EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111314/2019

Held in Glasgow via Cloud Video Platform (CVP) on 17, 18 and 19 November 2020

Members' Meeting held on Tuesday 22 December 2020 (V)

Employment Judge: Rory McPherson
Members: G Coyle
S Singh

Mr J Gilmour **Claimant**

Ramsdens Financial Ltd **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that;

1. In relation to, what are identified as s20, s21 Equality Act 2010 (EA 2010) complaints of the 6 separate asserted PCP's;

   a. S20, s21 EA 2010 **PCP 1** "*Not carrying out individual risk assessments for employees returning from long terms sick, particularly those returning from having a stroke* "(the proposed Risk Assessment PCP) does not succeed, this Tribunal do not have jurisdiction to consider same; and

   b. S20, s21 EA 2010 **PCP 2** "*Not obtaining Occupational Health report immediately upon employees returning from long terms sick to see what adjustments should be considered, particularly for those returning from stroke."* (the proposed Occupational Health PCP) does not succeed, this Tribunal do not have jurisdiction to consider same; and

   c. S20, s21 EA 2010 **PCP 3** "*Assigning specific managers only to specific branches, and not giving adequate consideration to managerial requests to*

swap branches." (the proposed Branch Manager Swap PCP) does not succeed; and

d. S20, s21 EA 2010 **PCP 4** "*Not paying for taxi to and from work whilst Access to Work requests to DWP are being considered."* (the proposed taxi payment PCP) does not succeed; and

e. S20, s21 EA 2010 **PCP 5** "*Not maintaining salary levels for disabled employees who require reasonable adjustments to be made to their role to allow them to continue in their role, for a temporary period whilst those adjustments are being implemented"* (the proposed salary maintenance PCP) does not succeed; and

f. S20, s21 EA 2010 **PCP 6** "*Policy on what is deemed to an acceptable staffing level."* (the propose staffing level PCP) does not succeed; and

2. The claimants claim for constructive unfair dismissal does not succeed;

3. The Tribunal declines to make any recommendations in terms of s124(2) (c) of EA 2010.

REASONS

Introduction

Preliminary Procedure

1. The Final Hearing which took place via CVP, followed upon Preliminary Hearings on **17 January 2020** (the January 2020 PH) and **4 June 2020** (the June 2020 PH). The January 2020 Preliminary Hearing identified that the claims were for constructive unfair dismissal and in respect of s20 of the Equality Act 2010. The June 2020 determined, both parties having indicated a willingness for the Final Hearing to take place remotely, that the Final Hearing take place by CVP (either by hybrid or full CVP). It was subsequently agreed that the Final Hearing would operate fully via CVP and that witness statements would be used.

2. Prior to the Final Hearing, on **Friday 13 November 2020** respondent witness statements (which were identified as not having been amended since they were

presented in draft on 5 November 2020 to the claimant) were provided to the Tribunal for the Final Hearing.

3. On **Friday 13 November 2020** a Bundle headed Respondents List of Documents which was operated as the Joint Bundle was provided.

4. On **Friday 13 November 2020** an undated claimant witness statement was provided.

5. On **Monday 16 November 2020,** in advance of the Final Hearing additional documents were provided;

   a. the claimant Attempted April 2018 E-mail,

   b. the respondent To Whom It May Concern April 2018 letter, and

   c. a respondent provided explanation email, from the respondent IT Director in response to provision of the claimant Attempted April 2018 E-mail.

   There was no objection and the additional documents were added to the Joint Bundle. In addition, respondent proposed Time Table of Events and Agreed Facts (the respondent proposed agreed chronology of events was provided to the Tribunal) was provided.

6. The evidential element of the Final Hearing commenced on **Tuesday 17 November 2020** and concluded on **Thursday 19 November 2020**. Evidence in chief was given for the claimant, via written unsigned and undated statement, the claimant being subject to cross examination and re-examination. Evidence for the respondent was given via witness statement Scott Carson SBDM (Staff Business Development Manager) West Scotland dated Monday 4 November 2020 Tom O'Donnelly (Regional Manager) dated Tuesday 5 Nov 2020 and Leanne McNamara (HR Manager) Tuesday 5 November 2020 each of which was taken as Evidence in chief and each of whom were subject to cross examination.

7. Following the evidential element of the Final Hearing, parties were:

   a. permitted until **Tuesday 3 December 2020**, or as otherwise agreed between the parties, to exchange their respective full written submissions (the

primary written submissions), addressing all matters which have been the subject of the final hearing in relation to the claimant's claims in relation to constructive unfair dismissal and in terms of s 20 of EA 2010, remedy and any issue of recommendation in terms of s124(2)(c) and s124(3) of EA 2010.

b. and thereafter to provide by e-mail, in written form **Thursday 17 December 2020** issue their respective final written submission to the Tribunal and each other, addressing the Tribunal on all matters relevant for this Final Hearing including their position on any relevant findings of fact and law which the Tribunal are invited to make in relation to the issues addressed in this final hearing in relation to the claimant's claims in relation to constructive unfair dismissal and in terms of s 20 of EA 2010, remedy and any issue of recommendation in terms of s124(2)(c) and s124(3) of EA 2010.

8. The Tribunal's private deliberation took place at Members' Meeting on **Tuesday 22 December 2020, final** written submissions being available by that date and being the earliest mutually available date for the full panel of the Tribunal.

Issues for the Tribunal

9. **Time limit / limitation issues**

Questions for the Tribunal were,

c. Were the complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 (EA 2010) always having regard to the operation of s.207B(3) of ERA 1996 which provides that in working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted; s.207B(4); and

d. Dealing with this issue would involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit;

whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc; and

e. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **Sunday 19 May 2019** (the respondent arguing, in submissions at conclusion that the relevant date was **Tuesday 2 July 2019**) re the initial period of Early Conciliation [the Tribunal on **Tuesday 5 November 2019** advised there was no need to present another ET1 in accordance with **Compass** set out below] was *potentially* brought out of time, so that the Tribunal may not have jurisdiction to deal with it. The ET1 (5.11) and ET3 (ET3 4.1 and para 15 paper apart) both set out what was said to be the date of termination.

10. **In relation to Disability Discrimination**:

The respondent having conceded on the issue of Mr Gilmour's qualifying disability status, issues which would otherwise be before the Tribunal in terms of s6 of the EA 2010 and Schedule 1 Determination of Disability, would not arise:

f. whether did the claimant have a physical or mental impairment at the at the relevant time; and

g. did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities; and

h. if so, is that effect long term? In particular, when did it start and (has the impairment lasted for at least 12 months /is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months? do not arise; and

i. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

11. The head of claim raised in terms of the EA 2010 were in terms of **s20 (and in effect s21)** (reasonable adjustments)

12. **EA 2010**, **sections 20 & 21: issues in relation to reasonable adjustments for disability, were;**

    j. Did Ramsdens know or could it reasonably have been expected to know that Mr Gilmour was a person with a disability (this was however a matter of concession)?

    k. A "PCP" is a "*provision, criterion or practice".* Did Ramsdens apply a PCP, and if so, what was the form of the PCP, applied to Mr Gilmour. The claimant in their Further and Better Particulars intimated Friday 7 February 2020 had given notice of what were said to be PCP's relied upon (responses for the respondent intimated **Friday 13 March 2020**) (while bullet points were adopted in those Further and Better Particulars a numbering system for ease of reference is utilised here) being;

        1. **PCP 1** "*Not carrying out individual risk assessments for employees returning from long terms sick, particularly those returning from having a stroke* "(the proposed Risk Assessment PCP)

