Employees were permitted to carry over credit or debit from one week to the next. However, there were settlement periods lasting 8 weeks and at the end of the settlement period employees had to have no more than 5 hours debit or they could face disciplinary action. Normally a warning would be given with the requirement that the employee make up the deficit during the next settlement period but if the employee continued to have more than 5 hours debit they could be required to work fixed hours for up to 12 months. Employees were informed that if they needed to be absent from work for part of the day for example for a dental appointment normally such arrangements should be made outside core time.

18 On 17 April 2014 the claimant asked Christopher Johnson to be credited 3.5 hours for 2 physiotherapy appointments. He explained he could authorise up to a maximum of 1 hour 30 minutes per session depending on how much 'core time' she was out of the office. He also explained that core hours were between 10.30 and 12.00 and 14.00 and 15.30. She said she was aware of that. Only the second appointment had fallen within core hours.

19 The claimant's requests for flexitime and how they were handled by Christopher Johnson were a source of tension between them and

on 31 May 2014 the claimant sought and secured a three months secondment to the Respondent's criminal team as a team administrator Grade 3. This brought with it an increase in salary. Her line manager was Erin Simpson (Practice Development Manager, Quality and Complaints). Under the job description for the team administrator post there was no requirement to lift and carry files. Prior to commencement of the secondment Erin Simpson told the claimant there was a good chance it would be made permanent. However, the respondent's secondment policy provided that any permanent position still had to be advertised and any secondee would have to apply for the position.

20 The secondment began well and in due course its term was extended. The claimant was very keen to stay on and began to push for confirmation that the position would become permanent.

21 On 11 July 2014 the claimant saw her GP and (according to the GP's Letter) expressed concern about '*chronic*' shoulder pain for which she was receiving physiotherapy. The GP's Letter said there was no mention in her medical records about her shoulder from 21 January 2014 to that date. She then visited the GP again on 14 August 2014 and requested an ultrasound of her shoulder.

22 On 2 September 2014 during a 1:1 meeting with Erin Simpson the claimant asked about her secondment and was told the post she held would become a permanent vacancy when the secondment of the person she was covering for became permanent.

23 On 17 September 2014 the claimant had an ultrasound scan of her shoulders. The report of the scan said if pain persisted in the claimant's left shoulder a guided steroid injection might be beneficial.

24 On 29 September 2014 Christopher Johnson emailed his team (which did not then include the claimant) to say if anyone needed help with lifting any box, they should refer to him.

25 On 2 October 2014 the claimant's GP discussed the ultrasound report with her diagnosed bursitis and administered a steroid injection to her left shoulder.

26 On 17 October 2014 the claimant asked HR to explain the difference between secondment and 'acting up'. It was explained 'acting up' was a short-term arrangement of minimum 4 weeks and maximum 3 months and had to be offered through a competitive basis. Secondment was for longer and could involve a move on the same grade.

27 On 31 October 2014 the claimant told Erin Simpson she had been invited to attend a 6-week Pilates programme to improve her core strength beginning on 5 November and ending on 10 December for an hour a week from 3.15 pm to 4.15 pm. She attended such sessions on 12 19 26 November and 3 and 10 December 2014.

28 On 24 November 2014 Erin Simpson met with the claimant and told her it was not appropriate for her to contact HR direct about her secondment; it was a management decision and although she understood her concerns about her future role she should allow her to deal with the situation.

29 On 25 November 2014 the claimant attended a 1:1 meeting with Erin Simpson to discuss her mid-term Personal Development Review ('PDR') in which the discussion of the previous day was noted .The claimant was told that if the person she was covering for was unsuccessful in her application for a permanent post she would have to return to her substantive post.

30 The claimant was absent from work for 5 working days from 27 November to 3 December 2014 with cold/ flu symptoms.

31 The claimant was given a guided injection in her left shoulder at hospital on 20 December 2014.

32 Under the respondent's Managing Sickness Absence Policy ('SAP') for all absences *'Advice may be sought from OH at any stage that may require a medical opinion, and a referral to OH may be required*.' By week 4 of absence a manager should contact OH for advice.

26 January 2015 -Background only

33 On 26 January 2015 the claimant attended an additional 1:1 meeting with Erin Simpson arranged so Erin Simpson could address some concerns raised with her about the claimant and some concerns of her own. The notes of that meeting record Erin Simpson said there appeared to be a '*dip*' in the claimant's performance and wanted to know of any work-related factors or matters outside work which might impact on this. The specific issues discussed related to the claimant's tardy completion of a seating plan filing problems and use of the office laptop not having booked a day's leave before taking it returning late after swimming at lunchtimes and using an Emergency Call Cascade List to contact a fee earner at home one evening after she had left the office .When prompted about anything causing her concern the claimant mentioned '*the injury to her shoulder* 'and her illness before Christmas. Erin Simpson expressed the view these were unlikely to cause any recent problems because the shoulder injury was the previous January (though she acknowledged there was ongoing pain and discomfort) and the cold/flu was at the end of November. The claimant mentioned that she had had to return a pet which had made her unhappy and Ms Simpson was also aware that she was taking her driving test shortly which might also have caused some anxiety. The claimant asked again about the likelihood of the secondment post becoming permanent. Erin Simpson could not provide an update. The claimant also said she felt she was doing 2 roles and did not feel she got any praise or recognition for the hard work she had done. The notes were uploaded on to the respondent's IKEN System to which the claimant and Erin Simpson had access and were sent to the claimant 2 days after the meeting.

34 On 14 April 2015 Erin Simpson conducted the claimant's full year PDR and she was rated at B. Erin Simpson's comments were '*Senka has a very enthusiastic approach to her work which as (sic) been appreciated by her colleagues in the legal team .She had embraced the challenges in her new role. There have been a couple of things that have not gone so well and Senka has learned from these*.'

35 A 'B' rating indicated that performance was good; an A rating required an employee to show that all targets had been exceeded. There was no difference in any pay award if an A or B score was given. Notwithstanding the claimant took

her PDR rating badly and (only then) took issue with the contents of the notes of the meeting which had taken place on 26 January 2015.

36 On 15 April 2015 the claimant raised a statement of complaint /letter of grievance to Anthony Farmer (Erin Simpson's line manager) in which she complained about her PDR and the contents of the notes of that meeting. She said what came out of the meeting was information that was '*very much one off*', but also some personal information was recorded '*against my will*' and that '*Some of the comments were hurtful," e.g. I complained of feeling pain in my shoulder, however, ES found her reasons to dispute this*.' It had been '*unnecessary*' to record that she had been tearful about the pet. She went on to say: "*This is a highly personal matter and I was not expecting this to be put in our meeting notes. I was having deeply rooted US guided shoulder injections into my shoulder. I was particularly not expecting having to return the cat to my neighbour to end up in my supervision notes*." She said there had been no need to mention her driving test and complained of being forced out of her secondment by Ms Simpson.

37 Anthony Farmer invited her to attend an informal meeting to discuss her grievance. She subsequently complained in a grievance dated 10 July 2015 that '*personal and sensitive information (cats, driving test, pain in my shoulder) was used to record*' the meeting on 26 January 2015. It is clear that the claimant was not concerned (as she now alleges) that the information she had '*disclosed*' to Erin Simpson about her shoulder had been inaccurately or incompletely recorded by her ,instead stating the claimant was suffering from anxiety due to her driving test and the return of the pet, or that Erin Simpson had not referred her to OH; what had concerned her was the inclusion in the notes of what she considered to be personal information. We conclude that the notes made by Erin Simpson had accurately recorded what the claimant told her about her shoulder injury on 26 January 2015. She did not know the claimant had had shoulder injections until she was made aware of the contents of the claimant's complaint /grievance on 16 April 2015**.**

38 On 17 April 2015 the claimant emailed Antony Farmer to ask him not to extend her secondment any further and to inform him she would be returning to her substantive post with effect from 19 May 2015.That decision was accepted by an email from Erin Simpson on 20 April 2015.The claimant went on to explain by email she would now put in her grievance which related to the 1:1 meeting on 26 January 2015 and the PDR-she said she wanted the earlier meeting properly recorded and her version of events [put] next to that of Erin Simpson's. She said she had not been told the purpose of the meeting and given the chance to bring another member of staff but it had been used as '*blips*' during her PDR and she felt forced out of the secondment.

39 The claimant sent Anthony Farmer a statement of personal grievance on 24 April 2015 and by return of email he said he would like to try and resolve the issue informally by a meeting (accompanied by a colleague if she wished) and to consider what she would like to see as a resolution.

Allegation 3 1 May 2015

40. On 1 May 2015 she emailed Anthony Farmer to ask if there was another secondment /grade 2 role she could go to. She said her CMC position involved a lot of '*lifting boxes post etc'* and she had an ongoing problem with her shoulder.

We find the claimant had begun to regret her decision to end her secondment. Mr Farmer replied he was not aware of any secondment opportunities at the moment that would not include lifting and carrying but suggested she email Prakesh Patel about opportunities in Democratic Services. Mr Farmer also told her she should discuss an OH referral for her shoulder with her current or next line manager. Having contacted Prakesh Patel he told her there were no alternative roles in Democratic Services.

41 Antony Farmer and the claimant (accompanied by a colleague) met on 5 May 2015.He subsequently emailed the claimant on 11 May 2015 to confirm he had asked the following actions be taken by Erin Simpson: an OH referral for her shoulder; a copy of her personal statement to be attached to the meeting notes of 26 January 2015 and a discussion with the head of Electoral Services about grade 2 roles there.

42 On 12 May 2015 the claimant emailed Antony Farmer thanking him both for the meeting and the 3 actions he had taken. She confirmed she was happy her complaint be dealt with informally. As far as her secondment was concerned, she said she wanted to remain in the criminal team and undergo mediation with Erin Simpson to improve their future working relationship but if someone else had been found for it then she would return to her substantive post while waiting for other options in other teams. She thanked him for dealing with the complaint '*peacefully*' which was '*very much appreciated*.'

43 On 18 May 2015 Anthony Farmer asked the claimant in an email to stay on in her secondment role for a further month which would offer a chance to evaluate her options and see if anything else was available. He said he hoped this was ok but would understand if she felt she could not do so. That same day she was certified by her GP as unfit for work because of '*multiple joint pains* 'until 26 May 2015.

9 June 2015 Background

44 The claimant returned to work on 22 May 2015 and a return to work interview took place with the claimant and Erin Simpson, On 2 June 2015 Erin Simpson had prepared a draft of a Return to Work Interview form in which she put the reason for absence as '*joint pain and stress'* because the claimant had said she felt stressed when she had originally rung her to report her absence. However, the claimant asked her to remove the reference to stress in the draft form which she did. The reason for absence given on the final version of Return to Work interview form dated 9 June 2015 was '*multiple joint pain'.* It also noted *'Shoulder pain does not impact on her ability to do current role.* That form was signed by the claimant and Erin Simpson.

45 Erin Simpson also prepared a Stress Risk Assessment Form which recorded the claimant had '*on-going pain in shoulder which causes concentration difficulties from time to time.* 'and her unhappiness the secondment was not made permanent, but that she would be returning to her substantive post. However, the claimant said in an email to her the following day that she did not want to sign the form because it recorded that the notes of the 26 January 2015 meeting had resulted in' *breakdown of relationship with manager .Upset that team members did not address issues directly with her*'. She did not feel their relationship had '*irretrievably broken down'* and asked whether Erin Simpson had

considered the option of mediation which she had suggested to Anthony Farmer in her email of 12 May 2015 as an option of staying in the secondment.

46 Erin Simpson emailed the claimant back to say as the secondment would end on 19 June 2015 she had arranged agency cover from 22 June 2015 .The claimant had not mentioned mediation when they had met so she had assumed it was not something the claimant wanted to pursue. She reminded the decision to end the secondment was her choice and at no point during their meeting had she said she had changed her mind; in fact, she said she had felt uncomfortable in the team since the PDR meeting. It is clear that as far as Erin Simpson was concerned there was to be no going back from the claimant's decision to end the secondment.

Allegation 6 12 June 2015

47 On 12 June 2015 the claimant emailed Anthony Farmer saying the OH referral had not yet taken place about her ongoing problems with lifting heavy items due to her shoulder problems which she said '*will make it more difficult for me to perform in my substantive role*.' She said she felt her complaint had not been dealt with yet and asked Anthony Farmer to consider her continuing the secondment role but being managed by someone else if Erin Simpson would not consider mediation with her. On 17 June 2015 Anthony Farmer responded to her by email saying having discussed it with Erin the conclusion reached was the secondment should end on 19 June 2015 and thanked her for her support.

48 On 18 June 2015 Erin Simpson referred the claimant to OH '*Due to on-going pain in her back and shoulder*. 'It was said she was returning to her substantive role on 19 June 2015 in which she '*may be required to lift and carry file from one location to another. There may also be some twisting movement in using scanning equipment*.' That same day Anthony Farmer confirmed in an email to the claimant that the referral had been made and would come back to Erin Simpson, but the recommendations /outcomes would be dealt with by Christopher Johnson. The claimant's response was to say she wanted her complaint to proceed '*to the next stage'*.

49 This irked Mr Farmer. He swiftly sent a bluntly worded email in response saying that there was no next stage. He said she had requested mediation if her role was to continue which it was not due to her conduct capability and performance .He referred her to the respondent's grievance procedure on People Solutions and said '*for the avoidance of doubt -**Erin and I have completed everything we agreed we would**.*
With that very important point in mind, I feel this matter in its current form is closed.'

Allegation 8 9 July 2015

50 The OH referral took place on 9 July 2015.The OH report noted the claimant was at work and had been advised to by her GP to maintain being active and to keep her shoulders and back mobile. It was recorded she had expressed concerns about '*heavy lifting activities at work'* in her role. Having had two injections no further treatment was planned. The restriction adaptations or adjustments required were '*She should avoid heavy lifting, carrying pushing and pulling activities as these activities are likely to exacerbate the pain in her shoulders and delay recovery*.' The '*significant underlying health problem'* was

'*Miss Besirevic has inflammation to bother(sic) shoulder ,but her left shoulder give her the most discomfort and pain, However ,she has full mobility in her shoulders and I would expect that she will eventually recover .Shoulder injuries can notoriously (sic) and take several months to full (sic) recover from.*' It was said the Equality Act 2010 was not likely to apply to the claimant's condition but also that managers have to make a decision based on their knowledge of the case taking into consideration a summary provided of the definition of disability under the Equality Act 2020, thus effectively leaving the issue of disability for the manager to decide. Christopher Johnson received this report.