        2. **PCP 2** "*Not obtaining Occupational Health report immediately upon employees returning from long terms sick to see what adjustments should be considered, particularly for those returning from stroke."* (the proposed Occupational Health PCP)

        3. **PCP 3** "*Assigning specific managers only to specific branches, and not giving adequate consideration to managerial requests to swap branches."* (the proposed Branch Manager Swap PCP)

        4. **PCP 4** "*Not paying for taxi to and from work whilst Access to Work requests to DWP are being considered."* (the proposed taxi payment PCP)

        5. **PCP 5** "*Not maintaining salary levels for disabled employees who require reasonable adjustments to be made to their role*

to allow them to continue in their role, for a temporary period whilst those adjustments are being implemented" (the proposed salary maintenance PCP)

6. **PCP 6** "*Policy on what is deemed to an acceptable staffing level."* (the proposed staffing level PCP)

l. If they were accepted to be PCP's (the respondent Further and Better Particulars set out that none were accepted to be PCP's) did the application of any of those PCP's put Mr Gilmour at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time.

m. If so, did Ramsden know or could it reasonably have been expected to know that Mr Gilmour was likely to be placed at any such disadvantage?

n. If so, were there steps that were not taken that could have been taken by the Ramsden to avoid the disadvantage?

o. If so, would it have been reasonable for Ramsdens to have to take those steps at any relevant time?

4. In relation to Constructive Dismissal. did the respondent, by any such failure, act so as to entitle the claimant to resign; and

5. The claimant had set out in his ET1 that recommendations were sought (in terms of s124(2)(c) and s124(3) of EA 2010)

Findings of Facts

1. The ET1 was presented on **Tuesday 1 October 2019** following initial period of ACAS Early Conciliation (ACAS Early Conciliation **Wednesday 22 May 2019** to **Friday 5 July 2019**) and was followed by second period of ACAS Early Conciliation **Thursday 3 October 2019** to **Friday 4 Oct 2019.**

2. On **Monday 4 November 2020** the respondents submitted an ET3.

3. The respondent is a provider of financial services, including but not restricted to the provision of Pawnbroking services.

4. The claimant who was 34 at the date of termination had worked with the respondent from **Saturday 1 October 2011** to **Wednesday 14 August 2019** latterly as a Branch Assistant.

5. The claimant had been initially employed as a **Full Time Branch Assistant** at their **Partick Branch.** On **Friday 13 December 2013** the claimant transferred to the respondent's Branch at the Forge Shopping Centre taking the promoted role of **Branch Manager** at the respondent's **Forge Branch**.

6. On **Friday 1 April 2016** the claimant transferred from the respondent's Forge Branch to take on the role of Branch Manager at the respondent's **Queens Park Branch.** The Tribunal accepts the claimant's evidence to the effect that Queens Park branch had different requirements than other stores he had worked in (which focussed on currency exchange) due to the pawnbroker type of transactions which are subject to more stringent regulations with higher valued transactions and included requirements that contacts be signed by two members of staff. Two full time members of staff were employed at the Queens Park branch. The Tribunal concludes, including having regard to the claimant's evidence that the role of Branch Manager at Queens Park was not directly interchangeable with the role of Branch Manager in the respondent's Partick and or Argyle Street branches**.** The claimant's pay as Branch Manager of Queens Park was in excess of pay for Branch Managers in other geographically close branches which had transactions which were less complex. The claimant as sole Branch Manager had direct managerial responsibility for the operation of the Queens Park Branch including in relation to its employees. The respondents provided support to branch managers including the claimant including through the provision of a Regional Manager, Tom O'Donnelly as Line Manager covering various branches and a Staff Business Development Manager James Gilmour covering the Glasgow region over some 14 branches and who has regular contract with all branches. Mr Gilmour had regular contact with the claimant every few days and would have a full visit meeting with the claimant each month.

7. On around **Monday 11 December 2017** the claimant suffered a vertebral artery dissection (a stroke episode). It was a matter of agreement that the

respondent was aware that the claimant had suffered a stroke episode. It was a matter of agreement that the claimant had at all material time a qualifying disability in terms of s 6 of the EA 2010.

8. The respondent was not notified at the material time that the claimant was advised to take 6 months (i.e., to around **Monday 11 June 2018**) off work. The claimant elected to return earlier than the date he was signed off, the *Statement of Fitness for Work* (known generally as a *'Fit Note',* and which replaced the so-called Sick Notes in 2010) covered **20 December 2017** to **Wednesday 31 January 2018**, having completed an online return to work form on **Thursday 28 December 2017.**

9. While the Tribunal was not provided with the Fit Note, it gives the completing doctor the option of declaring the patient either *'not fit for work'* or '*may be fit for work taking account of the following advice'.* It may indicate the nature of the illness, the period of absence that is initially expected.

10. While absent the claimant received relevant contractual sick pay arrangements including 5 days contractual pay and thereafter pay at the rate provided in terms of the applicable Statutory Sick Pay Regulations which arrangements uniformly applied across all levels of employees across the branches up to Director levels at the respondent Head Office at the time. The claimant who was Branch Manager of the Queens Park Branch at the time did not communicate to the respondent that he felt motivated to return to work to his existing role because of reduction in his income while absent.

11. The claimant requested, and the respondent agreed to, a Phased Return to Work commencing Friday 19 January 2018 (**Jan 2018 Phased Return to Work**) operating until to around March 2018.

12. The claimant was absent from work on **Thursday 22 February 2018** for medical treatment, being an aortic dissection. The claimant elected to return to work the following day.

13. On **Tuesday 3 April 2018** (page 59 bundle) the claimant submitted the respondent pro forma Flexible Work Request (the **April 2018 Flexible Work Request**) form, consistent with the Flexible Work Regulations 2014 provided

that "*should this request be granted, this will be a permanent change to current Terms and Conditions unless otherwise agreed".*

14. The **April 2108 Flexible Work Request** set out that the claimant wished to *"stagger"* his working days over 4 days on a short-term basis to *"aid my recovery- I am finding work too much*" at that moment. He proposed, that he worked Monday, Wednesday, Friday and Saturday. He set out that "*Alternatively another member off staff in the short term particularly as we are coming up to the busy season. My recovery has been estimated to be between 12-18 months and I really need support".* The claimant, in response to a pro form box which set out that "*I would like this permanent alternation to my working conditions to commence from*" intimated that he would like it commence "*As soon as possible".* He further set out that "*I understand that in the short term that if I reduce a day the branch will need support on that day- I am hoping that this will only be for a short period of time."* The effect of this request would be that he would move to a new working pattern as Manager of the Queens Park Branch of 4 specific days being Monday, Wednesday, Friday and Saturday (that is giving him Tuesday and Thursday addition to Sunday as non-working days). The claimant did not describe any ongoing symptoms including vertigo, fatigue or spatial awareness nor any alleged stresses of the branch nor any issues with travel distance to and from work. The claimant did not give any notice of any identifiable risks to his health and safety arising from the then current working arrangements.

15. The claimant certified as unfit to attend work from **Friday 6 April 2018** to **Thursday 19 April 2018** for aortic dissection awaiting further investigation.

16. On **Monday 16 April 2018** at 3.23pm the claimant attempted to send an e-mail from his personal Hotmail e-mail address to the respondent (the claimant Attempted April 2018 E-mail). The Tribunal accepts that e-mails to the generic respondent HR email which are external are subject to firewall. The Tribunal accepts that claimant included a wrong (full stop missing) email address for the respondent's Ms Kelly. The claimant Attempted April 2019 E-mail was not received. That email intended to set out that the claimant had "*been advised by my stroke consultant that I am unfit for work and have sent in my sick line*

to my branch ... to be scanned to my SBDM. The sick lines cover the next two months due to the ongoing health problems that I am suffering due to my artery dissection…and residual neurological effects from my strokes in December 2017. I am hoping to be able to return to some form of work sooner rather than later. I am aware that I had original applied … for flexible work… until I recover from my illness... A big part of the difficulties I am having is travelling to and from work which involves taking 2 buses across town each way. At the moment I am not up to doing this. I would like to explore the possibility of working in a closer branch in the meantime, if this is a feasible option". It further intended to set out that the Queens Park Branch was an hour away while Partick and Argyle street were 10 minutes away. The email concludes *"Would it also be possible for you to send me written confirmation that I will only be receiving SSP for the periods that I am off sick. I need this confirmation to forward to my landlord and HB".* The Tribunal finds that the claimant attempted April 2019 Email was not received by the respondent, it had not been addressed properly.

17. On **Tuesday 17 April 2018,** in response to a telephone request from the claimant, and not in response to the claimant Attempted April 2019 E-mail, Claire Kelly, HR Manager issued a "*to whom it may concern"* letter (the respondent To Whom It May Concern April 2018 letter) setting out that the claimant has been employed since October 2011, that he works at Queen Park Branch, he had been absent through work through sickness since 6 April and will be paid Statutory Sick Pay for this absence. The letter set out that should any further information be required the recipient should contact Ms Kelly. The claimant did not seek further information or response from Ms Kelly in response to the terms of the respondent To Whom It May Concern April 2018 letter.

18. On **Friday 26 April 2018** Scott Carson the respondent's Staff Business Development Manager (SBDM) met with the claimant as part of his regular monthly catch up of meetings with the claimant, to take place over a coffee and out with the Queens Park Branch in order that the claimant would feel able to discuss any matters of concern. The claimant knew that Mr Carson as SBDM was in a position to provide relief support including cover for absences. No reference was made by the claimant to the attempted April 2018 Email or the respondent To Whom It May Concern April 2018 letter. The claimant agreed

that his 5 day working week pattern would be reduced as he had requested, on a temporary basis to 4 days a week for a period of 3 months and agreed to consequential reduction in salary, further that Scott Carson as SBDM would arrange to provide temporary support to the store on each day that the claimant was working with an additional member of staff to allow for regular breaks, further it was planned that an employee who was based in the Respondent's Argyle Street store would be transferred upon her return to work (**the April 2018 Flexible Working Arrangement**). The claimant did not describe any ongoing symptoms including vertigo, fatigue or spatial awareness nor any alleged stresses of the branch or any issues with travel distance to and from work. The claimant did not give any notice of any identifiable risks to his health and safety arising from the then current working arrangements.

19. On **Tuesday 1 May 2018** the respondent's HR Manager Claire Kelly confirmed respondent's decision and clarified in relation to the April 2018 Flexible Working Arrangement that;

    a. The respondent could not accommodate his request to move to a new working pattern as Manager of the Queens Park Branch on 4 specific days being Monday, Wednesday, Friday and Saturday (that is giving him Tuesday and Thursday addition to Sunday as non-working days);

    b. However, it was able to accommodate his request that he works 4 days per week on a temporary basis with a reduction to 30.50 hours per week with consequential reduction in his Manager salary and holiday entitlement.

    It was confirmed, that the reduction in working days would be reviewed at the end of 3-month period (that is around July 2018) to ensure that the Queens Park branch and West of Scotland Region were adequately resourced.

20. The claimant did not submit a grievance and or any appeal in response. He did not apply to ACAS for Early Conciliation in response and did not submit a claim to Tribunal within 3 months less one day (subject to any ACAS extension) of the date of the decision. There is no claim before the Tribunal in relation to the operation of the Flexible Work Regulations 2014 or s80F – 80I of the Employment Rights Act 1996.

21. Subsequently in or around **May 2018** the respondent's HR Manager Claire Kelly (CK) departed and was subsequently replaced by Ms Leanne McNamara as HR Manager. There was no handover.

22. On **Thursday 31 May 2018** the claimant emailed the respondent's Operations Director Mike Johnston (who was effectively senior to both Scott Carson and Tom O'Donnelly) who was on annual leave, asking for a review of the company sick pay policy, which the claimant felt was unfair (to him). The claimant did not give any notice of any identifiable risks to his health and safety arising from the then current working arrangements.

23. On **Wednesday 20 June 2018** the respondent's Operations Director Mike Johnson confirmed, after his annual leave, and having consulted with fellow directors that the decision was not to change the policy uniformly applied to its employees at that time and tailor the policy to him, however, he advised that if the claimant needed to discuss his personal situation the claimant should contact Mike Johnson, Scott Carson the SBDM or Tom O'Donnelly the Regional Manager. Scott Carson had throughout this period continued with his regular programme of meetings with the claimant. The claimant did not give any notice of any identifiable risks to his health and safety arising from the then current working arrangements.

24. Prior to Scott Carson the respondent's SBDM's meeting with the claimant, the respondent's Assistant HR Ms Rebecca Davies, had advised Mr Carson that the respondent was not able to accommodate the extra resource in the branch.

25. On **Wednesday 20 June 2018** the respondent's SBDM Scott Carson had arranged one of his regular catch-up meetings with the claimant, to take place over a coffee and out with the Queens Park Branch in order that the claimant would feel able to discuss any matters of concern. The claimant advised that he was hopeful that he would return to work full time (5 days a week) and confirmed to Mr Carson, that he understood that the respondent was not in a position to support with an additional member of staff. Mr Carson requested that the claimant keep him updated on his condition and if he needed any more support, he should contact Mr Carson. The claimant knew that Mr Carson as SBDM was in a position to provide relief support including cover for absences.

Mr Carson confirmed that the April 2018 Flexible Working Arrangement of 4 working days would continue to be offered for a further period of up to 3 months (the extended April 2018 Flexible Working Arrangement) to support the claimant, although he would be requiring the claimant to resume his 5 days a week working arrangement thereafter. The claimant did not give any notice of any identifiable risks to his health and safety arising from the then current working arrangements.

26. By **August 2018** the claimant had returned to 5 day working week by agreement. The claimant did not give any notice of any identifiable risks to his health and safety arising from those then current working arrangements.

27. On **Monday 20 August 2018** NW commenced as a new start, to the company, assistant in the Queens Park Branch. She was recruited and engaged by the respondent to provide additional support to the claimant, although she did not have prior experience of the respondent's business this was not uncommon for new starts, she was however fluent in customer languages.

28. On **Wednesday 10** and **Friday 12 October 2018** the claimant texted Scott Carson requesting a meeting the following week regarding issues relating to NW's aptitude. No issues were raised by the claimant regarding his own work arrangements. Mr Carson's view both at present and at the time, was that new start assistant employees take a period of time to become accustomed to the respondent processes. The claimant did not give any notice of any identifiable risks to his health and safety arising from his then current working arrangements.

29. On **Wednesday 31 October 2018** the claimant was absent for one day leave with the cause being notified to the respondents as Vertigo. That was the first absence after the April 2018 Flexible Working Arrangement and occurred almost 3 months after the claimant had returned to a full 5 day working week. The claimant's absence and reason for same did not give any notice of any identifiable risks to his health and safety arising from his then current working arrangements.

30. On **Monday 8 December 2018** the claimant sent a text message to Scott Carson relating to Ms Woods aptitude. Mr Carson's view, both at present and at the time, and was that new start assistant employees take a period of time to become accustomed to the respondent processes. The claimant did not give any notice of any identifiable risks to his health and safety arising from his then current working arrangements.