Allegation 9 10 July 2015

51 The claimant was upset by what she regarded as the aggressive tone of Mr Farmer's response and on 10 July 2015 raised a grievance complaining (among other things) that she had told Anthony Farmer on 1 May 2015 that going back to her substantive role would involve lifting which would exacerbate her shoulder injury and he had said any grade 2 position would involve lifting and that mediation with her manager was refused. She said that she had suggested mediation with Erin Simpson, or if not accepted to be managed by another manager within the office. She concluded her grievance by stating that '*As a result of this grievance I will no longer be bullied and harassed. Due to direct threats from AF on 18th June I will have to ask Human Resources to move me somewhere else within Birmingham City Council*.' She has alleged in allegation 9 that her grievance outlined that she had requested to move department due to her condition and this had been refused and that she had complained about not being offered mediation with her manager and that her grievance was not dealt with. She has also alleged that the respondent proposed to move her to another role but failed to follow the proposal through. However her witness statement simply referred to the submission of the grievance on 10 July 2015 and that she had highlighted the need for (unspecified) adjustments to be made as her role involved heavy lifting but her managers had failed to make reasonable adjustments. We find that in her grievance the claimant did complain about the refusal of her suggestions of mediation /alternative manager but did not outline the refusal of any request to move department due to her condition. Its focus was her complaint about Ms Simpson and the way Mr Farmer had responded to her. That grievance was referred to Mr Evans and in due course after meeting with the claimant and her trade union representative in September and October 2015 he provided an outcome (paragraph 72). By 10 July 2015 the claimant had not made a request to move department which had been refused; she had inquired about the availability of an alternative grade 2 role .In her grievance she indicated a future intention to make such a request but as at 10 July 2015 the respondent had made no proposal to move the claimant to another role nor had it failed to follow such a proposal through.

Allegation10 13 July 2015

52 At a 1:1 meeting with Christopher Johnson on 13 July 2015 he and the claimant discussed the OH report. The note of the meeting records the recommendation that the claimant should '*avoid heavy lifting ,carrying, pushing and pulling* 'was agreed by Christopher Johnson and that he asked her to seek assistance if she faced a task that involved the activities in question. The claimant alleges that this was not practical because 70% to 80 % of the role involved lifting and she would have had to seek assistance most of the time. However, her witness statement provided no evidence about how much of the

role was spent lifting, only that lifting duties were a '*routine*' part of the job and when assistance was required Mr Johnson was often not at his desk or had left early. She did not raise the impracticality of the measure proposed by Christopher Johnson and never asked him for any help with lifting. We have preferred the evidence of Christopher Johnson that in terms of lifting boxes (which would contain four bundles /folders) this made up about 10% of the CMC role, folders /bundles had to be lifted and put into boxes, but this was not heavy lifting, a trolley was available for transporting boxes and the claimant had never told him she was having trouble in lifting folders or bundles or in any scanning duties.

53 On 14 July 2015 the claimant was examined by Professor Grimer (a consultant orthopaedic surgeon) and he prepared a report on her for the purposes of a personal injury claim arising from the bus door incident in late January 2014 ('The Grimer Report').He recorded that by 3 January 2014 her left shoulder pain was causing issues thought to be aggravated by lifting boxes at work. She had described to him pain in her head during the day and pain in both shoulders every day and pain in her lower back and hips every day. His opinion was that her left shoulder symptoms were precipitated by lifting boxes and clearly predated the accident. His examination of her shoulders showed a full range of movements with no evidence of rotator cuff disease. He could find no apparent orthopaedic cause for her symptoms and said it may be there was a bio psychosocial cause for her pains rather than a physical explanation.

54 On 8 August 2015 while climbing with a friend in Swanage her climbing partner fell on the claimant's head. Having been taken to hospital she complained of neck and back pain and was discharged to the care of her GP after X ray. She was off work for two weeks as a result.

Allegation 11 20 August 2015

55 The claimant was due to attend a 1:1 review with Christopher Johnson on 20 August 2015 but was still absent from work. He emailed her noting she would need to reduce her flex debit from 14.24 hours to 5 hours. On 21 August 2015 the claimant returned to work. She told Mr Johnson on 21 August 2015 she had had an accident on a climbing holiday and the statement of fitness for work dated 17 August 2015 said she should refrain from work from 17 August to 24 August 2015 due to a neck injury

56 In September 2015 the respondent replaced its PDR system with MyAppraisal. Under the MyAppraisal system there is no appeal procedure if an employee does not agree with the rating given. If the rating given is '*achieving*' the employee receives an increment in pay. If employees are absent when final ratings are being agreed line managers should complete the appraisal assessment based on conversations which had taken place during the year. If employees are absent for '*a significant part of the year* 'on for reasons which include long term absence or disability related illness the manager '*may use*' the previous year's performance as a guide of predicted performance and award the '*appropriate rating'* but where there is no such rating the manager is advised to base their assessment on the evidence of the employee's performance in the current year.

57 On 7 September 2015 Christopher Johnson conducted a return to work interview with the claimant. Both he and the claimant signed the notes of the

meeting. It was stated her absence was not related to a disability and that she was fit and healthy for a return to work. She was still having pain but needed to keep mobile. The injury might take from 9 to 12 weeks to resolve. She did not want to raise any concerns or for any further action to be taken. She needed to take regular comfort breaks from her desk so she could exercise her neck muscles. She did not raise with Mr. Johnson any concern about his email on the need to reduce her flex debit hours or tell him that it had accrued as a consequence of attendance at medical appointments. Indeed, despite regular meetings with Mr Johnson which followed she did not mention medical appointments as having been the cause of her accrual of debit hours. We accept Christopher Johnson's evidence that he did not laugh at the claimant at this interview as alleged but expressed surprise at the singularity of the incident on 8 August 2015.We find this was misinterpreted by the claimant as indicating amusement.

58 The claimant's absences triggered an Attendance Review Meeting under the respondent's SAP.

Allegation 13 14 September 2015

59 Having met with the claimant and her union representative, Stuart Evans (the Head of Service) wrote to the claimant on 14 September 2015 in an initial response to her grievance. He did not uphold her complaints but said there was a genuine need to find a solution and suggested her line manager be changed if possible and her place of work altered. He discussed with Prakash Patel the possibility of a placement for the claimant in Democratic Services but the gist of their discussion was there was no role available and no possibility of such an appointment being made because the respondent was subject to financial constraints (though Mr. Patel was to keep an eye on it).

Allegation 14 15 September 2015

60 There was an Attendance Review meeting conducted by Christopher Johnson and attended by the claimant and her trade union representative Kevin Harris. She signed the notes of that meeting. As far as reasonable adjustments /support going forward was concerned it was noted that a workstation review would be arranged and that she should not lift anything that she felt was too heavy to lift. After that meeting and on her own initiative the claimant found a chair within the office which she used going forward. We find the claimant did not request an orthopaedic chair at this meeting as she alleged.

Allegation 15 23 September 2015

61 The claimant filled in her own MyAppraisal Performance Wheel under MyAppraisal and under the 12 headings gave herself 8 scores of 10 (the highest score) and 4 scores of 9 (the next highest score).

62 On 2 October 2015 Christopher Johnson sent an email to the team (including the claimant) to say some boxes to be closed were heavier than the usual and if assistance was needed in lifting them, they should ask him to lift them.

63 By 22 October 2015 the claimant's future goals had been set and agreed for the purposes of MyAppraisal. The second goal was '*Improved performance in some Performance wheel Sills (sic) and Atributes* (sic). This would be measured

by an improved agreed rating as at 31 March 2016. Given her high self-assessment, in reality the claimant had left herself precious little scope to improve her performance and achieve this goal.

64 On 23 October 2015 the claimant '*appealed*' that she had not yet received the results of Mr Evans' investigation under stage 1 of the respondent's Grievance Procedure. In fact, stage 1 is the informal resolution of the grievance. If '*informal avenues'* have been exhausted then there is provision for the '*receiving manager*' to agree terms of reference for an investigation under stage 2 (Grievance Investigation) and (when the investigation is concluded and the findings determined) a grievance hearing is arranged (Stage 3).

Allegation 16 12 November 2015

65 The claimant had a 1:1 meeting with Christopher Johnson on 12 November 2015.The notes record that the claimant had received good feedback from colleagues for urgent work submitted when others had left the office which Christopher Johnson thought had worked well because the claimant's preference was to come in late and stay late. It was noted she was still on course to reduce her deficit to under 5 hours by the end of week 8.The claimant has alleged that at this meeting it was recognised she was staying late to make up her debited hours and to achieve Goal 2.The notes of that meeting were signed by the claimant. The claimant's witness statement did not mention this meeting at all or how or why the debit hours had accrued. We find that there was no recognition by Mr Johnson at this meeting that she was staying late to make up her debited hours and to achieve Goal 2; rather he recognised that her preference to come in late and stay late had enabled her to carry out urgent work when others had left and was valued by her colleagues. He merely noted the fact she was reducing her debited hours, not how or why she was doing so.

66 The claimant attended work on 4 December 2015 and gave Mr. Johnson a certificate of fitness for work which certified her as unfit for work for the next two weeks giving the cause as suspected thoracic injury and this was recorded on People Solutions by Christopher Johnson who immediately sent her home.

67 The statement of fitness for work (which certified the claimant as unfit for work from 25 January 2016 to 25 March 2016) said this was because of '*thoracic spine injury-under investigation awaiting physio and MRI results*.' Christopher Johnson referred the claimant (having discussed it with her) to OH. His referral noted that after her return to work after the climbing accident she had undergone a display screen equipment assessment and was '*provided with a special chair and screen arm for her monitor'* and *'excused from lifting boxes which form a normal part of her duties*. 'Her initial two-week absence had been extended to 25 March 2016 and she had attended physiotherapy sessions and was awaiting an MRI scan. He asked for an opinion on whether the claimant's condition was likely to be covered by the Equality Act 2010 and advice on any restrictions adaptations or adjustments.

68 The OH referral appointment was conducted by telephone on 22 February 2016.It was reported the claimant believed she had a life threatening bony injury although the OH opinion was any fractures would be healed given the length of time since the accident in August 2015.No indication could therefore be provided about when she would be fit to return to work but the opinion given was it was not likely that the claimant's condition was covered by the Equality Act 2010.

69 On 2 March 2016 a contact meeting took place at the claimant's home. She was accompanied by her trade union representative. She disagreed with the contents of the OH report. Christopher Johnson asked her if she had a return to work date in mind as the OH report was unable to do so. She said she would return as soon as she felt able and was self-funding physiotherapy sessions to show her willingness to return. She asked for a review of her chair as a support to help her return to work. Her union representative told her to contact Access to Work when she had a return date and they would carry out a consultation with her.

Allegation 19 Around 31 March 2016

70 The claimant's My Appraisal period ran from September 2015 to the end of March 2016. Christopher Johnson carried out the claimant's appraisal during her absence on sick leave. On 17 May 2016 the respondent's HR team had advised Christopher Johnson that if an employee was absent for a significant part of the year due to (among other types of absence) long-term or disability related absence a line manager could use the previous year's performance as a guide of predicted performance and award the appropriate rating. Where there was no such information he was advised to base his assessment on the evidence of performance in the current year .If having considered all the factors before completing the appraisal he believed her score should be 'Not Achieved' was for him to decide. He concluded that he could not look at any previous rating because at that time the claimant had been in a completely different role and he should therefore base his rating on what she had achieved in her time in as a CMC before she began her period of long term absence. He assessed her on the time she was in work (September 2015 to December 2015) and decided on reviewing the notes of their 1:1 meetings there was no evidence that she had made progress towards the second goal in the four areas where she had given herself scores of 9 (see paragraph 63 above) and marked her as having '*not achieved'*. There were no adverse financial consequences in that outcome as far as the claimant was concerned because no pay increments were made that year.

71 On 1 April 2016 the claimant attended an OH appointment and a report was prepared. There was a disagreement between the claimant and the OH opinion about when exactly the claimant would be fit to return to work (OH assessed her as being fit to return in two weeks' time) but a phased return was proposed of 2 weeks at 4 hours a day then at 5 hours a day and then 6 hours a day and thereafter fulltime .The claimant was said to undergoing physiotherapy and due to begin Cognitive Behavioural Therapy. The OH opinion was she would be able to return to reliable and consistent attendance in the future and that the claimant's condition was unlikely to be covered by the Equality Act 2010.

72 On 14 April 2016 Stuart Evans wrote to the claimant while she was absent from work to tell her he agreed that the grievance was being dealt with at Stage 1 (informal resolution) and was not upheld. He said he intended to take no further action but if she wanted to take the matter to Stage 2, she was asked to confirm her intention within the next 7 days.

73 On 28 April 2016 a full case hearing ('FCH') was conducted under the SAP before Mr Cooney (Payroll manager -Schools Academies and other External Clients). Such meetings are triggered when *'an employee has been on long term sickness and there is no likelihood or returning to work within a reasonable*

period' and '*absent levels are impacting on service delivery*. 'The claimant was accompanied by her trade union representative. The claimant brought with her some medical reports (Dr Elizabeth Justice a consultant rheumatologist (25 April 2016-('The Justice Report')); Dr T Hayton a consultant neurologist (11 December 2015-'The Hayton Report'); Mr Chitnavis a consultant neurologist (17 February 2016-'The Chitnavis Report'). She said she was aware Christopher Johnson was in the process of getting a chair for her and felt she could return to work if she had a phased return a risk assessment and support with access to a chair. She referred to 12 weeks of bouts of falling asleep no energy and inability to wake up in the mornings. She agreed after discussion to return to work on 18 May 2016 on a phased return. The claimant's statement of fitness for work dated 22 April 2016 had advised her to refrain from work until 18 May 2016 but stated she did not need to be seen again at the end of the period and no comments were made in the relevant box about the benefit of phased return altered hours amended duties or workplace adaptations.

74 The outcome of the FCH was confirmed in writing on 29 April 2016; the claimant's employment would not be terminated but there would be a phased return concluding with full time hours at week 4, there would be a risk assessment of her workstation and a referral to Access to Work with consideration of any recommended actions. She was also issued with an attendance improvement plan ('AIP') with a target of 9.25 days (the respondent's standard target) with 3 monthly progress review meetings. She was given the right of appeal.

75 The Hayton Report had been prepared following a referral by the claimant's GP. He described the claimant's climbing accident and said she got bad headaches and feelings of dizziness and her concentration was poor and she was struggling with sleeping very heavily and sleeping through her alarm clock. He concluded, "*I think this lady probably does have post-concussion syndrome*" and "*I think she has also probably had a soft tissue injury to the neck*". If physiotherapy did not work, she was advised to try a tricyclic antidepressant (nortriptyline or failing that gabapentin). The Chitnavis Report was obtained by the claimant because she was dissatisfied with the treatment she had received to date locally. He referred to pre-existing bursitis in her shoulders but in particular the injury she received in the climbing incident. He concluded that "*What is sure is that she has sustained a significant injury to her thoracic spine, exacerbating what was probably already a pre-existing kyphosis*." She was advised to extend the scope of her activities to test what her limits were and informed that "*often injuries of this nature can take 2 years to settle down and that nothing drastic will happen to her in the interim. She should try and increase her level of physical activity to test that hypothesis*." He suggested that she would benefit from some additional support, perhaps in the way of CBT.