31. In **December 2018** while in the role of Branch Manager of the Queens Park Branch the claimant had elected to make an application to the UK Government Access to Work scheme (**the Claimant's December 2018 Access to Work Application**) programme for additional funding in relation to his travel arrangements. He did not communicate to the respondents at this time that he had done so, nor any motivation for doing so.

32. On **Friday 28 December 2018** NW left the respondent's employment.

33. On **Tuesday 19 March 2019**, the claimant, who had been on holiday, texted Tom O'Donnelly the Regional Manager, to advise that having attended hospital for a scan, the hospital had kept in him till the Wednesday 20 March 2019 to carry out an angiogram and as such the claimant would not be able to attend a scheduled meeting. The claimant did not give any notice of any identifiable risks to his health and safety arising from his then current working arrangements.

34. Michael Johnson the Respondent's Operation Manager, upon being advised on **Thursday 21 March 2019** asked Mr O'Donnelly to let the claimant know "*we are thinking of him, also let him know that that his branch was highlighted as being top retail and PB branch in entire company".*

35. In the morning of **Friday 22 March 2019**, the respondent's Regional Manager Tom O'Donnelly made contact with the claimant who had returned to his post as Full Time Branch Manager at the Queens Park Branch. The claimant advised Mr O'Donnelly that he was "*feeling ok. They were just carrying out tests on him".* Mr O'Donnelly advised the claimant that Scott Carson SBDM would be providing a briefing to the claimant, of respondent's plans relating to the Queens Park Branch the following week, and that Mr O'Donnelly would go

to Queens Park Branch to meet with the claimant to discuss in detail. The claimant, in response "*suggested he might need to stand down as manager if his health does not improve"*. That was the first intimation to the respondent, that the claimant had ongoing difficulties in operating as a Branch Manager since the respondent implemented the April 2018 Flexible Working Arrangement in response to his March 2018 Flexible Working Request. The claimant did not describe that the reason related to the distance of the Queens Park Branch from his home. The claimant did not notify Mr O'Donnelly of the claimant's December 2018 Access to Work Application. The claimant did not suggest to Mr O'Donnelly that there were any risks to his health and safety arising from his then current arrangements.

36. On **Thursday 28 March 2019** the claimant met with Mr Scott Carson. At that meeting the claimant advised of matters, as he subsequently set out in an e-mail issued at 5.11pm that day to Mr Carson, copying in the respondent generic HR. In particular he advised that he was diagnosed with **Chronic Post Stroke Syndrome** which manifest with vertigo attacks, anxiety, spatial awareness as a result of his artery dissection/stroke in December 2017. He described that he was "*on various medical treatments to manage this*". He described that Queens Park branch was "*2 bus rides away from home"* and that he was struggling with this "*mainly at night".* The claimant described that his symptoms were very erratic *"however I am receiving great support from both friends and my branch colleagues"* and that "*Ideally I would like to relocate to a store nearer to where I live, I have spoken to ACAS"* and set out that he had been advised that he was protected under disability legislation due his *"ongoing illness, and I am asking for reasonable adjustments to be made for me to my work conditions to support me…"* He did not reference the claimant December 2018 Access to Work Application. The claimant did not propose that the respondent funded any taxi fares or otherwise met travel costs. While the claimant described an ongoing illness and that "Ideally" he would like to relocate to a store nearer to where he lived, he did not suggest to Mr Carson that there were any specific risks to his health and safety arising from his then current arrangements. The claimant had not, prior to being advised on Friday 22 March 2019, that there were plans in relation to the Queens Park Branch, requested

a change of branch close to his home. He did not give notice that he considered that moving to another branch on reduced role, such as Branch Assistant would amount to a reasonable adjustment. The claimant did not notify Mr Carson of the claimant's December 2018 Access to Work Application.

37. Mr Carson, responded to that e-mail on **Monday 1 April 2019** at **2.48pm,** copying the respondent HR, and Ms McNamara, to the claimant. He stated that he had logged the information and had a conversation with the Regional Manager Tom O'Donnelly with "*regard to your request. At the moment I don't have a position that you are looking for however should one become available I well certainly make you aware of it and consider you for the position. I have this month added extra support for you and your store in the form of extra staff until your new start gets up to speed… can I ask you to keep me abreast of any changes to your health and other adjustments I can help you with…?* "

38. **Leanne McNamara**, the respondent's HR Manager who had been appointed in September 2018, first became aware of issues relating to the claimant in March 2019, following Mr O'Donnelly's contact with the claimant on **Friday 22 March 2019**.

39. In the week commencing **Monday 1 April 2019** Ms McNamara spoke with the claimant on several occasion, the claimant described what he indicated were ongoing symptoms including vertigo fatigue and spatial awareness and described what he said were stresses of the branch combined with travel distance to and from work and suggested these were exacerbating his symptoms. Ms McNamara advised that while the company had no managerial positions in branches closer the company was willing to create a full role of Branch Assistant in the Patrick Branch for the claimant which it hoped would alleviate stress and reduce some of the symptoms. The claimant did not give any notice of any identifiable risks to his health and safety arising from his then current working arrangements.

40. On **Thursday 4 April 2019** the claimant advised Ms McNamara that he was declining take the offered post of Assistant at the Partick Branch due to what he indicated were personal financial pressures. The claimant did not give any

notice of any identifiable risks to his health and safety arising from his then current working arrangements.

41. In e-mail **Tuesday 9 April 2019 11.52 am** the claimant set out that Ms McNamara had asked if **"***any risk assessment had been done"* and confirmed that it had not. The claimant did not suggest to Ms McNamara that there were any risks to his health and safety arising from his then current arrangements.

42. In letter dated **Tuesday 9 April 2019,** following upon a number of discussions between the claimant and Ms McNamara, the respondent's HR manager, in the week commencing Monday 1 April 2019, Ms McNamara noted that Scott Carson had confirmed to the claimant that "*unfortunately he did not have a management vacancy at any branch closer"* to his home. Ms McNamara indicated that she wanted to "*assess whether you will be able to continue working in your current position and if there any reasonable adjustments that we need to make"* and requested the claimant's consent for GP or specialist medical report. In none of those discussion did the claimant give any notice of any identifiable risks to his health and safety arising from his then current working arrangements.

43. The claimant signed medical consent form on **Friday 12 April 2019,** confirming that he wished to see the report, prior to its issue to the respondent.

44. On **Tuesday 16 April 2019** Ms McNamara contacted the claimant by telephone explaining that she wanted to make telephone contact, she explained that given the confidential nature of matters she did not want to e-mail the branch e-mail and commented "*so thank you I know you said you had sent the consent form back for your medical reports I hope I tried to make it as clear as possible in the letter that the reasons for wanting to get the medical report is just cause we need to understand your condition all we know is what obviously you've told us and… we're not doctors and obviously the condition you … went off with in December 2017 … obviously there's a lot of variations of it so we just need to get an understanding of your particular condition and how it affects you at work and what they recommend",* she confirmed that she had offered the post of branch assistant which the claimant had not accepted at that time due to the financial implications and stated *"we kind of don't know*

what else we can due without that medical guidance". The claimant responded "*no that's perfectly fine…"* and continued that from his point of view he had *"extra support in the branch and that's great it's just the physical travelling to from work because by the end of the day I'm absolutely exhausted".* Ms McNamara noted that the claimant had said before (to others) that he had "*had to get taxis and stuff home on occasions when he was too fatigued at the end of the day to get public transport".* The claimant commented that she was relatively new to the company, at the very beginning there was little support, it wasn't until a year after he was ill, that extra staff were supplied consistently. He described that he was struggling and that on an occasion he was unwell suggested that he had been directed to the back of the shop which he described as appalling and described that he *"really need to… move forward from it get support in place and move forward… and just yeah just get it off my chest."* In response Ms McNamara confirmed that it was the claimant's *"right if you do want to air your concerns through the grievance procedure and that's absolutely fine and we'll make the arrangements for that".* She commented that once she got the consent form, she would *"write to your doctor".* The claimant commented that if he stepped down, he would be struggling financially but appreciated the call and confirmed that the form was on its way. Ms McNamara commented that if the claimant needed anything from her, he had her telephone number and e-mail. The claimant concluded *"Perfect thanks very much".* While the claimant described that he was *"absolutely exhausted"* at the end of the working day, and it was noted that he had described taking taxis because he was too fatigued to take public transport, he did not suggest that there were any health and safety risks arising from the working arrangements.

45. The Tribunal concludes that the allegation, made by the claimant to Ms McNamara, that the claimant was directed to the back of the branch, when the claimant reported feeling unwell did not occur. The claimant did not suggest that the respondent meet the cost of taxi's receipts or reimburse the claimant for any taxi fares incurred.

46. The claimant submitted an undated grievance which was received by the respondent on **Tuesday 23 April 2019 (the April 2019 Grievance)** setting out the respondent was aware that he had suffered *"a stroke as a result of a*

spontaneous left Vertebral Artery Dissection… was forced back to work earlier than medically advised …as the company has no sick pay policy… it was confirmed that there would be no change in the… policy … "I have made my Line Manager Scott Carson, aware that on occasion I have been struggling with travelling independently to and from the branch (NOT WITH THE ACTUAL ROLE ITSELF)" and that "*over the last few days I have contacted*" both ACAS and *"the Equality Advisory Support Service who have advised me of my rights and protections"* The claimant set out that the Equality Act 2010 "*says that I am protected against unlawful discrimination at work in relation to my disability. ...I believe that treatment cannot be objectively justified because reasonable adjustments have not yet been fully considered or implemented… employers are under a duty to make reasonable adjustments… If it is reasonable for the employer to make an adjustment then it must be made… The adjustment/s which I consider that you have failed to make* ***are relocation of work place*** *… I have tried resolving this informally and also* ***by requesting a change of branch closer to home*** *but I am not satisfied with the outcome"*. He describes that he raising a grievance in accordance with the company's grievance procedure "*I understand that a grievance meeting will be arranged in which we can discuss these matters and try to resolve these concerns. I also understand my right to be accompanied by a colleague or trade union representative. I look forward to receiving your response in writing within 14 days or in line with the company's grievance procedure".* The grievance did not give notice of the claimant's December 2018 Access to Work Application. The claimant did not suggest that payment of taxi fares or other funding arrangements would amount to a reasonable adjustment. The claimant did not set out where, and in what circumstances, he had *"requested a change of branch closer to home".* The claimant had not, prior to being advised on Friday 22 March 2019, that there were plans in relation to the Queens Park Branch, requested a change of branch close to his home. He did not give notice that he considered that moving to another branch on reduced role, such as Assistant Branch Manager would amount to a reasonable adjustment. The claimant did not give any notice of any identifiable risks to his health and safety arising from the then current working arrangements.

47. The Equality Advisory Support Service (EASS) is a specialist helpline service providing information about discrimination and rights including on the operation of the Equality Act 2010.

48. On **Wednesday 24 April 2019** the claimant's consultant **Dr Helen Slavin**, at the request of the claimant prepared a "*to whom it may concern"* medical report (the claimant requested April 2019 Medical Report) setting out that he had *"made a good physical recovery from his stroke episode in the sense that the subtle signs of inco-ordination that we picked up initially resolved fairly quickly".* She set out that he had developed a number of symptoms secondary to his stroke. She concluded that "*I do not think there is any reason that Mr Gilmour needs to restrict his work activities as such, However I do think that making reasonable adjustments to minimise his levels of work stress, and minimise the potential for worsening fatigue is not unreasonable*". The claimant requested April 2019 Medical Report did not suggest that any adjustment to the workplace and or reduction in travel time would amount to a reasonable adjustment. It did not set out that there were any specific risks to the claimant's health from the current working arrangements. The claimant requested April 2019 Medical Report did not use the term **Chronic Post Stroke Syndrome**, which the claimant had used in his email of Thursday 28 March 2019. The claimant was cc'd as a recipient of that report; however, he did not provide same to the respondent at that time.

49. On **Thursday 25 April 2019,** in response to the April 2019 Grievance, the respondent sought a report from both the claimant's GP and the claimant's consultant Dr Slavin (the Respondent's April 2019 Requests for Medical Report) The request for report set out that the claimant was employed as Branch Manager at the respondent's Queens Park Branch working 38.25 hours per week. The request set out that that the respondent was concerned as to whether the claimant's health "***is*** *being impacted as a result of his position"* and requested the consultant's view on whether the claimant "*may be well enough to perform his current duties in his current location"*. The request set out a number of questions including whether the consultant considered that the claimant "*has, or will have, a disability under the meaning described in the Equality Act 2010*" and requested comments on any reasonable adjustments,

any specific recommendations in relation to finding alternative role, if necessary. Both the Respondent's April 2019 Respondent Requests for Medical Report, set out that the claimant had requested to see the report before it was issued. The claimant requested April 2019 Medical Report was provided by the claimant to Ms McNamara, it was not however provided to Mr O'Donnelly.

50. On **Tuesday 7 May 2019** the respondent invited the claimant to a Grievance Hearing on **Tuesday 14 May 2019** which was chaired by Tom O'Donnelly respondents Regional Manager.

51. On **Wednesday 8 May 2019**, the claimant's consultant **Dr Helen Slavin** issued a letter headed Private and Confidential to Ms McNamara at the respondent's head office (the Updated Consultant May 2019 report). That letter set out that "*as an addendum to my previous report"* she had "*now received"* the Respondent's April 2019 Requests for Medical Report and set out in response that she could "*see no reason why he should not be able to carry out the work that his current post entails. From the point of view of his employer I think there needs to be an awareness of his residual symptoms plus reasonable attempts made to minimise his potential for headaches and fatigue such as minimising travel time ensuring appropriate shift patterns etc"*. It did not set out that there were any specific risks to the claimant's health and safety from his then applicable working arrangements, other than a suggestion of reasonable attempts to minimise the claimant's potential for headaches and non-specific fatigue "*such as minimising travel time ensuring appropriate shift patterns".* It did not propose that the respondent arrange to meet taxi charges to address same.

52. The Updated Consultant May 2019 report, was not made available to Mr O'Donnelly at or before the Grievance Hearing including by the claimant, the claimant's consent having been provided on the basis that any report would be made available to him. The claimant did not provide to Mr O'Donnelly the claimant requested April 2019 Medical Report (dated 24 April 2019 and which was copied to the claimant).

53. On **Tuesday 14 May 2019** the claimant attended the Grievance Meeting **(the May 2019 Grievance Meeting)** which was chaired by Tom O'Donnelly respondents Regional Manager.

    1. The meeting discussed the provision of phased return to work, the flexible work arrangement, allocation of sequentially appointed additional staff; and

    2. The possibility of transfer with the Partick Branch Manager was discussed however the claimant confirmed that he understood (p120) that this was not an option in all the circumstances; and

    3. The claimant provided a leaflet from the Stroke Association and intimated that if "*we could be more aware of these issues then we could ...stop meetings like this"*

    4. It was confirmed that despite the business model (transaction count) not warranting an additional member of staff, additional member of staff had been considered.