76 The Justice Report was also prepared following a referral by the claimant's GP. As far as her past history was concerned reference was made to "*bilateral shoulder pain aggravated by lifting. Right shoulder ultrasound; mild thickening subacromial sub deltoid bursa, no bursal effusion. Left shoulder: slight fraying supraspinatus at bursal surface, small subacromial sub deltoid bursal effusion, some improvement on subacromial injection*." It said that "*she has a final case hearing with work next week. They are very keen for her to have a phased return to work over a month. I have discussed that I think it will be helpful for her to have Occupational Therapy input, but she should be allowed to have regular changes to her physical tasks in the daytime to prevent over periods of time of excess*

sitting or standing, and if this is possible, it may improve the likely success of her returning to work."

77 On 4 May 2016 the claimant emailed Christopher Johnson to ask him to finalise her DSA assessment and order her a chair and if she could start at 10-10.30 am while on the phased return, though if needed she could do Monday morning post from 8.30 am .She also asked how many hours she would be working during the first month and whether there was a lunch break so she could organise physiotherapy and other appointments around her working hours.
Christopher Johnson replied the same day to say he could not order the chair because he did not know what would suit her needs and told her to contact Health and Safety. He set out his expectations as far as hours were concerned and said although a start time of 10-10.30 was allowed for the first 2 weeks by week 3 it would be better if she began at 9 – 9.30.

Allegation 21 19 May 2016

78 Following her return to work on 19 May 2016 Christopher Johnson conducted a return to work interview with the claimant. He recorded in an attendance improvement plan the absence target of 9.25 days she had been given. The note made said her absence was not related to disability or pregnancy. They discussed the phased return to work plan agreed with Mr Cooney and it was agreed the claimant could start at 10.30 am (rather than the agreed 11.00 am) for the next few weeks. She expressed concern about her chair and workstation. She was told this should be sorted out by Access to Work which the claimant had contacted that day. An AIP meeting was also held that day the notes of which record that the claimant said her medication affected her sleep pattern and made it difficult for her to wake up at certain times; she wanted this noted because Christopher Johnson would expect her to do post duty once a week starting at 9.00.The attendance target was discussed and she was reminded she had not appealed this. She told Mr. Johnson that her union had recommended 15 days.

79 On 3 June 2016 the claimant appealed against the imposition of the 9.25 attendance target saying because of the time she had off that she continued to experience pain discomfort and tiredness and that she had been told by her consultant it could take up to 2 years to recover .She suggested a more realistic target was 15 days. Mr. Johnson spoke to Mr. Cooney to see if he could change it. Having done so Mr. Cooney had confirmed it should stay at 9.25 days.

Allegation 22 9 June 2016

80 On 9 June 2016 the claimant replied to Stuart Evans' letter and asked for an extension (length unspecified) of the 7 days reply to do so since she was on sick leave and had returned to work on 19 May 2016.She chased him for a reply on 21 June 2016.Mr Evans replied on 3 August 2016 that he would not be extending the time .He said she had been given 7 days to reply, had not done so and only asked for an extension 19 days after her return to work. He went to say '*Whilst I note you are on sick leave at the time I wrote you, you left it nearly 2 months before you sought to seek an extension, and as stated above 19 of those days were after it which you had returned to work. The grievance processes are meant to be addressed in a timely manner. This is so that both you as the aggrieved person and any others involved do not have the issues weighing on you for too long. In addition, memories and recollections of events fade over time which*

make it difficult for people to accurately recall matters. Keeping matters open indefinitely and without good reason is not desirable.
With that in mind I do not believe it would be fair or in the interests of either you or the other people involved in your grievance if you were to now be granted an extension of time to submit grounds to take your complaint to the next stage. You were given a reasonable amount of time to respond to the request and I am not satisfied that the reason you have given, of sickness, when coupled with the substantial delay requesting an extension and the impact of failing to address the matter sooner, is sufficient for me to extend the deadline for you.'

81 By 20 June 2016 the claimant was back at work on full hours.

82 The Access to Work assessment was carried out in late June 2016 and a different chair was recommended for the claimant with a motorised height adjustable work station .It was recommended she carry out no manual handling related duties .If there was a need for lifting carrying heavy items or other manual handing activities the task should be reallocated to another member of staff.
The claimant attended at 1:1 meeting with Christopher Johnson on 29 June 2016 and he sought a reduction in her debited hours from 10 to 5 by the time of the next 1:1 on 10 August 2016.It was also noted she had had no absences since returning to work.

Allegation 23 7 July 2016

83 On 7 July 2016 Christopher Johnson pointed out to the claimant by email that her debit had continued to grow and was now 12 hours rather than working towards 5.He set out some example hours to show her how to reduce the target and said if she continued to arrive at work between 9 and 9.30 she would need to work until 17.30 to 18.00 in order to not go further into debt. If the hours could not be brought under control by 10 August 2016 the benefit of flexi time would be removed and fixed hours applied (8.45 till 17.00 – 30 minutes for lunch). She had alleged that she had to leave work early because she was in pain but her witness statement provided no evidence about this and in her email to Mr Johnson later that day she explained that 5 hours accrued after the accident and before she went off sick (but did not explain why this had happened) and the rest (6 hours) was caused by going to appointments and not returning to the office. She said she still found it hard to get up in the morning and to work long hours because of the absence of the specialist chair and asked for it to be in place when she returned to work on 20 July 2016.Christopher Johnson replied to say 14.24 hours had built up before the accident and after her return to work she managed to reduce it to 5.24 but in the two and a half weeks since she had returned to full time [work] it had grown by over 6 and a half hours (even allowing for credit for medical appointments in accordance with the respondent's guidelines). The claimant did not demur but said she would be able to reduce the hours quickly if she had a chair as soon as possible. The claimant stands her ground with management if she feels she is in the right. She did not do so on this occasion and we infer from this she accepted the truth of what Mr. Johnson said.

Allegation 24 on or around 7 July 2016

84 A colleague in the respondent's Legal Services Department in the Finance team (Shuriah Meah) had to attend a number of medical appointments in the period April 2016 to January 2017. She was employed as Finance Assistant engaged in financial administration tasks which were largely computer based. On

an occasion when Ms Meah was working late the claimant asked her about the medical appointments process, and she referred the claimant to the respondent's policies and procedures. She told her that she was able to work from home with her line manager's approval to make up some of the time. Ms Meah was only ever credited for 1 hour and 30 minutes for appointments within core time. She had to make up any remaining debit hours and would use annual leave or work late. On occasion her manager (Nathan Thomas) permitted her to work from home on the day she attended hospital. Employees were permitted to work from home subject to the discretion of their line manager having regard to the nature of the role. Ms Meah was able to work from home on her computer.

85 By 10 August 2016 the claimant's chair had arrived, and the claimant said in an email it was very comfortable and provided much needed support to her lumbar and thoracic spine. She also had a keyboard and scanner for her desk. She was working full time and reducing her 'flex deficit.' She was recorded as '*Unable to do heavy lifting due to back injury*.'

86 On 20 August 2016 the claimant wrote to Stuart Evans to complain about his having not let her proceed to Stage 2. She contrasted the amount of time he had taken to communicate with her compared to the time afforded to her to communicate with him and said from 15 April 2016 to 9 June 2016 she was not in a fit state to deal with employment issues, she was in great pain on medication and had been '*focussed*' on the importance she ascribed to returning to work .The extension had been requested when she was fit to respond She needed to take things in small chunks and dealing with employment issues needed *'medical fitness*. 'Mr Evans' response dated 9 November 2016 (which he admits was tardy but this was due to pressure of work at the time) was to tell the claimant her complaints had been considered and a response provided in April 2016 and it was not reasonable for time to be extended for her complaint to be pursued.

87 An AIP meeting took place with Christopher Johnson on 26 August 2016.It was recorded that a decision was awaited on the classification of her condition as a disability and exclusion from the attendance target and that she was back at work full time carrying out '*all*' of the duties expected with the exception of any lifting. She was taking medication and still in pain but working through it with regular comfort breaks.

Allegation 27 9 November 2016

88 There was a 1:1 meeting between the claimant and Christopher Johnson on 9 November 2016. The notes were signed by the claimant and Mr. Johnson. Her workload management was recorded as being '*absolutely fine'*; if she had spare capacity, she said she helped out the rest of the team. She had no days absent and her debit hours were reduced to 1. She asked if time for medical appointments could be credited. Christopher Johnson said he applied the legal service's *'rules on medical appointments as he interprets them'*. The claimant said she would take this up with HR to clarify the procedure. She sent an email to her union representative on 29 November 2017 in which she referred to having contacted HR in relation to Mr. Johnson's interpretation of the relevant rules but was told his '*answer has not changed'*. We find she contacted HR as she indicated she would do at the meeting on 9 November 2016 and that she received a response to the effect Mr. Johnson's position was unchanged.

89 There was another 1:1 meeting between the claimant and Christopher Johnson on 25 November 2016. It was noted she was maintaining her zero-absence record. She said she was considering reducing her hours from January 2017 and later that day asked if she could work from home '*in the way John Emmins does*' due to having '*physio appointments*.' Christopher Johnson refused her request on 1 December 2016. He said John Emmins was trialing working from home but both of them felt it was not working so from the New Year he would only be working from home in '*exceptional circumstances'* and *'certainly not every Tuesday morning*.' The trial had come about because although no one in the team had hitherto been allowed to work from home, in October 2016 John Emmins asked if he could do so. Christopher Johnson (having obtained the agreement of his manager) had agreed to this but on a trial basis. John Emmins already had Tuesday afternoons off, so the home working had been confined to Tuesday mornings to minimise disruption. At about the same time Mr. Emmins broke his ankle and was in a plastic boot for three months. The trial lasted about two months until Christopher Johnson decided it was not feasible after all and Mr. Emmins reverted to working Tuesday mornings in the office wearing his plastic boot for the first month. Mr. Johnson's reason for turning down the claimant's request was that his experience of Mr. Emmins' trial period of working from home had not been positive. Mr Emmins (who was engaged on similar duties as the claimant) had not got as much done as he should have, and it had not worked for the team.

Allegation 28 7 December 2016

90 The claimant had told her union representative on 29 November 2016 that she was thinking about proposing a reduction in hours because she was finding it hard to work eight hours a day, particularly when she needed to take time off for physiotherapy. On 8 December 2016 she made a flexible working request asking to reduce her hours '*due to longstanding consequences of the climbing accident I had'* and by 12 January 2017 it was agreed she could work 5 hours a day starting at 9.15 on one day for post duties any time before 10.30 on 3 days and 12.00 on the other day to allow the claimant to book and attend physiotherapy appointments (on a temporary basis pending physiotherapy treatment). She had explained in an email to Mr. Johnson on 11 January 2017 that as she was finding it difficult to work full time hours she would be looking to start reduced hours as soon as possible .Mr. Johnson recorded the reason for her change in hours as '*rehabilitation*' .The claimant's evidence in her witness statement was that she felt forced to reduce her working hours in order to help her manage her time better because she was having a number of hospital appointments and that Mr. Johnson had failed to record the correct reason. She accepted under cross examination that Mr. Johnson had authorised her change in hours and completed the form and she had agreed to what had been put in it. The request said she needed to reduce her hours because of the '*long standing consequences of a climbing injury that happened on 8.8 2015. I need some time for physio and rehabilitation*.' We find that Mr. Johnson had not failed to record the correct reason as alleged. What he recorded is consistent with what the claimant put in her request. She has alleged that she requested a reduction in her hours as she felt unwell and pressured into meeting her attendance target and to halt the increase her debit hours. We find the claimant was not made to reduce her hours by the respondent. She requested a reduction in her hours because she was finding working full time difficult and wanted to attend physiotherapy appointments.

91 On 10 February 2017 there was a team meeting at which Mr Johnson said sarcastically on the topic of flexi time that although a team member had lost some time even the claimant had managed to make some overtime and laughed at his own joke. He realised he had upset the claimant by his joke at her expense and promptly apologised. To make such a joke at a team meeting was poor judgment on Mr Johnson's part but although the claimant mentioned the incident in her witness statement it is not a matter about which she has raised a complaint or made an allegation in these proceedings.

92 On 15 February 2017 during a team meeting the claimant raised her hand to ask for permission to speak .Employees at team meetings did not usually seek permission first before speaking and again Mr. Johnson chose to make an ill judged joke by telling her she had permission to go to the toilet. Children (in particular) do put up their hands to seek permission if they need to go to the toilet. Again, when the claimant showed she did not find the joke amusing he apologised and the meeting continued. Although she referred to it in her witness statement this too is not a matter about which she has raised a complaint or made an allegation in these proceedings.

Allegation 29 27 February 2017

93 Christopher Johnson sent out a rota to the team for the week commencing 27 February 2017 indicating Mr Emmins was working from home on Tuesday 28 February 2017.He had agreed to permit Mr Emmins a further trial period of working from home.

94 On 28 February 2017 there was an AIP meeting with the claimant (accompanied by her trade union representative) with Christopher Johnson at which it was noted the claimant felt she had not been supported by Christopher Johnson in her request to work from home and be credited for out of core hours appointments which caused her to work reduced hours. She said she had not been supported because Mr. Emmins had again been permitted to trial working from home .Mr. Johnson said she could apply again following a review of the success of Mr. Emmins' latest trial period .She was not happy with this response and Mr Johnson described their conversation as a waste of time. She was commended on her 100 % attendance record since the FCH though still suffering pain and discomfort and having had to attend medical appointments. She subsequently sent Mr Johnson copies of some letters which she had sent chasing a response to a complaint that she made to OH in 2016 about the contents of an OH report.

95 On 7 March 2017 the claimant contacted her solicitor because she had been upset that Mr Johnson had said he would be unable to pursue the complaint she had made about OH because she had stated it was confidential.

96 On 1 April 2017 John Emmins took over from Christopher Johnson as the claimant's Line Manager. An AIP meeting took place between the claimant and Mr Emmins and he agreed to follow up the complaint from the claimant to OH.

Allegation 31 24 July 2017

97 John Emmins is a blue badge holder and was permitted to park in the respondent's car park. Employees with reduced capability can apply for car

parking using a designated form and providing medical evidence. It is common ground the claimant did not complete such a form.

98 The claimant discovered her appraisal score from the past year ("*Not Achieved*") and on 24 July 2017 asked Christopher Johnson to change her appraisal for 2015 /2016 from "*not achieved*" to "*achieved*". Christopher Johnson explained to the claimant in an email of 24 July 2017 that he did so because she had not made any progress before she went off sick. When she challenged this he said that she had had "*two 1 1's (which you signed off) and you never made any progress on your 2nd goal. Therefore I will not be changing the result. I haven't got time to get into a debate on this if you want to take it any further please speak to Anthony*."