    5. The claimant confirmed that he had felt supported describing that it was just as his sickness issues he felt unsupported (but gave no specification).

    6. He notified of the December 2018 Access to Work Application and described that Scott Carson SBCM had been fair.

    7. He described that *"its just the policies that I feel need addressed".* The claimant did not suggest that there were any risks to his health and safety arising from the current arrangements.

    8. He was not notified of the outcome.

54. **Saturday 18 May 2019** was the earliest date an act could be in time by reference to the May/July ACAS EC.

55. In letter dated **Tuesday 21 May 2019** Ms McNamara set out the respondent's response to the grievance (**the Respondent's Grievance Response Outcome Letter Tuesday 21 May 2019**), noting there were 4 areas of concern.

1. The claimant said he felt the respondent had failed to make reasonable adjustment following the absence from work in December 2017 for a left vertebral artery dissection, this was indicated as being support and that it "*took until August 2017 to get another member of staff in the branch".* The company noted the claimant returned on phased return and the requested flexible working arrangement was implemented and extended.

2. The claimant said, at the time of the grievance, he felt he was forced back to work following his absence in December 2017. The company did not uphold this complaint noting that the company sick pay policy was operated, employees will get 3 days company sick pay in a 12-month period, and 5 days company sick pay once they had had 5 years' service. It is applied across all employees.

3. It was confirmed that the claimant's request (in May 2018) to have Company sick pay policy changed was denied. It was confirmed that the request to make, in effect a special arrangement for the claimant, was considered but not implemented.

4. The claimant felt that his request (on **Thursday 28 March 2019**) to move branches was not unreasonable but had not been implemented. The respondent confirmed that the company did not have a vacancy for a Branch Manager (or any other position) at any of the branches close to your you. The company offered however to create Branch Assistant vacancy (at the Partick Branch), which the claimant declined. The company confirmed it was not possible to relocate the Branch Managers from the nearby branches to Queens Park. The Tribunal accepts that those reasons include differential grading relating to footfall and, in effect, it not being open to the respondent to insist that an existing manager moves without agreement. The respondent set out *"This offer to create a Branch Assistant position for you remains should you which to revisit this option however we are unable to move you a Branch Manager unless a colleague vacates their position."*

   The response confirmed that the company did not uphold his grievance although notes "*the Company will continue to review any reasonable adjustments that we may be able to make" the* response continued that the

company had requested reports from the GP and the Specialist confirming *"Once these reports have been received, we will then arrange a further meeting to discuss…and the possible next steps"* .The response concluded that any appeal should be set out in writing and submitted within 7 days. The claimant chose not appeal the outcome of the grievance hearing.

56. On **Wednesday 22 May 2019** ACAS EC commenced (in relation to initial ACAS conciliation).

57. On **Wednesday 22 May 2019** by e-mail 4.46pm the claimant intimated to Ms McNamara that he had called earlier, regarding the grievance hearing itself (he had not yet received the **Respondent's Grievance Response Outcome Letter dated Tuesday 21 May 2019**) but could not make contact and set out in e-mail "*I was wondering if the offer to move branch was still on the table as a Branch Assistant".* The claimant set out that "*a lot of things were clarified and I thank those involved*" (in the Grievance Hearing) "*for that it gave me a further understanding of certain business decisions etc, however I am still in the exact position as before… I have spoken to ACAS today who have advised me that the next stage would be early conciliation… I am keen to resolve this in the best interest of my health and I appreciate the businesses view point also – I feel if things remain as they are this would continue to be detrimental to myself. Although I have extra staff members and Chris is fantastic" (*although comes from a different retail role) *"… and Francis is doing really well…and is still picking up other aspects of the role…"* While the claimant suggested that maintaining the status quo would "*continue to be detrimental"* to himself, he did not given notice of any specific risks to his health and safety from the then current arrangement.

58. On the afternoon of **Thursday 23 May 2019,** the claimant spoke with Ms McNamara who confirmed that

    a. She had just had a phone call from Access to Work. She confirmed that Access to Work were "*just finalising some details and they will send out a letter in* ***the next couple of days so…"****; and*

b. Before Ms McNamara commented further the claimant described that the working environment with new members of staff was "*just a very stressful environment… I need to take a step back".* The claimant did not give notice of any risks to his health and safety from the then current working arrangements; and

c. The claimant confirmed he had not received the Respondent's Grievance Response Outcome Letter dated Tuesday 21 May 2019; and

d. Ms McNamara set out that the claimant required to consider financial implications (of a decision to move to Branch Assistant Role) and did not wish to put any undue pressure on the claimant; and

e. The claimant described that he "*just want to step away from it"* (the Manager Role at Queens Park Branch); and

f. Ms McNamara confirmed that the claimant should set out his decision in writing and she would confirm it all in writing; and

g. The claimant concluded "*Perfect…thank you"*.

59. At no point during this conversation did the claimant raise any issue regarding the provision of a taxi by the respondent. The reason for considering and accepting the alternate role related to the responsibility of supervising members of staff as Manager of the Branch. The claimant did not give any notice of any identifiable risks to his health and safety arising from the then current working arrangements.

60. Approximately 15 minutes after the telephone call on the afternoon of **Thursday 23 May 2019** the claimant e-mailed Ms McNamara, and set out by email at 2.45 pm *"To confirm our conversation it is with regret that I resign from my position as branch manager at QueensPark. I have thought long and hard about this and given my health situation I feel that this for the best".* The claimant set out that *"I feel that not only the travel distance to work and back but the stress off managing the store with newer inexperienced staff has exacerbated my symptoms…. I cannot allow this to continue for my own health and well being. ... I have contacted ACAS regarding the legality of taking such*

a move … early conciliation is something they would be able to help with… I have decided not to progress with this step. I would like to take up the offer you confirmed is still open to me as branch assistant and if you could do that in writing as soon as practicably possible I would greatly appreciate it". The claimant did not suggest that he was maintained at his previous Manager pay level. The claimant did not expect that he would be maintained at his previous Manager pay level. While the claimant made reference to the travel, his email of 23 May 2019, taken with his telephone discussion on the same day identified that the primary motivation was the opportunity to remove from himself the responsibility of supervising members of staff as Manager of the branch. While the claimant described that "*not only the travel distance to work"* but also the "*stress of managing the store with newer inexperienced staff has exacerbated my symptoms",* he did not give notice of any specific risks to his health and safety from the then current working arrangements.

61. On **Thursday 30 May 2019** the respondent issued Confirmation of Variation of Contract, confirming that as from **Monday 24 June 2019** the claimant would transfer to the respondent's Partick Branch as Branch Assistant setting out the rate of pay which is lower than that of Branch Manager.

62. With effect from **Monday 24 June 2019** the claimant moved to the role of Branch Assistant at their Partick Branch.

63. **Friday 5 July 2019** ACAS EC Certificate (in relation to initial ACAS conciliation) was issued.

64. On **Wednesday 31 July 2019**, by email 10.13 am the claim emailed the respondents *"I am tendering my resignation today from Ramsden to take effect EOB Wed 14Th August 2019. I am sad to be leaving the company after nearly 8 years and Scott I want to thank you for your support particularly over the last 1.5 half that I have been unwell".* The claimant did offer any criticism, he did not assert that one of the reasons included any breach of contract, or breach of implied terms of trust and confidence, nor any alleged discrimination on the part of the respondent. The claimant did not give any notice any risks to his health and safety from the then current working arrangements.

65. On **Monday 5 August 2019** the respondent's confirmed it accepted the claimant's notice resignation, confirming that the employment would terminate effective the date intimated, by the claimant, being **Wednesday 14 August 2019.**

66. On **Monday 5 August 2019** an employee within the respondent's Argyle Street Branch made certain proposals following a period of ill health absence, however that person remained the Argyle Street Manager until late September 2019.

67. On **Wednesday 14 August 2019** while the claimant was working his notice the claimant met briefly and informally with Mr Scott Carson who mentioned in passing that a Manager role at Argyle Street may arise, however the post was not available to be offered for reasons the panel accept. The claimant did not give any notice of any identifiable risks to his health and safety arising from his then current working arrangements.

68. On **Monday 19 August 2019** the claimant started in new role with Chest Heart & Stoke Scotland as Partick Branch Shop Manager, at a higher pay rate than that, his then role as Branch Assistant at Partick. The Tribunal concludes that the claimant had secured that role prior to tendering his resignation to the respondents on Wednesday 31 July 2019.

69. On **Sunday 29 September 2019** the claimant left employment with the respondents.

70. The ET1 was presented **Tuesday 1 October 2019.**

71. The second period of ACAS Early Conciliation commenced **Thursday 3 October 2019** to **Friday 4 Oct 2019.**

72. The claimant was not replaced, by the Respondent, as Branch Assistant at the Partick Branch after he resigned from that role, which had been created for him by the respondents.

73. On **Wednesday 23 October 2019** on behalf of the claimant, both the Tribunal and respondent were asked if the claimant would require further ET1 as the claimant's termination had occurred since ET1 had been presented, the

Respondent did not insist, it was not raised at the Preliminary Hearing on Tuesday 7 January 2020 from which it was agreed that the issues were unfair dismissal and s20 Equality Act 2010. No issue of bar in relation to the termination was raised.

74. On **Thursday 12 December 2019** Chest Heart & Stoke Scotland, received a report following upon its decision to refer the claimant to an external Occupational Health provider who described at it had concerns about "*recent headaches"* stage the "*claimant was medically unfit for work whilst he seeks investigations of the new headaches"*

Submissions

75. Both Mr Gilmour and Ramsdens provided written submissions and were given an opportunity to issue supplementary commentary in light of their opponent's submissions.

Submissions for Mr Gilmour

76. The Tribunal does not consider it necessary to set out the full details of the 22 -page written submissions for Mr Gilmour, other than summarising that it was argued that the claimants claims in terms of s20, 21 of the EA 2010 (in relation to all the proposed PCP's) and his constructive dismissal should succeed. In relation to time bar the claimant made reference to **Bexley Community Centre (t/a Leisure link) v Robertson** [2003] EWCA Civ 576 **(Robertson**). In relation to the Management of Health and Safety at Work Regulations 1998 the claimant made reference to **Bailey v Devon Partnership NHS Trust** [2014] WL 3387689 (**Bailey**), **Bunning v GT Bunning** [2005] EWCA CA Civ 104 (**Bunning**), **Spencer v Boots** [2002] EWCA Civ 1691 **(Spencer**). In relation to PCP's the claimant made reference to **Ishola v Transport for London** [2020] EWCA Civ 112 (**Ishola**). In relation to reasonable adjustments the claimant reference to **G4S Cash Solutions v Powell** [2016] UKEAT/023/15 /[2016] IRLR 820 (**G4S**). **Northumberland Tyne and Wear NHS Foundation v Ward** [2019] UKEAT024918 & UKEAT001319 (**Ward).**

77. In relation to constructive unfair dismissal the claimant referred to **Western Excavating (ECC)Ltd v Sharp** [1978] ICR 221 **(Western), Malik & Mahmud**

v BCCI [1997] ICR 462 **(Malik), Woods v WM Car Services v Peterborough** [1981] IRLR 347, **Lewis v Motor world** [1985] IRLR 465(**Lewis**), **Morrow v Sainsbury Stores** 2002 IRLR 9, **Nottingham County Council v Meikle** 2004 IRLR 703 **(Meikle), Bahir v Brillo Manufacturing** 1979 IRLR 295 **(Bahir), El-Hoshi v Pizza Express Restaurants** [2004] UKEAT/0875/03 **(El-Hoshi), WE Cox Toner** 1981 IRLR 443, **Buckland v Bournemouth University Higher Education Corporations** 2010 IRLR 445 **(Buckland).** The claimant argued that the recommendation (as set out in the submissions which are set out below) should be made and that the claimant should be awarded compensation for loss of earnings (based on the claimants' earnings as Manager at the Queens Park branch) and discriminatory treatment including an award for injury to feelings.

Submissions for Ramsdens

78. The Tribunal does not consider it necessary to set out the full details of the 41-page written submissions for Ramsdens, other than summarising that it was argued that any acts or omissions before Tuesday 2 July 2019 are out of time and while there was a second ACAS certificate that does not extend the times, reference being made to **HMRC** v **Garau** [2017] UKEAT/0348/16 (**Garau).**

79. The respondent further relied upon **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] IRLR 1050 (Morgan), **British Coal v Keeble** [1997] IRLR 336 and **Robertson v Bexley Community Centre** [2003] IRLR 434 it being argued that the claimants claims in respect of failure to make reasonable adjustment are time barred.

80. In addition, it was argued that the claimants claim in terms of s20, 21 of the EA 2010 should not succeed, it being argued that none of the proposed PCP's were PCPs, reference being made to **Kenny v Hampshire Constabulary** [1999] IRLR 76 (**Kenny**), **James v Eastleigh Borough Council** [1990] IRLR 288 (**James**), **Tarbuck v Sainsbury Supermarkets** Ltd [2006] IRLR 664(**Tarbuck**), **Scottish & Southern Energy plc v Mackay** [2007] UKEATS/000775/06 (**Mackay**), **O'Hanlon v Comrs. for Revenue and Custom** [2007] IRLR 404 (**O'Hanlon**), **Project Management Institute v Latif** [2007] IRLR 579, (**Latif**), **Environment Agency v Rowan** [2008] IRLR 20

(**Rowan**), **Lincolnshire Police v Weaver** [2008] ALL ER (D) 291 (Mar) (**Weaver**), **Newcastle City Council v Spires** [2011] UKEAT/0034/10 (**Spires**), **Burke v College of Law** [2012] EWCA Civ 37 820 (**Burke**), **Newcastle upon Tyne NHS Foundation Trust v Bagley** [2012] UKEAT/0417/211 (**Bagley**), **Nottingham City Transport Ltd v Harvey** [2013] EqLR 4 (**Harvey**), **Sanders v Newham Sixth Form College** [2014] EWCA Civ 734 (**Sanders**), **Doran v DWP** [2014] UKEAT/0017/14 (**Doran**), **General Dynamics Information Technology v Carranza** [2015] IRLR 43 (**Carranza**), **G4S Cash Solutions (UK) v Powell** [2016] IRLR 820 (**G4S**) and **Ishola v Transport for London** [2020] IRLR 368 (**Ishola**).

81. The Tribunal makes reference, where it considers them applicable below. Further the respondent argues that claimant's claim of constructive dismissal should not succeed and thus no loss arises.

82. The respondent in conclusion argues further that there had been no advance knowledge of any asserted recommendations and in respect of the two proposed recommendations neither can be relevantly made by the Tribunal.

Conclusions on witness evidence

83. The Tribunal heard evidence from the claimant Mr Gilmour who provide a witness statement which he supplemented with oral evidence. Witness evidence on behalf of the respondent was also provided via witness statements, each of which was taken as read. Each of the following witnesses confirmed their witness statement at the Final Hearing and were thereafter subject to cross examination and re-examination, Scott Carson Staff Business Development Manager, responsible for 14 stores in the Glasgow Region, Tom O'Donnelly (Glasgow) Regional Manager, and Leanne McNamara, HR Manager for the Respondent. The Tribunal concludes that each of the witness for the respondent gave straightforward and honest evidence. The Tribunal found the evidence of Mr Carson both compelling and straightforward.