99 That same day the claimant had a supervision meeting with John Emmins the notes of which referred to her having clocked in after 10.30am on a number of occasions. We accept Mr Emmins' evidence that the claimant had voluntarily started work at around 9.00 am on many occasions despite her agreed start times. He asked her to clock in by 10.30. She also agreed to increasing her hours to 6 ½ hours a day. When subsequently asked to sign and return the supervision notes she asked that the reference to clocking in late be deleted. She explained the 6 occasions on which this occurred and said sometimes she had a problem with parking or getting change. Mr Emmins declined to make the deletion sought because the issue had been discussed. He suggested that if she was having trouble parking her car catching the bus might be a better option and he felt he had to make her aware that she was clocking in out of core time on several occasions and that a note was made of this. The claimant said he had told her this and she taken it on board but she needed him to record that she had stayed longer on a number of occasions and also wanted to include in the notes some 28 examples of excellence in her performance from 26 May to 27 July 2017. He said she should have brought this up at the meeting, but she could bring it up at the next one and it could be added then. She replied that she "*will add it now*." The claimant has alleged that on that date she made a request to park in the respondent's car park. However, despite seeking to change /add many issues to the supervision meeting notes this request was not something she asked Mr Emmins to record and we find that no request to park in the respondent's car park was made.

100 On 3 August 2017 John Emmins sent an email to the claimant about her 2015/16 appraisal saying he and Erin Simpson had looked into it and spoken to Chris Johnson. "*There is no evidence of "achievement" against the goals set. This is in part understandable as you are absent on sick leave for almost 6 months during that year*.
There are only 2 options for the Appraisal outcome- "Achieved" or "Not Achieved" and we uphold Chris Johnson's original decision to record "Not Achieved."

Allegation 32 17 August 2017

101 From 17 August 2017 Mr Emmins required court shifts to start at 8.45 am. The claimant sent an email to John Emmins the next day saying she saw that the rota put her on 3 court shifts for the following week. She said that she found it hard to get up in the morning, she wasn't sure she could make it in for then and asked whether he wanted her to provide a certificate from her GP. He replied on 23 August 2017 saying that it was only 2 court shifts that week .Changes would be made to the rota once all the support teams merged in the next week or so but

in the meantime he did require her to be flexible to meet the needs of the service. If she felt she couldn't attend the office at the required time to cover her rota duty she would need to produce a medical note. She did not do so because her GP refused to provide it.

102 The respondent advised its employees in July 2017 that a revised '*Flex Scheme'* would come into effect on 4 September 2017. In advance of the introduction of that scheme Erin Simpson sent an email providing guidance on the approach to medical appointments. She said the existing guidance on People Solutions was to be followed: '*As a rule we have tended to credit core hours for attendance at medical appointments*' but there would be no core hours going forward and the current guidance to be followed was that '*reasonable time off be given for GP and hospital appointments*' and re hospital appointments employees should be credited (for) '*time needed (travel to and from plus time at hospital less any normal travel time to and from work).Time can also be taken for regular attendance at a Doctor's surgery or hospital for a prescribed course of medical treatment or one off appointment*.' The guidance in People Solutions was that employees should be credited the time needed for hospital appointments (travel time to and from plus time at hospital less any normal travelling time to and from work).

103 On 15 September 2017 the claimant was given a statement of fitness for work which said she was unfit for work until 15 October 2007 because of "*shoulders bursitis-pain*".

104 On 28 September 2017 John Emmins (accompanied by Erin Simpson) saw the claimant at home. The claimant was accompanied by her trade union representative. John Emmins prepared typed notes which he sent to the claimant on 2 October 2017.She made no amendments or comments. The notes record that when the claimant was asked '*how things were going/feeling and where was the pain?*' she replied that she had been in discomfort for a few weeks and had pain in her arms/legs and hands. We prefer and accept Ms Simpson's clear recollection that when asked during that meeting by Mr Emmins where the injury had come from, the claimant had referred to the climbing accident and not (as she alleges) that she had told him that lifting had caused her shoulder pain.

105 On 23 October 2017 the claimant agreed to be referred to OH. The referral (prepared by Mr Emmins) was sent to her on 8 November 2017. It said the claimant had been off work from 15 September 2017 with shoulder pain which "*so far as I am aware was an old injury which she suffered in a climbing accident in August 2015, where Senka suffered neck, shoulder and spinal injuries which she took 2 weeks off work for. This will be the 4th time that Senka has been referred to OH. Details of her referrals are as follows:*
1 09/06/15-This referral was to do with health issues, following back/shoulder pain caused by an accident in January 2014-Appointment took place on 09-07-15.
2 28/01/16-This referral was to do with long term sickness due to the climbing accident in August 2015-Appointment took place 22nd-02-16.
3 03/03/16-This referral was a re-referral-Appointment took place on 01-04-16
We have put in place an adjustable desk, ergonomic keyboard, specialized chair and more flexible monitor arm. This was put in place following an assessment by access to work. We also agreed reduced working hours for Senka, prior to this Senka was working 36.6 hours per week. The reduction in hours has been in place since February 2017, the reduced hours were agreed as Senka was finding

it hard to get up in the mornings due to the medication that she is on. Senka has informed me that she has a hospital appointment at the ROH on 2 November 2017 when images of her shoulder will be taken." We find that in attributing the shoulder pain to the climbing accident he was reflecting what the claimant had told him at the home visit.

106 On 8 November 2017 the claimant received a copy of Occupational Health referral prepared by John Emmins. On 13 November 2017 the claimant sent an email to John Emmins to draw to his attention some "*incorrect factual information on your referral which needs to be changed and passed to Occupational Health Department*." The first issue she raised was about the cause of the shoulder pain being attributed to the climbing accident in August 2017.She said this was not what she had told him at the home visit. When he had asked where the shoulder pain came from, she had told him it was from lifting in the office. She then took issue with the OH referral on 9 June 2015 having been described as made following back and shoulder pain caused by the bus incident in January 2014; she referred to the Grimer report (though she did not provide a copy) which had concluded the bus incident had not caused the bursitis and pain in the shoulders but had been caused by lifting heavy boxes in the office which predated it. She said she had told Erin Simpson about this at the 1:1 meeting on 26 January 2015 and at the return to work meeting when she had mentioned the two injections in her shoulder. She said the reference to the referral on 9 June 2015 should therefore be described as '*to do with bursitis/steroid injections/shoulder pain'*. She said the reduced hours were agreed due to the injuries caused by the climbing accident and not because she was finding it hard to get up in the morning due to her medication. She said she wanted to be accompanied by her trade union representative at the OH appointment on 21 November 2017.She accepted under cross examination that she had wanted management to acknowledge in the OH referral that it was lifting that had caused her shoulder problem.

107 Mr Emmins acknowledged the claimant's email that same day and said she would have to ask OH about being accompanied. She confirmed to him she had '*bcc-ed'* her email to OH.

108 The OH appointment took place on 21 November 2017 and the OH report of that date said there had been a '*constructive discussion*. 'It said she was absent from work due to shoulder bursitis and was suffering pain and reduced movement in her shoulder and back. She was waiting for an MRI scan which would allow an assessment of the extent of the issues affecting her shoulder and implementation of an effective treatment plan. As the outcome of the further investigations was difficult to predict a reasonable time by which she might be fit to return to work could not be predicted and when she did return she would need some reasonable adjustments for a time though it could not be predicted what they might be. She should be rereferred to OH after treatment. No reasoned prognosis as to future attendance could be given and the opinion was given that "*Ms Besirevic's (sic) is likely to be afforded a level of protection under the disability element of the Equality Act 2010, therefore if she does require periods of absence from work due to her underlying health condition, you may wish to see this as a reasonable adjustment under the remit of the Act*."

109 The claimant resigned with immediate effect by her letter dated 11 January 2018 emailed on 13 January 2018. Her letter said "*I'm writing to inform you of my decision to resign with immediate effect from my role as Grade 2 Administration*

Assistant/Paralegal Clerk at Birmingham City Council, Legal & Democratic Services, Case Management Team. Please accept this letter as formal notice of my resignation." She went on to say *"I have decided to resign as I have been humiliated and discriminated, which made me feel forced out of the employment. The management treatment left me feeling thoroughly undignified.*

I have never been given a performance based pay rise, although I have been working hard, sometimes as hard as volunteering to do 2 secondments (Team Administrator for Criminal and Housing Team, and web streaming of Counsel House meetings). I was given all sorts of excuses for not being given a pay rise, e.g.: "you made a few blips" or "you went to speak to another team, although you were told not to", or: "no other person was given the highest rating, therefore, no member of staff can get a pay rise."

During my employment with Birmingham City Council, the start of which dates to 2016, I applied the numerous other positions, however I was never given the opportunity to attend the interview.

As a result, I remained at the bottom of the grade without a chance to progress.

In May 2015, I was so enthusiastic about moving from Licensing Office to Legal Services within Birmingham City Council, and when I was given to do a lot of lifting, associated with closures and storage of files, I did not complain. As a result, I develop bursitis, a painful condition associated with my shoulders.

I was subjected to being shouted at, blackmailed into signing one-to-one meeting forms, humiliated during one-to-one and staff meetings, and my achievement was failed while on sick leave due to the significant injury 2 years ago, although my previous reviews were all very good. My manager laughed to my injury, and office chit chat and gossip was used against me. I requested a special chair after the significant spinal injury, however, the chair was delivered one year later. When asked for a permission to talk, I was told: "Toilet, toilet, that's your place!" I was asked if I will go back to Bosnia and whether I have got enough annual leave to book a holiday.

The above treatment would systematically destroy my position within the company. It also made my recovery from a significant head, neck and back injury very difficult.

I was not given the same opportunity as I could not get to work from home when having hospital appointments, and could not get time credited for hospital appointments outside of the core hours. These opportunities were available to other support staff members. As a result, I was forced to reduce the working hours, which made meeting the cost of living hard.

Details of my poor treatment were outlined in my personal grievance dated 10th July 2015, in my solicitor's letter dated 1st August 2017 and my extended grievance emailed to my Union representative Charlie Friel on 16th November 2017.

Because of my personal grievance in July 2015, I requested to be permanently moved to another Department, however, I was not given a chance to do so. I suggested mediation back in May 2015, however, this was not accepted by then manager Erin Simpson.

I recently underwent the ACAS Early Conciliation Period but received no response from my employer.

Because of the above treatment, I made a hard decision to resign. I feel that my employment contract has been fundamentally broken and I am resigning in response. I would like to thank 2 members of staff at Birmingham City Council who provided their guidance and accelerated my professional development.

I wish you all the best for the future."

110 Erin Simpson wrote to the claimant on 18 January 2018 acknowledging receipt of the claimant's email and stating "*Please accept this communication as acceptance of your resignation. Your last day as a BCC employee will be Sunday the 11th February 2018 you will be paid in lieu of your remaining notice period of one month together with (if any) accrued holiday entitlement*."

111 On 7 February 2018 the claimant presented her claim form to the tribunal. The details of her claim were set out in 37 numbered paragraphs drafted by the firm of solicitors by which she has been represented throughout.

Law

112 In order to make a complaint of unfair dismissal an employee must have been dismissed by the employer. Section 95 ERA sets out the circumstances in which an employee is dismissed by the employer. Section 95(1)(c) ERA provides that an employee is dismissed by his employer if "*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*". This is called a constructive dismissal. The burden of proving dismissal falls on the claimant.

113 In the leading case of **Western Excavating (ECC) Ltd vSharp [1978] ICR 221,** it was held that in order to claim constructive dismissal, the employee must establish (1) that there was a fundamental breach of contract on the part of the employer (2) that the employer's breach caused the employee to resign (3) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

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

115 It is therefore irrelevant that the employer does not intend to damage his relationship provided the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it. It is the impact of the employer's behaviour on the employee that is significant - not the intention of the employer (**Malik**). The impact on the employee must be assessed objectively. In **Niblett v Nationwide Building Society UKEAT/0524/08** His Honour Judge Richardson said, in the context of an employer's conduct of a grievance procedure and whether the implied term of trust and confidence had thereby been broken, that "*the implied term of trust and confidence is a reciprocal obligation owed by employer to employee and employee to employer. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the*

implied term. It has never been the law that an employer could summarily terminate the contract of an employee merely because the employee behaved unreasonably in some way. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. In the context of the implied term of trust and confidence, the employer's conduct must be without proper and reasonable cause and must be calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

116 In **BG plc v O'Brien [2001] IRLR 496** **Langstaff P said '***The question is whether, objectively speaking, the employer has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. If the conduct has that effect, then the question of whether there has been a reasonable and proper cause for the behaviour must be considered*.' As was observed by Lindsay P in **Croft v Consignia plc [2002] IRLR 851 EAT**: *'It is an unusual term in that it is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows*.' As was said in **Cantor Fitzgerald International v Bird and Others [2002] IRLR 867 HC** '' *loss of confidence in management is not the same as conduct by the employer calculated to destroy or seriously damage trust and confidence between employer and employee in the sense of the implied term relied upon*.'

117 In **Omilaju v Waltham Forest London Borough Council 2005 ICR 481,CA** the Court of Appeal considered the necessary quality of 'a last straw'. It said '*When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in Woods at p 671F-G where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, "squeezes out" an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

22. *Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above*). '

118 In **Wright v North Ayrshire Council** **[2014] IRLR 4** it was pointed out that the test to be applied is not what is the principal or effective cause of a resignation, but whether the Claimant resigned at least in part by reason of some or all of the conduct which is said to amount to a repudiatory breach.

119 In **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ** it was held that "*the following through, in perfectly proper fashion on the face of the papers, of a disciplinary process*". Such a process, properly followed, or its outcome, cannot constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitute such a breach. The employee may believe the outcome to be wrong; but the test is objective, and a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee.

120 A person has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities (section 6 (1) (a) and (b) Equality Act 2010('EqA')).

121 In **Goodwin v Patent Office 1999 ICR 302** the EAT said that the words used to define disability in section 1 (1) Disability Discrimination Act 1995 (now section 6 (1) EqA) required a tribunal to look at the evidence by reference to 4 different questions:

(1) Did the claimant have a mental and/or physical impairment? (the 'impairment condition').
(2) Did the impairment affect the claimant's ability to carry out normal day-to-day activities (the 'adverse effect condition').
(3) Was the adverse condition substantial (the 'substantial condition'); and
(4) Was the adverse condition long-term (the 'long-term condition').

122 An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if a) measures are being taken to treat or correct it, and b) but for that, it would be likely to have that effect. 'Measures' includes, in particular medical treatment.

123 Under Schedule 1 EqA the effect of an impairment is long-term if a) it has lasted for at least 12 months, b)it is likely to last for at least 12 months or c) it is likely to last for the rest of the life of the person affected. If an impairment ceases to have a substantial adverse effect on a persons' ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

124 The question of long term effect has to be answered as at the date of the alleged discriminatory acts and not with the benefit of hindsight at the date of the hearing: See **Richmond Adult Community College v Mc Dougall [2008] ICR 431**. 'Likely' means 'could well happen' (**SCA Packaging Ltd v Boyle [2009] ICR 1056 (HL)).**

125 The burden of proof is on the claimant to show that she was a disabled person in accordance with section 6 and with reference to Schedule 1 EqA at all relevant times.

126 Tribunals must take account of the Guidance on Matters to be Taken into Account in Determining Questions relating to the Definition of Disability (the Guidance'). Neither Counsel made any reference to the Guidance in submissions. The Appendix to the Guide provides an illustrative and non-exhaustive list of factors which if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day to day activities. These include difficulty picking up and carrying objects of moderate weight, such as a bag of shopping or a small piece of luggage with one hand. The Appendix to the Guide provides an illustrative and non-exhaustive list of factors which if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day to day activities which include an inability to move heavy objects without assistance or a mechanical aid, such as moving a large suitcase or heavy piece of furniture without a trolley. The examples are indicators not tests .A person may have more than one impairment ,any one of which alone would not have a substantial effect .In such a case ,account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day to day activities.(paragraph B6 of the Guidance).

127 Under Section 13 EqA:
'(1) 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.' Section 23 EqA provides on a comparison of cases for the purpose of this section there must be no material difference between the circumstances relating to each case which includes a person's abilities for the purposes of section 13 if the protected characteristic is disability.

128 Under Section 15 EqA:

'(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'

129 The meaning of the word 'unfavourable' cannot be equated with the concept of 'detriment' used elsewhere in EqA. It has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability. It is necessary to identify the relevant treatment before deciding if it is unfavourable (**Williams**).

130 In the case of **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305,** Mr Justice Langstaff held that there were two separate causal steps to establishing a claim under section 15. Once a tribunal had identified the treatment complained of, it had to focus on the words "because of something" and identify the "something" and then decide whether that "something" arose in consequence of the claimant's disability.

131 In the case of **Hall v Chief Constable of West Yorkshire Police [2015] IRLR** the EAT held that the tribunal had erred in concluding that it was necessary for the claimant's disability to be the cause of the respondent's action and that it was sufficient for the claimant's disability to have been a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but was nonetheless an effective cause of the unfavourable treatment.

132 In the case of **Pnaisner v NHS England [2016] IRLR 170** the EAT stated that (a) the tribunal had to identify whether there was unfavourable treatment and by whom; (b) it had to determine what caused the treatment. The focus was on the reason in the mind of the alleged discriminator, and an examination of the conscious or unconscious thought processes of that person might be required; (c) the motive of the alleged discriminator acting as he did was irrelevant; (d) the tribunal had to determine whether the reason was " something arising in consequence of [the claimant's]disability", which could describe a range of causal links; (e) that stage of the causation test involved an objective question and did not depend on the thought processes of the alleged discriminator; (f) the knowledge required was of the disability; it did not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

133 Under section 136 EqA if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred but that does not apply if that person shows the person did not contravene the provision.

134 As far as knowledge of disability is concerned the position was summarised by the Court of Appeal in the case of **Gallop v Newport County Council EWCA Civ 1583** (a case which preceded the EqA) namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the *facts* constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be

regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined .However it is essential for a reasonable employer to consider whether an employee is disabled and form their own judgment.

135 The burden is on the employer to show that it was unreasonable for it to have the required knowledge.

136 The Equality and Human Rights Commission has prepared a Code of Practice on Employment (2011) ('the Code'). Tribunals and courts must take into account any part of the Code that appears relevant to any questions arising in proceedings. Only Ms Garner made any reference to the Code in submissions.

137 The Code states at paragraphs 5.14 and 6.19:

> *" It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not have reasonably been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.*
>
> *An employer must ,however ,do all they can reasonably be expected to do to find out [whether this is the case].What is reasonable will depend on the circumstances .This is an objective assessment .When making enquiries about disability ,employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."*

138 Section 39(5) EqA imposes a duty to make reasonable adjustments upon an employer. Where such a duty is imposed sections 20, 21 and 22 and Schedule 8 apply. Section 20(2) states that duty comprises three requirements. Insofar as is relevant for us, the first of those requirements is that where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, that the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

139 Section 21(1) EqA states that the failure to comply with one of the three requirements is a failure to comply with a duty to make reasonable adjustments. Section 21(2) EqA provides that a failure to comply with a duty to make reasonable adjustments in relation to the disabled person constitutes discrimination by the employer.

140 In **Environment Agency v Rowan [2008] IRLR 20** a case concerning the provisions of the DDA the Employment Appeal Tribunal, His Honour Judge Serota QC, presiding stated as follows:-

'27 …..In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:

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

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

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

(d) the nature and extent of the substantial disadvantage suffered by the Claimant.

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

It was held that an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters at a) to d) above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person at a substantial disadvantage.

141 Paragraph 6.10 of the Code suggests that *'provision, criterion or practice'* should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications and in line with authorities pre dating the EqA this includes one-off decisions and actions.

142 The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.

143 The EqA states that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact and is assessed on an objective basis.

144 Once the duty is engaged employers are required to take such adjustments as it is reasonable to have to take, in all the circumstances of the case. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

145 Paragraph 6.28 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

whether taking any particular steps would be effective in preventing the substantial disadvantage;
the practicability of the step;

the financial and other costs of making the adjustment and the extent of any disruption caused;
the extent of the employer's financial or other resources;
the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
the type and size of the employer.

146 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable. Arranging for an OH or other assessment of an employee's needs is not in itself a reasonable adjustment because such steps do not remove any disadvantage (**Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664 EAT**).

147 As far as knowledge for the purpose of the claimant's claim of a failure to comply with the duty to make reasonable adjustments is concerned in **Secretary of State for the Department of Work and Pensions v Alam [2010]IRLR 283** (EAT) (again a case that preceded EqA) it was held that two questions needed to be determined:
Did the employer know both that the employee was disabled and that his/her disability was liable to affect him/her in the manner set out in section 4A (1) DDA?
Only if that answer to that question is no then ought the employer to have known both that the employee was disabled and that his /her disability was liable to affect him/her in the manner set out in section 4 A(1)?
If the answer to both questions was also negative, then there was no duty to make reasonable adjustments (see also the comments of Underhill P at [37] in **Wilcox v Birmingham CAB Services Ltd [2011]EQLR 810 EAT).**

148 Schedule 8, para 20(1) EqA states that a respondent is not under a duty to make reasonable adjustments if he or she does not know,and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to .It would seem therefore that the analysis in **Alam** remains good law. The test for knowledge for reasonable adjustments is therefore a different test to that for section 15 claims.

149 However in either claim the employer must do all they can reasonably to find out whether this is the case and what is reasonable will depend on the circumstances.
The Code states at paragraph 5.15:

> *" The employer must ,however ,do all they can reasonably be expected to do to find out [whether this is the case].What is reasonable will depend on the circumstances .This is an objective assessment .When making enquiries about disability ,employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."*

150 Section 123 EqA provides that:

> *"(1) Subject to sections…140B, proceedings on a complaint within section 120 (which relates to a contravention of Part 5 (Work) of EqA)may not be brought after the end of –*

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

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

…..

(3) For the purposes of this section –

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

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

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

(a) when 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."

151 In **Matuszowic v Kingston –upon Hull City Council [2009] EWCA Civ 22** the Court of Appeal found that a failure to make a reasonable adjustment is an 'omission' rather than a 'continuing act' so that the time limit for presentation of a claim starts from the expiry of the period within which the employer might reasonably have been expected to make the adjustment. In the case of **Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil and others UKEAT /0097/13BA** the then President of the EAT Langstaff P held that where an employer refused to make a particular adjustment but agreed to keep it under review rather than making a 'once and for all' refusal ,the failure to make that reasonable adjustment was capable of amounting to a continuing act ,although the refusal to make the reasonable adjustment had occurred more than three months prior to the presentation of the claim. In **Viridor Waste v Edge UKEAT 0393/14/DM** the EAT distinguished **Jamil** and held each case was to be decided on its facts. In that instance it was a refusal and that it might be reconsidered was irrelevant. It was not a case of a policy to review as in **Jamil**.

152 It was held in **Hendricks v Commissioner of Police for the Metropolis [2003]IRLR 96 CA** that in determining whether there was an act extending over a period ,as distinct from a succession of unconnected or isolated specific acts ,for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme of regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.' Further 'the burden is on the claimant to prove, either by direct evidence or by inference from primary facts ,that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period.''

153 The 'just and equitable' test under section 123 (1) (b) EqA is a broader test than the 'reasonably practicable' test in section 111 Employment Rights Act 1996.The burden is on the claimant to persuade a tribunal that it is just and equitable to extend time **(Robertson v Bexley Community Centre [2003] IRLR 434.**

154 In the case of **British Coal Corporation v Keeble [1997] IRLR 336 EAT** it was suggested that in exercising its discretion the tribunal might be assisted by

the factors mentioned in section 33 of the Limitation Act 1980 .Those factors are consideration of the prejudice which each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case ,in particular the length of and reasons for the delay ;the extent to which the cogency of the evidence is likely to be affected by the delay ;whether the party sued had cooperated with any requests for information ;the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action ;and the steps taken to obtain appropriate advice once he or she knew of the possibility of taking action. However a tribunal is not required to go through the matters listed in section 33 (3) of the Limitation Act, provided that no significant factor is omitted **(London Borough of Southwark v Afolabi [2003] IRLR 220).**

155 Tribunals were reminded in **Chapman v Simon [1994] IRLR 124 CA** that the jurisdiction of the employment tribunal is limited to the complaints which have been made to it. It is not for us to find other acts of which complaints have not been made if the act of which complaint is made is not proven.

156 Tribunals are also urged to take an overview of the totality of the evidence before making findings in respect of individual allegations made by a claimant. The necessity of setting out chronological findings of fact should not lead to the assumption that they have been made piecemeal. We looked at the totality of the evidence before reaching our findings of fact as set out above and reaching the conclusions which follow.

Conclusions

Time Limits

157 As far as the claimant's complaints of disability discrimination are concerned the final act of discrimination alleged is on 17 August 2017, the date on which Mr Emmins introduced early shifts with an 8.45 am start. The claimant alleges this is a failure to comply with the duty to make reasonable adjustments under section 20/21 EqA which (following **Matuszowicz**) is an 'omission'**.** Under section 120 (3) (b) EqA a failure to do something is to be treated as occurring when the person in question decided on it. Mr Emmins made his decision on or prior to 17 August 2017.He would have reconsidered the position as far as the claimant was concerned had she provided him with medical evidence, but she did not do so. There was no policy of review by the respondent. There was no ongoing failure to make a reasonable adjustment. Time therefore runs from 17 August 2017. If we consider the preceding alleged failure to comply with the duty to make reasonable adjustments (Allegation 29 the refusal of her request(s) to work at home) we found those were refused by Mr Johnson on 1 December 2016 and on 28 February 2017 when she complained about this again. Mr. Johnson said she could apply again following a review of the success of Mr. Emmins' latest trial period. She did not renew her request. If (and it was by no means clear this was her position) she contends this too constituted an ongoing failure to make a reasonable adjustment we conclude that a review would have taken place had the claimant renewed her request but since she did not do so the relevant dates of the acts of discrimination are when Mr Johnson decided to refuse her requests on 1 December 2016 and 28 February 2017. There was no ongoing failure to make a reasonable adjustment and time therefore would therefore run from those dates.

158 The claimant has not pleaded or addressed in her evidence that there was an act or conduct extending over a period that would bring her discrimination claims in time .In his written submissions Mr Macmillan relied on **Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0324/16** when the EAT found in a claim of race discrimination that in treating the decision to instigate disciplinary procedures as a one off act the tribunal had lost sight of the substance of Dr Hales's complaint which was that he had been subjected to disciplinary procedures and ultimately dismissed ;the complaint being of a continuing act beginning with the decision to instigate the procedure and ending in a dismissal. He submitted '*by an application* ' of **Hale** we should look at the substance of the claimant's reasons in her resignation letter which were he submitted '*wholly aligned with her consistent complaint that she had been demeaned and overlooked and disadvantaged in circumstances where she was disabled and the respondent was on notice of those disadvantages*.' In fact the claimant said very little in her resignation letter about medical matters and nothing about events after 29 February 2017 ('*I could not get to work from home'*) and unlike Dr Hale the claimant was not complaining about the application to her of a specific procedure from inception to its end .Although ,as Mr Macmillan submitted, the involvement of the same or different individuals is a relevant but not conclusive factor, in this case there were 5 different managers in two different teams within the respondent's Legal Services Division who were involved over more than 2 years in management of the claimant and the application to her of a variety of the respondent's policies and procedures. The claimant has not sought to demonstrate any discernible link between them. We conclude they were independent decision makers who addressed the matters raised by the claimant as and when they arose and there was no act or conduct extending over a period that would bring her discrimination claims within time.

159 The claimant sought early conciliation on 27 October 2017 and the ACAS certificate was issued on 11 December 2017. Time for presentation of the claim expired on 10 January 2018. The claim was presented on 7 February 2018. Even if there had been conduct extending over a period the final alleged act pleaded (17 August 2017) as part of that conduct is not within time.

160 The claimant has presented no evidence whatsoever about why it would be just and equitable for time to be extended. During her employment she sought the advice of and was assisted and represented by her union, by March 2017 she had contacted a solicitor and, in the summer of that year, instructed solicitors to write to the respondent on her behalf .She has been represented by a firm of solicitors in relation to the presentation of this claim and at this hearing. Though absent from work since 15 September 2017 this was due to her physical condition and there was no evidence that her health placed any limitations on her ability to discuss matters with her solicitors or manage her affairs such that it would have prevented her presenting a claim.

161 No reasons have been given for the delay. Ms Garner submitted that the cogency of evidence of witnesses has been affected by the delay and that the inability of Mr Evans (who had left the respondent's employment) to recall events was particularly marked. We accept that the delay has contributed to (though was not the sole cause of) any lack of cogency of the evidence of witnesses. There was no evidence that the respondent had not cooperated with any requests for

information .The claimant raised issues and made complaints about her treatment by the respondent over several years but took no steps to act promptly when she was in possession of the facts which gave rise to her causes of action against the respondent. She had sought legal advice as early as March 2017 but still did not present her claim until 7 February 2018.

162 We conclude the claimant has not discharged the burden on her to persuade us that it is just and equitable to extend time. The tribunal does not have jurisdiction to hear her complaints of disability discrimination because they have been made out of time.

Disability

163 However, if we are wrong in that conclusion, we have considered the issue of disability. The claimant was diagnosed with bursitis on 2 October 2014.It is not in dispute that bursitis is a physical impairment. However for the claimant to satisfy the definition of disability in section 6 and Schedule 1 EqA as at that date (as was submitted Mr Macmillan) the substantial adverse effect of that impairment on her ability to carry out normal day to day activities must have already lasted 12 months or more or be likely to do so or be likely to last for the rest of the claimant's life. The claimant's witness statement and the personal impact statement in the agreed bundle served in compliance with an order of the tribunal dealing with the effects of her alleged disability prepared in 2018 address the effects **as at that time** of both bursitis and the neck back head and injuries she suffered in August 2015.They set out the medication prescribed for her and the two shoulder injections she had in 2014 but provide no evidence about what the effects of either condition would have been at any time but for that treatment (or any other treatment) or of the likelihood of any effects lasting for 12 months or for the rest of her life. The claimant is first recorded as having complained to her GP about her shoulders on 21 January 2014. Thereafter she saw her GP about shoulder pain intermittently between that date and the diagnosis of bursitis in October 2014.During this period she was working full time carrying out the duties required of her as a CMC (including the lifting and carrying of files and the undertaking of an onerous spare capacity task on 13 March 2014) and as a team administrator. Although she had the physical impairment of bursitis as at October 2014, she has not proved that she also met the other necessary conditions of the definition of a disabled person.

164 From October 2014 the contemporaneous documentary evidence about the effects of bursitis concerned the claimant's lifting abilities. The OH report on her dated 9 July 2015 (prepared following her concerns about heavy lifting) advised she should refrain at work from heavy lifting carrying pushing and pulling. There is no evidence her ability to pick up and carry objects of moderate weight was in any way affected. She was able to carry out the normal day to day activities required of her while at work and to swim and felt able to engage in climbing (which we do not consider a normal day to day activity).

165 In her oral submissions Ms Garner said that the respondent conceded disability from 4 December 2015 because that was the date on which the claimant began a lengthy period of sickness absence from work which ended on 19 May 2016.

166 Although it is possible the substantial adverse effects on the claimant's normal day to day activities of the impairments of bursitis and neck back and

head pains occasioned as a result of the climbing accident on 8 August 2015 preceded the date on which her long term sickness absence commenced, we had no cogent evidence from which we could conclude with any certainty how long before that date this might have been. We conclude that the substantial adverse effects of those impairments began on 4 December 2015 by which time she was no longer able to work, and her long-term sickness absence began.

167 The claimant did not return to work until 19 May 2016 and then did so on a phased basis of a further four weeks. The Chitnavis Report had said that the injuries she had sustained on 8 August 2015 could take up to 2 years to '*settle down*'. In June 2016 (although she had returned to full time work) she needed a specialist chair and adjustable workstation (provided in August 2016) and was unable to carry out any manual handling. She was taking medication in August 2016. By December 2016 she felt unable to work full time. We conclude that for the period June to December 2016 the impairments continued to have a substantial adverse effect on normal day to day activities (albeit not to the extent hitherto because she was able to work) or but for the treatment and correction measures taken ,it is likely the impairments would have had a such an effect. We conclude that advised It was therefore likely (in the sense it 'could well happen') that by December 2016 the substantial adverse effects of the bursitis and the neck back head and injuries she suffered in August 2015 had lasted for at least 12 months in total. We conclude therefore the claimant was a disabled person as at December 2016.

S13 Direct Discrimination

Allegation 11 20 August 2015

168 If our conclusion that it was not until December 2016 that the claimant was a disabled person is wrong, we conclude that there was no less favourable treatment of the claimant when Mr Johnson told the claimant she would need to reduce the debit of her hours from 14.24 to 5. She has alleged that a comparator (Ms Meah) was credited for attendance at her hospital appointments within core hours and was allowed to work at home for the remainder of the day when she had a medical appointment. However the claimant's witness statement provided no evidence about when or why she had attended medical appointments or that attendance at such appointments had caused or contributed to the 14.24 hours flex debit which had accrued and which Mr Johnson required her to reduce. She did not raise this with Mr Johnson. The claimant has not proved that the debit had accrued due to her attendance at medical appointments .In any event both the claimant and Ms. Meah were only ever credited against core time for 1 hour and 30 minutes of absence on medical appointments and she and Ms. Meah were obliged to make up any remaining debit hours in accordance with the policy applied in the Legal Services Division up to September 2017.Ms Meah was not in the same team as the claimant nor was she managed by Mr Johnson and unlike the claimant's role as a CMC the nature of her role was such that her manager was able to permit her to work at home.

Allegation 23 7 July 2016

169 We conclude that there was no less favourable treatment of the claimant when on 7 July 2016 Mr Johnson emailed the claimant and said if she did not reduce her hours debit he would remove her right to flexi leave, the claimant often leaving work early because she was in pain. The claimant has not proved

that the debit (12 hours) had accrued due to her often leaving work early because she was in pain as alleged .Further Ms Meah was not in the same material circumstances as the claimant because she had not accrued 12 debit hours. A hypothetical comparator who had accrued 12 debit hours and who was also taking time off for hospital appointments and being credited in accordance with the policy applied in the Legal Services Division up to September 2017 would have been treated in the same way by Mr Johnson.

Allegation 24 on or around 7 July 2016

170 The claimant has alleged that she was advised that Ms. Meah's hours were being credited for medical appointments, including travel time and she felt pressurised to reduce her working hours because her time off outside of core hours was debited. We have found on or around 7 July 2016 the crediting of travel time was not discussed between the claimant and Ms Meah and further that there was no difference between the claimant and Ms.Meah in that they were both credited with 1 hour and 30 minutes of medical appointments against core time and obliged to make up any remaining debit hours in accordance with the policy applied in the Legal Services Division up to September 2017.The claimant has failed to prove she was treated less favourably as alleged.

Allegation 27 9 November 2016

171 We found in paragraph 88 above that (as alleged by the claimant) during the one to one meeting on 9 November 2016 Mr. Johnson told her he applied the '*legal services rules on appointments as he interprets them*'. Although she also alleged that Ms Meah said her team leader allowed her to take time off for medical appointments and those hours were not debited we found the discussion between the claimant and Ms Meah was as set out in paragraph 84 above. We found in paragraph 88 above that (as alleged by the claimant) she wrote to HR for clarification. Although she also alleged that she received no response from HR, we found in paragraph 88 that she did receive a response, which was Mr. Johnson's position was unchanged. However, there was no less favourable treatment of the claimant in any event because we have found the claimant and Ms Meah were treated in the same way in relation to the way the Legal Services Division interpreted the crediting of hours for medical appointments.

Allegation 29 27 February 2017

172 The claimant has alleged that on 27 February 2017 Mr. Johnson sent an email to the claimant's team that Mr. Emmins would be working from home on Tuesdays and that she had requested that she work from home, but this had been refused. We have found that her request had initially been made to Mr. Johnson on 25 November 2016 and refused by on 1 December 2016 for the reasons set out in paragraph 89 above. The claimant has not proved (as alleged) that an email was sent on 27 February 2017 confirming that (henceforth) Mr Emmins would be working from home on Tuesdays; the only date referred to in the rota for the week in question on which he was working from home was Tuesday 28 February 2017 (see paragraph 93).However, we have found Mr Johnson had agreed to a further trial period of working from home. There was no less favourable treatment of the claimant. Any employee who did not have a disability and asked to work from home would also have had their request turned down because Mr Johnson had concluded working from home did not work for the team in the light of his experience with Mr Emmins' working from home on a

trial basis and would also have had any renewed request refused pending the outcome of Mr. Emmins' further trial period of working from home.

Allegation 31 24 July 2017

173 The claimant has alleged that she struggled to get to work on time due to the side effects of her medication and to help her arrive on time on 24 July 2017 she requested but was not permitted to park in the respondent's car park. We found no such request was made (paragraph 101 above). The claimant also alleged that at this time she had been asked to monitor three specific drawers in order to box up files ready for closing (a task which aggravated her symptoms because it involved lifting) but her witness statement provided no evidence about such a request or the task itself .She has failed to prove any such request was made to her or that she undertook such a task.

174 Even if the claimant's claims of direct disability discrimination had been made in time and at a time when the claimant was a disabled person they would have failed and been dismissed.

S15 discrimination from something arising in consequence of disability

175 If we were wrong in our conclusion that the claimant was not a disabled person until December 2016 and the claimant was a disabled person at the material time, we have considered the 'something arising' in consequence of disability in relation to each section 15 Equality Act claim made.

Allegations 15 and 19

176 Ms Garner confirmed in her oral submissions that the respondent made no concessions as far as each 'something arising' in consequence of her disability alleged by the claimant was concerned save for a (period) of sickness absence for the purposes of Allegation 15 (that the claimant failed her appraisal on 23 September 2015 and was off sick from 3 December 2015 and only had two months to achieve the goals set for her) .However her written submissions in relation to Allegation 19 were the same as those she made for the purposes of Allegation 15 .It seems to us to follow that the respondent also accepts that a (period) of sickness absence was 'something arising' in consequence of her disability for the purposes of Allegation 19 (that on or around 31 March 2016 the claimant was on sick leave and her appraisal was carried out in her absence).

Allegation 11

177 The 'something arising' alleged was the claimant's absence from work attending medical appointments but she has failed to prove that she attended such appointments or when or why she did so. We are not satisfied that prior to 20 August 2015 there were any absences from work attending medical appointments or that if there were any such absences they were 'something arising 'in consequence of her disability.

Allegation 16

178 The 'something arising' alleged was the claimant's debited hours but she has failed to prove that her debited hours arose in consequence of her disability.

Allegation 21

179 The claimant alleges that on 19 May 2016 she was given an attendance improvement plan with an absence target of 9.25 days. We have found that this was done on 29 April 2016 (see paragraph 74). The 'something arising' alleged was the claimant's level of sickness absence. Ms. Garner did not address this in her written submissions, and we conclude the claimant's level of sickness absence arose in consequence of her disability.

Allegations 23 and 24

180 In relation to both Allegation 23 (that on 7 July 2016 Mr. Johnson threatened to remove her right to flexi-time) and Allegation 24 (that on or around 7 July 2016 the respondent debited her hours when she took time off for medical appointments outside of core hours) the 'something arising' alleged was her level of sickness absence. The threat to remove her right to flexi- leave was made because she had accrued a 12-hour debit, but we are not satisfied that any causal link between the accrual of that debit and the level of sickness absence has been made out. Similarly, although Mr Johnson accepted the claimant had attended medical appointments (because he gave her credit for them as permitted under the respondent's guidelines), the claimant has not proved what medical appointments she attended or when or why she did so and we are not satisfied that any causal link between the time off for which she was debited outside core hours attending such appointments and the level of sickness absence has been made out.

Allegation 28

181 As far as Allegation 28 is concerned (that the claimant had to reduce her hours) the 'something arising' alleged was the sickness absence. We conclude her sickness absence arose in consequence of her disability.

182 The claimant having failed to prove the 'something arising' for the purposes of Allegations 11 16 23 24 those allegations could not have succeeded even if the claimant was a disabled person at the relevant time.

183 We have gone on to consider whether in relation to in relation to allegations 15 19 21 and 28 there was unfavourable treatment by the respondent.

Allegation 15

184 We conclude that failing an appraisal and being given only two months to achieve the goals set for her goals was unfavourable treatment by the respondent even if there were no adverse financial consequences for the claimant.

Allegation 19

185 The unfavourable treatment alleged by the claimant is that the appraisal was carried out in her absence and not in line with the respondent's own policy and she failed goal 2 despite her efforts to reduce her debited hours and the previous years' good performance. We conclude that to carry out an employee's appraisal in their absence is not (without more) unfavourable treatment and (contrary to the claimant's assertion) was in line with the respondent's policy. However, for an

employee to be failed in a goal given to an employee for appraisal purposes is unfavourable treatment.

Allegation 21

186 We conclude that being given an attendance improvement plan and a target absence of 9.25 days (as alleged by the claimant) is unfavourable treatment by the respondent because in the event of non-adherence there was the possibility her employment could be terminated. We found Mr. Cooney imposed both the attendance plan and the attendance target following the FCH which was triggered by the claimant's long-term absence.

Allegation 28

187 The claimant has alleged that she was treated unfavourably '*as a result of having to reduce her hours in order to meet her attendance target.*' and that this was imposed because of '*sickness absence'* which was '*something arising'* from her disability. We have already found at paragraph 90 above that the claimant did not request a reduction in hours in order to meet her attendance target but in any event there was no unfavourable treatment by the respondent. It did not make the claimant reduce her hours; this was an act by the claimant not the respondent and the claimant's hours were reduced because she requested it and her request was granted. In our judgment the position here is analogous to that referred by the then President of the EAT in paragraph 34 of his judgment in **Williams v The Trustees of Swansea University Pension and Assurance Scheme UKEAT/0415/14/DM**. When the claimant requested a reduction in her hours to which the respondent agreed it was complying with its duty to make reasonable adjustments for the claimant, a disabled person. The reduction in hours cannot then also be unfavourable treatment within section 15 EqA.

188 However, in relation to allegations 15 and 19 the claimant's sickness absence did not have any significant influence on Mr Johnson .Her sickness absence was the context in which Mr Johnson came to appraise the claimant in her absence under the MyAppraisal policy .He failed her because she had not made any progress towards achieving goal 2 in the period September 2015 to December 2015 and had no previous performance in the role in the previous year upon which she could be assessed (paragraph 70).As far as allegation 21 is concerned, although we did not hear evidence from Mr Cooney, we infer from his decision (paragraph 74) that the attendance improvement plan and the attendance target were imposed because of the claimant's sickness absence.

189 If the claimant was a disabled person as at 29 April 2016 we did not hear evidence from Mr Cooney but we conclude that Mr Cooney did not know and could not reasonably have been expected to know the claimant was a disabled person at that date. He knew (or ought reasonably to have known) the claimant had bursitis and had sustained an injury to her thoracic spine in August 2015. He also knew (or ought reasonably to have known) that the effect on her normal day to day activities was substantial and adverse because she had been unable to work for 5 months and would not be returning to full time work for another 4 weeks. However, he did not know and could not reasonably be expected to know that the effect was long term. Although the Chitnavis report said it would take two years for the injury to settle down, the statement of fitness for work dated 22 April 2016 said she was fit to return to work without restrictions and did not need to be seen again after 18 May 2016.The respondent had sought an OH opinion on the

issue of disability ; the OH report at paragraph 68 said she was not covered by Equality Act 2010 and the OH report at paragraph 71 said that following her return to work she would give good and reliable service and that she was not covered by the Equality Act 2010 .Neither she or her representative said she was a disabled person at or prior to the FCH nor did any of the reports she supplied give an opinion on the issue of disability or suggest more information should be sought .Mr Johnson had the same information as Mr Clooney when he appraised the claimant in her absence. We conclude that he too did not know and could not reasonably be expected to know that she was a disabled person at that time. Her section 15 claims therefore would also have failed even if they had been made in time.

S20 and 21 claims

Allegation 3

190 If, contrary to our conclusion, the claimant was a disabled person at 1 May 2015 we conclude that Mr Farmer did not know and could not reasonably be expected to know that the claimant was a disabled person. He knew of a shoulder injury in January 2014 and that the claimant had had shoulder injections and that as May 2015 she said she had a problem shoulder as a result of which he suggested she discuss an OH referral but as he knew at that time she was carrying out the duties required of her in her seconded role. He could not reasonably be expected to make any further enquiries. The alleged PCP was requiring all those in Grade 2 positions to deal with lifting and carrying. We conclude that if the claimant was a disabled person the claimant was not placed at any substantial disadvantage by that PCP in comparison with persons who are not disabled. When on 17 April 2015 she told Mr. Farmer of her decision to terminate the secondment she had expressed no qualms about her ability to carry out the lifting and carrying duties which would be required of her in her substantive Grade 2 role on her return to it. We conclude from the contents of her email of 12 June 2015 and the OH report of 9 July 2015 that the claimant was able to deal with the lifting and carrying required of those in Grade 2 positions. It follows Mr Farmer did not know and could not reasonably be expected to know of any such disadvantage.

Allegation 6

191 If, contrary to our conclusion, the claimant was a disabled person at 12 June 2015 we conclude that Mr Farmer did not know and could not reasonably be expected to know that the claimant was a disabled person. He knew no more than he knew as 1 May 2015 other than she had reiterated her opinion that she had a problem with her shoulders which she now said would cause a problem in her substantive role as far as lifting heavy items was concerned and he had taken reasonable steps to find out what the position was by ensuring an OH referral was made. The alleged PCP was requiring the claimant to undertake her duties in accordance with her terms and conditions (which required her to undertake a significant amount of heavy lifting) with no adjustments. If, contrary to our conclusion, the claimant was a disabled person at 12 June 2015 we conclude no such PCP was applied nor was she put to any substantial disadvantage. Her job description made it clear that the obligation was to undertake the lifting and carrying of files using appropriate manual handling equipment and employees were not required to undertake lifting boxes without

assistance (see paragraph 24 above). After 19 June 2015 when she returned to her substantive post the claimant was required to carry out the duties required of her in accordance with her terms and conditions but she was not required to undertake a significant amount of heavy lifting (see paragraph 52) and to the extent heavy lifting was required there was an adjustment made (she was to seek Mr Johnson's assistance). It follows Mr Farmer did not know and could not reasonably be expected to know of any such disadvantage. Further the failures to make the reasonable adjustments alleged by the claimant (that the respondent failed to respond to the claimant's email of 12 June 2015 or refer the claimant to OH) are factually incorrect ;Mr Farmer responded to the claimant's email and the claimant was referred to OH (see paragraphs 47 and 48 above) and we cannot see how either of those steps could have in any way avoided or removed the alleged substantial disadvantage of not being able to undertake a significant amount of heavy lifting (**Tarbuck**).

Allegation 8

192 The alleged PCP was requiring the claimant to undertake her duties in accordance with her terms and conditions (which required her to undertake a significant amount of heavy lifting) with no adjustments. If, contrary to our conclusion, the claimant was a disabled person at 9 July 2015 we concluded in paragraph 191 above there was no such PCP nor was she put to any substantial disadvantage. If there was any such substantial disadvantage ,by obtaining an OH report on the claimant the respondent had done what it reasonably could do to find this out .If there was such a PCP and the claimant did suffer the substantial disadvantage alleged, the failure to make the reasonable adjustments alleged by the claimant (that it did not implement the recommendations made by OH in its report dated 9 July 2015) is factually incorrect; as we concluded Mr Johnson both accepted and took steps to implement the recommendations made (paragraph 52 above).

Allegation 9

193 The alleged PCP was requiring the claimant to undertake her duties in accordance with her terms and conditions (which required her to undertake a significant amount of heavy lifting) with no adjustments. If, contrary to our conclusion, the claimant was a disabled person at 10 July 2015 we concluded in paragraph 191 above there was no such PCP and she was not put to any substantial disadvantage and the respondent had done what it reasonably could do to find this out ,having obtained an OH report . If there was such a PCP and the claimant did suffer the substantial disadvantage alleged, the failure to make the reasonable adjustments alleged by the claimant (that it did not follow through with its proposal to move the claimant) is factually incorrect (paragraph 51 above).

Allegation 10

194 The alleged PCP was requiring the claimant to undertake her duties in accordance with her terms and conditions (which required her to undertake a significant amount of heavy lifting) with no proper adjustments. If, contrary to our conclusion, the claimant was a disabled person at 13 July 2015 we concluded no such PCP was applied. Further we have found she was not required to undertake a significant amount of heavy lifting (see paragraph 52) (the alleged substantial

disadvantage). If the respondent did apply the PCP alleged and the claimant did suffer the substantial disadvantage alleged the failure to make the reasonable adjustments alleged by the claimant (that it did not make any proper adjustments and simply advised the claimant to seek assistance when required) the claimant did not suggest at the 1:1 meeting with Mr Johnson on 13 July 2015 (or subsequently) any 'proper' adjustments which might have been made, nor has she done so in her evidence to this tribunal. There was nothing to prompt Mr Johnson to make further enquiries about either the claimant's condition or any substantial disadvantage. We conclude Mr Johnson put in place such an adjustment as was reasonable to avoid any disadvantage (that the claimant should seek assistance), although the claimant did not avail herself of this.

Allegation 11

195 The alleged PCP was requiring the claimant to be at work during core hours. It is alleged this placed the claimant at a substantial disadvantage compared to her non-disabled colleagues as she was more likely to be absent from work during core hours as a result of medical appointments. If contrary to our conclusion the claimant was a disabled person as at 20 August 2015, the claimant was not placed at any such substantial disadvantage by that PCP because credit was given for medical appointments which took place during core hours (the reasonable adjustment which the claimant contends should have been but was not made). If (contrary to her pleaded case) the PCP was that employees were only credited for hospital/medical appointments during core hours and the claimant was thereby placed at a substantial disadvantage compared to her non-disabled employees because she was more likely to have absences from work outside core hours as a result of medical appointments, there was no evidence of any absences occasioned by such appointments and we are unable to conclude that the claimant was put (or would be put) at any such substantial disadvantage. The claimant also contends that in relation to the pleaded PCP in addition to the reasonable adjustment of being credited for hospital appointments within core hours she should have been allowed to work from home for the remainder of the day when she had a medical appointment. We identify the PCP as being the practice that Grade 2 ('CMC') employees in the team managed by Mr Johnson were not permitted to work from home .We can see that disabled employees might thereby be placed at a substantial disadvantage compared to non-disabled employees because on days when they attend medical appointments they run the risk of accruing debited hours outside of core hours with the attendant sanctions. However, we are not able to conclude the claimant was or would be put at that disadvantage because there was no evidence of any absences occasioned by such appointments. It follows that Mr Johnson did not know and could not reasonably be expected to know of any such disadvantage. Further this was not a reasonable step for the respondent to have to take because it was not practicable; the nature of the claimant's work precluded her from working from home and the trial run with Mr Emmins had failed. The claimant provided no evidence in her witness statement about how her work (or any part of it) could have been done at home.

Allegation 13

196 The alleged PCP was requiring the claimant to undertake her duties in accordance with her terms and conditions (which required her to undertake a significant amount of heavy lifting) with no adjustments. If, contrary to our conclusion, the claimant was a disabled person at 30 September 2015 we

concluded in paragraph 191 above there was no such PCP nor was she put to any substantial disadvantage. It follows the respondent did not know and could not reasonably be expected to know of any such substantial disadvantage. If the respondent did apply the PCP alleged and the claimant did suffer the substantial disadvantage alleged, the reasonable adjustment contended for by the claimant (that the respondent's proposal to move the claimant was followed through) was superfluous; the claimant had already moved back to Mr Johnson's team and as we concluded in paragraph 191 above Mr Johnson had put in place such an adjustment as was reasonable to avoid it.

Allegation 14

197 The alleged PCP was requiring the claimant to undertake her duties using the standard equipment provided. If contrary to our conclusion the claimant was a disabled person at 15 September 2015, we conclude no such PCP was applied to the claimant in any event. The claimant not required to undertake her duties using the standard equipment provided but was able to identify and use a chair she considered suitable for her needs. Further the claimant has not set out the nature and extent of the substantial disadvantage to which she says she was put by being required to use the standard equipment save to allude to having had difficulty sitting for long periods because of shoulder inflammation. If that was the nature of the disadvantage, she has not explained how it would have been alleviated or avoided by the provision of an orthopedic chair, the reasonable adjustment for which she contends. We are unable to conclude the claimant was put at any substantial disadvantage and it follows the respondent did not know and could not reasonably be expected to know of it. If there was such a PCP and the claimant was thereby put at a substantial disadvantage, by providing a work station review and allowing the claimant to find and use a suitable chair the respondent complied with its duty to make reasonable adjustments.

Allegation 15

198 The alleged PCP was requiring the claimant to maintain a certain level of attendance in order not to be subject to sanctions. The claimant was appraised by Mr Johnson during her absence on sick leave having taken advice from HR on 17 May 2016 (not on 23 September 2015 which is the date of the act or omission alleged by the claimant) .We have concluded that she was by this time a disabled person. However, no such PCP was applied to the claimant in the context of her 2015/2016 appraisal. There were no sanctions applied to employees who had not maintained a certain level of attendance under the MyAppraisal scheme. They were not marked 'not achieved' as a result and absences due to long term sickness or disability were provided for. We identify the PCP as being Mr Johnson's assessment of the claimant on the basis of the time she had spent in work from September to December 2015.The substantial disadvantage to which she was thereby put was that she only had 2 months to demonstrate progress towards the goals (not achievement of them as she alleged) which she had set for herself (they had not been set for her as she alleged) in order to receive a mark of 'Achieved.' The reasonable adjustment for which she contended was that Mr Johnson in assessing her should have taken into account her pre-sick leave performance in July 2015 (good) and September 2015 (very good) and her performance the previous year rated at B and evidence of achievement she had gathered. In our judgment that would have been a reasonable step for Mr Johnson to take to avoid the substantial disadvantage to which the claimant was put. However, Mr Johnson did not know nor ought he

reasonably to have known that the claimant was a disabled person (paragraph 189 above).

Allegation 16

199 The alleged PCP was requiring the claimant to maintain a certain level of attendance in order not to be subject to sanctions. However the reasonable adjustment contended for is that she should have been allowed to make up her debited hours without needing to stay late at work ,the substantial disadvantage being that she had to stay late at work to make up her debited hours .If contrary to our conclusion the claimant was a disabled person at 12 November 2015 the PCP alleged was not applied to the claimant. What was required of her was she make up her debited hours to avoid sanction. However, we are not able to conclude that the claimant as a disabled person was or would be put at the substantial disadvantage alleged by that PCP when compared to colleagues without her disability. All that is clear is that she was staying late at work (paragraph 65). It follows the respondent did not know and could not reasonably be expected to know of any such substantial disadvantage.

Allegation 19

200 The alleged PCP was requiring the claimant to maintain a certain level of attendance in order not to be subject to sanctions. We have already concluded at paragraph 198 above that no such PCP was applied in the context of the claimant's appraisal 2016/2016.However, this allegation relates to the appraisal having been conducted while she was on sick leave and the reasonable adjustment contended for is that her appraisal should have been deferred till she was able to return to work. We identify the PCP as the respondent proceeding with appraisals while employees are absent due to long term ill health or disability. However, we are unable to conclude that the claimant as a disabled person was thereby put at a substantial disadvantage in comparison with her non-disabled colleagues; the policy addressed how appraisals were to be conducted in the above circumstances. There was no evidence how this disadvantaged those who were disabled or the claimant. She did not fail her appraisal because it was carried out while she was absent. Further the claimant has not explained how deferring her appraisal until she returned to work would have alleviated or avoided any substantial disadvantage.

Allegation 21

201 The alleged PCP was requiring the claimant to maintain a certain level of attendance in order not to be subject to sanctions. We identify the PCP as being the imposition of a target for sickness absence of 9.25 days given by Mr Cooney. We are unable to conclude the claimant was or would be put to any substantial disadvantage by that PCP in comparison with persons who were not disabled. The prognosis for the claimant in the OH report (see paragraph 71) was of reliable and consistent attendance in the future and indeed the claimant had no absences. There is no evidence of any substantial disadvantage (in the sense of being more than minor or trivial) to which she was put as a result of the application of the PCP for example that it would be harder for her as a disabled person to maintain her attendance . She simply complained in her witness evidence that the targets were unrealistic and created (unspecified) difficulties for her. Although she appealed the target (asking for an increase to 15 days) she did not explain in her letter why she was likely to need more days off work. In the

absence of any substantial disadvantage to which the claimant was put or would be put the duty to make reasonable adjustments did not arise. Further we have found that Mr Cooney did not know and could not reasonably be expected to know the claimant was at this time a disabled person (paragraph 189).

Allegation 22

202 The alleged PCP was requiring the claimant to maintain a certain level of attendance in order not to be subject to sanctions. However, the reasonable adjustment contended for was that time should have been extended for the claimant to respond to Mr Evans grievance outcome letter. It would appear that the substantial disadvantage was that the claimant as a disabled person was thereby put to some difficulty in responding to Mr Evans' grievance outcome letter within the specified time scale. The alleged PCP is misconceived. We identify the PCP as the imposition of a 7-day time limit for a reply to the grievance outcome letter. However ,there was no evidence that the claimant was not able to respond earlier; the evidence of her active participation in meetings her return to work and email traffic prior to writing her letter of 9 June 2016 indicate her ability to manage her affairs without difficulty . We are not able to conclude the claimant was or would be put at any substantial disadvantage. It follows the respondent did not know and could not reasonably be expected to know of any such substantial disadvantage.

Allegation 27

203 The alleged PCP was requiring the claimant to maintain a certain level of attendance in order not to be subject to sanctions. The reasonable adjustment contended for was that of the respondent not debiting the claimant's hours when she was absent from work attending medical appointments. The substantial disadvantage appears to be that the claimant was more likely to (or did) accrue debited hours attending such appointments. We identify the PCP as the requirement that employees have no more than 5 hours debit or face disciplinary action and if the employee continued to have more than 5 hours debit they could be required to work fixed hours for up to 12 months. However we are unable to conclude the claimant was placed at any such substantial disadvantage by that PCP because there was no evidence of any absences occasioned by such appointments and we are unable to conclude that the claimant was put (or would be put) at any such substantial disadvantage and it follows the respondent did not know and could not reasonably be expected to know of any such substantial disadvantage .

Allegation 29

204 It was conceded by the respondent that (as alleged by the claimant) the respondent applied the PCP of requiring the claimant to attend work in a particular location. The reasonable adjustment contended for is that the claimant be permitted to work from home but there was no evidence that the claimant was put (or would be put) at a substantial disadvantage by this PCP. It follows the respondent did not know or could it resobaly be expected to know of it. We have found she made this request because she wanted to attend physiotherapy appointments. There was no evidence of her attendance at any such appointments or of any particular difficulty to which she was put in having to attend a particular location on any other occasion. Further we have already

concluded at paragraph 195 above that this was not a reasonable step for the respondent to take.

Allegation 31

205 The alleged PCPs were requiring the claimant to maintain a certain level of attendance in order not to be subject to sanctions and requiring the claimant to undertake her duties in accordance with her terms and conditions (which required her to undertake a significant amount of heavy lifting) with no adjustments. We have already concluded in relation to the latter that there was no such PCP.As far as the former is concerned the reasonable adjustment contended for was that the claimant be permitted to park in the respondent's car park. The substantial disadvantage pleaded was that the claimant struggled to get to work on time because of the side effects of her medication. We identify the PCP as being the requirement to attend work on time so as not to be subject to sanction. By this time the claimant's start times had already been changed to one day a week at 9.15 am ,3 days a week by 10.30 am and I day a week at 12.00 am. Her application to work reduced hours contained an offer to start one day a week at 9.15 am. Although it was Mr Emmins' understanding that these arrangements had been put in place to accommodate any difficulties in getting up in the morning (paragraph 105) ,in her email to Mr Emmins dated 13 November 2017 the claimant said this was not the case. When Mr Emmins raised with her 6 occasions of clocking in after 10.30 am she did not attribute this to the side effects of her medication but problems with parking or getting change (paragraph 99).At the time of the meeting with Mr Emmins on 24 July 2017 the incidents of lateness were confined to days when she did not have to attend work until 10.30 am. Although the claimant referred in her witness statement to her current difficulties in getting up in the morning due to pain becoming even worse if she takes Amitriptylene she also said she had refrained from taking it on working days so she could concentrate and drive and being put back on it was a recent occurrence. We are unable to conclude that the PCP did or would put the claimant at any substantial disadvantage (in the sense of being more than minor or trivial).

Allegation 32

206 The PCP alleged was that the claimant was required to attend work at 8.45 a.m. and it was conceded as '*valid* 'by Ms Garner in her written submissions. The substantial disadvantage pleaded was again that the claimant struggled to get to work on time because of the side effects of her medication. The claimant did not provide the medical evidence she had been told by Mr Emmins would be needed about her difficulties in attending 8.45 court shifts (because her doctor would not provide it) and in the light of this and for the reasons already given in paragraph 205 above we are unable to conclude that this PCP put or would put the claimant at any substantial disadvantage (in the sense of being more than minor or trivial). Therefore even if the section 20/21 claims had been made in time they would have failed.

Constructive Unfair Dismissal

207 We have considered the allegations in the Amended Scott Schedule including those now said to be background only. In relation to the additional points made by Mr Macmillan (paragraph 3 above) as far as the last straw was concerned ,the Grounds of Complaint described the last straw as the claimant

seeing that Mr Emmins had incorrectly recorded the cause of her medical condition on the OH referral sent to her on 8 November 2017,and not those additional points. This was not supported by the claimant's witness statement in which she said that she took as the last straw the subsequent OH report which said that the Equality Act 2010 applied only to an extent , knowing she would be in line for a further FCH under the respondent's SAP policy .In other words the last straw was the contents of the OH report and the opinion expressed about whether she was a disabled person and not the OH referral which preceded it . We accept Ms Garner's submission that the additional points have not been pleaded. The claimant made no application to amend her claim to include them and we conclude that they formed no part of her pleaded case before us. Ms Garner has accepted that the constructive dismissal claim was brought within time. An issue which emerged during Mr Macmillan's oral submissions was the date on which the claimant's employment terminated. Further written submissions were permitted and made, and we have read and considered their contents. We conclude that her employment terminated on 11 January 2018.Ms Simpson's letter of 18 January 2018 and the payment in lieu did not have the effect of extending the date of termination to 11 February 2018.

208 We have already found at paragraph 37 that the meeting on 26 January 2015 between the claimant and Ms Simpson was not as alleged by the claimant. However, she also complained that no referral was made to OH until June 2015.She further complained that no referral was made following her 'disclosure' on 15 April 2015 that she had received injections in her shoulder.

209 We conclude having regard to the Respondent's SAP (paragraph 32) there was no reason for the respondent to refer the claimant to OH following the meeting on 26 January 2015. The claimant raised her shoulder injections in her grievance of 15 April 2015 because she was concerned about the inclusion of personal information in the notes of the meeting of 26 January 2015 (paragraph 37) not because she sought an OH referral. She raised her shoulder problem with Mr Farmer on 1 May 2015 in the light of her prospective return to her substantive post and it was his suggestion that she should discuss an OH referral with the appropriate manager. Such a referral was one of the actions to be taken by Ms Simpson following the meeting between Mr Farmer and the claimant (one which the claimant welcomed). She then agreed to say in her seconded role for a further month. Shoulder pain did not impact on her ability to do that role (paragraph 44). Having had 3 days' absence due to joint pain a return to work interview was conducted and by 18 June 2015 the OH referral made. The OH report was prepared on 9 July 2015 (albeit after her return to her substantive post on 6 July 2015) and its recommendations implemented by Mr Johnson. We conclude that any delay in making the referral in those circumstances was not such that it could amount to or contribute to a repudiatory breach of the implied term of mutual trust and confidence.

210 As far as allegation 3 is concerned we found in paragraph 40 that the claimant did email Mr Farmer and was told by Mr Patel that there were no alternative roles available in Democratic Services. However, there is nothing about the content or tone of the exchanges with Mr Farmer or Mr Patel which is capable of amounting to or contributing to a repudiatory breach of the implied term of mutual trust and confidence.

211 The claimant has complained that on 9 June 2015 Ms. Simpson recorded the reason her absence as 'stress'. We made our findings in paragraph 44 .Ms

Simpson had reasonable and proper cause originally to record stress as in part being the reason for her absence because that was what the claimant had told her and when she was asked to alter the description she did so. Ms Simpson's conduct cannot amount or contribute to a repudiatory breach of the implied term of mutual trust and confidence.

212 The claimant has complained in allegation 6 that she did not receive a response to her 'disclosure' on 12 June 2015 about her difficulties in performing her substantive role in particular lifting due to her shoulder problem. In fact what she disclosed to Mr Farmer was that the OH referral about this had not taken place and reading her email as a whole we conclude that she was regretting her decision to end her secondment and trying to delay or avoid returning to her substantive post. In any event she did receive a response to her email on 17 June 2015 (although its contents may not have been what she hoped for) and by 18 June 2015 she had been referred to OH by Ms Simpson. There was no conduct by the respondent in this regard which was capable of amounting to or contributing to a repudiatory breach of the implied term of mutual trust and confidence.

213 In allegation 8 the claimant complained that the OH report made the recommendations we have recorded in paragraph 50. We are unable to understand how this is capable of amounting to or contributing to a repudiatory breach of the implied term of mutual trust and confidence. The respondent took steps to implement the recommendations made.

214 In allegation 9 the claimant complained that her grievance raised on 10 July 2015 had not been dealt with. We have found it was dealt with by Mr Evans; she might not have agreed with the outcome or the process adopted but that is not what she has complained about. Further this did not feature in her resignation letter.

215 In allegation 10 the claimant complained that the suggestion made by Mr Johnson on 13 July 2015 that she seek assistance with lifting as and when required was not practical because 70 to 80 % of the role involved lifting. She failed to prove how much lifting the role required or what part of the role was heavy lifting .She never asked Mr Johnson for assistance with any lifting which her role entailed .She has not therefore proved that the suggestion made by Mr Johnson was impractical .

216 In allegation 11 the claimant complained that Mr Johnson had told her she needed to reduce her debit hours from 14.24 to 5 when Ms Miah was credited for hospital appointments within core hours and permitted to work from home. We found Mr Johnson had done so. This was in accordance with the respondent's Flexitime Scheme (paragraph 17). Ms Miah was treated in the same way as the claimant as far as credit for appointments within core hours was concerned. The claimant raised no concerns about this email (paragraph 55). She has produced no evidence of medical appointments. She did not tell Mr Johnson such appointments were the reason why the debit hours were building up. The claimant was not permitted to work from home but Mr Johnson had reasonable and proper cause for this (paragraphs 84 89 and 94). There was no conduct by the respondent in this regard which was capable of amounting to or contributing to a repudiatory breach of the implied term of mutual trust and confidence.

217 In allegation 13 the claimant has complained that she heard nothing further from Mr Evans about what she described a recommendation to alter her workplace and management or proposal to move her .Having made his suggestion Mr Evans did make enquiries thereafter but did not tell the claimant about them .However she did not chase this up with him and any such change was superfluous; the claimant had already moved back to Mr Johnson’s team where adjustments were made for her. There was no conduct by the respondent in this regard which was capable of amounting to or contributing to a repudiatory breach of the implied term of mutual trust and confidence.

218 In allegation 15 the claimant complains that she was only given two months to achieve the goals set for her under the My Appraisal scheme and in allegation 19 she complains about Mr. Johnson having conducted her appraisal in her absence and that she had failed goal 2 .We concluded at paragraph 198 above that Mr Johnson had not failed to make a reasonable adjustment but ,even if there had been such a failure , his conduct in this respect alone was not calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence.

219 In allegation 16 the claimant complains she was required to stay late to make up her debited hours and this was recognised by Mr Johnson at a 1:1 meeting on 12 November 2015. The claimant has not proved the latter (paragraph 65) or that she was required to stay late in order to make up debited hours or why any such debited hours accrued.

220 In allegation 21 the claimant complains that she was given an improvement plan with an absence target of 9.25 days. We have found she was given such a target by Mr Cooney. It was the respondent’s standard target. It was a target which she was able to meet. It was imposed in accordance with the respondent’s policies. Although we have concluded that the imposition of the target in question by the respondent would have been unfavourable treatment ,we conclude that such treatment would not be sufficient on its own to amount to or contribute to a repudiatory breach of the implied term of mutual trust and confidence . There was the possibility of the termination of her employment if not adhered to but before such a step was taken there would have been a further FCH at which the claiamnt would have been able to put her case about this.

221 In allegation 22 the claimant complains that she requested but was refused an extension of time to respond to the grievance outcome .Mr Evans’ responses to the requests were tardy; however that is not what the claimant complains about and we conclude that for the reasons cited by Mr Evans (paragraph 80) the respondent had reasonable and proper cause not to agree to extend time for her.

222 In allegation 23 the claimant alleges that Mr Johnson said on 7 July 2016 that if she did not reduce her hours debit he would remove her right to flexi leave and that she would often leave early because of pain and that she (unlike Ms Miah) had her hours debited when she took time off for medical appointments. She also alleged in allegation 24 that the credit for medical appointments given to Ms Miah included travel time. We found in paragraph 83 that Mr Johnson did make such a statement in his email of that date but we have not found that the claimant would often leave early because of pain. Ms Miah had only had core hours (I hour 30 minutes) for hospital appointments credited and we have not found that the claimant’s accrued hours debit was due to medical appointments.

230 In allegation 28 the claimant complains that she had requested a reduction in her hours of work because she felt unwell and pressurised into meeting an attendance target; her debit hours were increasing and she felt the only way out was to reduce her hours. We did not find the claimant made the request because she was pressurised into meeting an attendance target; she made a request for the reasons we found in paragraph 90. It was reasonable of the respondent to accede to the request made. There was no conduct by the respondent which was capable of amounting to or contributing to a repudiatory breach of the implied term of mutual trust and confidence.

223 In allegation 29 the claimant complains that unlike Mr Emmins her request to work from home had been refused. As we have already found Mr Johnson had reasonable and proper cause for his conduct in refusing the claimant's request. He did not close the door on a future application to work from home, pending the outcome of Mr Emmins' trial period. She also complained that she had requested to park in the respondent's car park but we found no such request was made (paragraph 99) .We accept Ms Garner's submission that Mr Johnson's decision was a reasonable management decision .There was no conduct by the respondent which was capable of amounting to or contributing to a repudiatory breach of the implied term of mutual trust and confidence. In the absence of any corroborating medical evidence that the claimant was in difficulties in attending work at 8.45 am due to the side effects of medication as alleged in allegation 32 we conclude that it was an entirely reasonable management decision of Mr Emmins to require court shifts to start at 8.45 am.

224 We concluded at paragraph 207 above that the pleaded last straw was Mr Emmins incorrectly recording the cause of her medical condition on the OH referral sent to her on 8 November 2017.This does not feature in her letter of resignation and as we have already noted in paragraph 207 the last straw referred to in her witness statement was the contents of the OH report which ensued. We accept Ms Garner's submission that it was not necessary for the OH referral to identify the (possible) cause of the injury or disability and what was required was that the effect of her condition on her ability to do her work be addressed. Mr Emmins had stated in the OH referral that the cause of the claimant's shoulder pain was the climbing accident because that was what the claimant had told him at the home visit. To record her condition and its cause in those circumstances is an innocuous act and not a matter that was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee or contribute to it. Further, we conclude that it played no part in the claimant's decision to resign.

225 If ,contrary to our conclusion in paragraph 207, the additional points form part of the claimant's pleaded case in relation to the last straw , the claimant also alleges that the respondent failing to take into account her email of 13 November 2017 concerning factual inaccuracies in the OH referral of 8 November 2017 as became apparent in the OH report of 21 November 2017 was the last straw. However it is clear that the claimant was able to and did draw the attention of OH to any factual inaccuracies of which she complained in the OH referral prior to the OH appointment (paragraph 110) .She also had the opportunity to address this at the OH appointment itself. In those circumstances Mr Emmins' failure to respond to or take the contents of her email of 13 November 2017 into consideration are not matters that were calculated or likely to destroy or seriously damage the relationship of confidence and trust between

employer and employee or contribute to it. Further, we conclude that it played no part in the claimant's decision to resign.

226 It follows that the most recent act (or omission) which the claiamnt alleges caused or triggered her resignation prior to the matters referred to in paragraph 224 and/or 225 above was the imposition of early shifts on 17 August 2017 .However, the claimant stayed in employment and did not resign until 11 January 2018 some five months later. We conclude that this amounts to affirmation. Although she was absent from work from 15 September 2017 this was occasioned by her physical condition and she was able to continue to communicate with the respondent and participate in the application of its absence management procedure.

227 The claimant's claim of constructive unfair dismissal fails and is also dismissed.

Employment Judge Woffenden
14 April 2020