84. Mr Gilmour broadly gave honest evidence reflecting his views of the respondent. The Tribunal however preferred the evidence of the respondent

witnesses as being wholly straightforward to that of Mr Gilmour where there was any dispute of fact.

Issues in this Tribunal claim

Time limits

The Law

85. s.123(1) of the EA 2010, provides:

123 Time limits

(1) … Proceedings on a complaint within section 120 may not be brought after the end of—

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

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

…

(3) For the 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"

86. s.123(1) of the EA 2010 is subject to s.207B(3) of the Employment Rights Act 1996 which provides that in working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending

with Day B is not to be counted; s.207B(4). If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

87. The respondent refers to **HMRC** v **Garau** [2017] UKEAT/0348/16 (**Garau**). In **Garau** Kerr J, sitting alone concluded that the early conciliation certificate provisions introduced from 6 April 2014 do not allow for more than one certificate of early conciliation per *"matter"* to be issued by ACAS. If more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period. The factual matrix in Garau is considered to be of some significance. The claimant had been on long term sickness and asserted that he qualified as disabled within the terms of s6 of EA 2010. On 1 October 2015, Garau was given notice of termination of his employment by HMRC. The notice was to expire on 30 December 2015. On 12 October 2015, Garau contacted ACAS for the first time, using the mandatory early conciliation procedure. On 4 November 2015, ACAS issued an early conciliation certificate. On 30 December 2015, the Claimant's employment came to an end on expiry of his notice period. Nearly, but not quite three months later on 28 March 2016, he contacted ACAS for a second time. The next day, 29 March 2016, was the day on which, subject to the operation of the early conciliation regime, the primary three-month limitation period would have expired. On 25 April 2016, ACAS issued a second certificate**.** One calendar month later, on 25 May 2016, the Claimant presented his claim for disability discrimination and unfair dismissal, in reliance on in effect the second certificate. The issue arose whether the claims, or either of them, were in time or out of time. The ET following submissions held that both claims were in time. The EAT in **Garau** noted

> ***"[10]*** *In Science Warehouse Ltd v Mills [2016] ICR 252, Her Honour Judge Eady QC held that the broad language used in s 18A(1) of the* Employment Tribunals Act*, "proceedings relating to any matter", precluded an argument by the employer that the employee was obliged to go through fresh mandatory early conciliation where she sought to amend her claim to add a new*

cause of action for victimisation following the employer's response to her initial claim for discrimination on the ground of pregnancy or maternity.

[11] *At para 30, HHJ Eady QC pointed out that the requirement to engage in conciliation is purely voluntary apart from the initial obligation to contact ACAS. The Employment Tribunal was entitled to allow the amendment sought on the basis that the employee had already obtained an early conciliation certificate in respect of the same "matter".*

[12] *In Tanveer v East London Bus and Coach Co Ltd [2016] ICR D11, the Digest states that HHJ Eady QC dismissed an appeal in which the limitation period, as modified by the operation of s 207B of the Employment Rights Act, expired one day before the employee presented his claim. The Digest records the Judge as saying that:*

"… the purpose of s 207B … was to ensure that, with regard to employment tribunal time limits, a claimant was not disadvantaged by the amount of time taken during the relevant limitation period for early conciliation compliance. Thus the amount of time spent on early conciliation would not count in calculating the date of expiry of the time limit; the clock simply stopped during the early conciliation period. …"

[13] *In* Compass Group UK & Ireland Ltd v Morgan *[2017] ICR 73, the employee contended that she suffered from a disability. There was a mobility clause in her contract of employment and the employer required her to work at a changed location. She brought a grievance obtained an early conciliation certificate from ACAS. Two months later she resigned and claimed constructive dismissal, among other things. An Employment Judge held that the early conciliation requirement had been satisfied*

[14] *Dismissing the employer's appeal, Simler P held that it did not matter that the early conciliation certificate had preceded some of the events relied on in the case. The word "matter" in s 18A(1) of*

the Employment Tribunals Act *was very broad and could embrace a range of events, including events that had not yet happened when the early conciliation process was completed. The learned President pointed out at para 21 that Parliament had not chosen to limit the scope of an early conciliation certificate, either by requiring it to relate to past events or by providing for it to be time limited, i.e. to lapse after a certain amount of time.*

[30] *The present case is different from* Tanveer *on two counts. First, the limitation clock could not stop under the first certificate, because it had never started. Secondly, the second certificate was not a certificate falling within the statutory scheme at all; it was a purely voluntary exercise with no impact on the running of time.*

[31] *It follows that the Employment Judge ought to have found that the three-month primary time limit expired on 29 March 2016, and that the claims were therefore presented out of time, unless (in the case of the disability discrimination claim) that claim could be rescued by invocation of the statutory concept of conduct "extending over a period", or unless time were extended in the exercise of the tribunal's discretion.*

[32] *The appeal must therefore be allowed. I will substitute a finding that the primary time limit expired on 29 March 2016.*

88. The EAT concluded that a second certificate did not have the effect of *extending* time. The early conciliation certificate provisions introduced from 6 April 2014 do not provide for more than one certificate of early conciliation per *"matter"* to be issued by ACAS to be effective. If more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period.

89. Simler (now LJ) **Compass Group UK and Ireland Ltd v Morgan** [2016] IRLR 924 (**Compass**) concluded that it may not matter that early conciliation preceded some of the events relied upon. Factors may include whether there

was any relevant challenge intimated. Whether Tribunal was satisfied on the facts that the proceedings were proceedings relating to matters in respect of which the individual had provided the requisite information to ACAS and whether the Tribunal is satisfied that there was a connection between the factual matters complained about in the respondent's claim form and matters that were in dispute at the time of the early conciliation process.

Discussion and Decision

Effect of ACAS EC

90. The Tribunal notes that the respondent argues that any act or omission occurring before **Tuesday 2 July 2019** is out of time. The ET1 was presented on **Tuesday 1 October 2019** following initial period of ACAS Early Conciliation (ACAS Early Conciliation **Wednesday 22 May 2019** to **Friday 5 July 2019**) and was followed by second period of ACAS Early Conciliation **Thursday 3 October 2019** to **Friday 4 Oct 2019**). The respondent's calculation is concluded to be based on the second ACAS EC period (although the Tribunal calculation would have placed any act or omission occurring before Thursday 4 July as being potentially out of time).

91. The Tribunal considers that the difference may arise from considering the effect of **s207B (3)** and **s207B (4)** of ERA 1996 ref is made to EAT guidance in **Tanveer v East London Bus** UKEAT/0002/22 (**Tanveer**).

92. The Tribunal concludes that anything which occurred before **Saturday 18 May 2019** is potentially out of time. In **Garau** the claimant was seeking to rely upon a series of ACAS certificates to further extend time where no ET had been presented in time. The claim in the present case was presented on Tuesday 1 October 2010 and was in time. Garau is not considered to be applicable.

93. Both the date of notice of resignation on **Wednesday 31 July 2019** and final date of employment was **29 September 2020** occurred prior to the presentation of the ET1 on Tuesday 1 October 2020. The intent of the second ACAS certificate is concluded to have been to seek address any argument on whether events which were said to occur after the date of the certificate on **Friday 5 July 2019** had been the subject of ACAS EC. The Tribunal's

acceptance that a second ET1 was not required in all the circumstances was consistent with **Compass,** including there being was no prejudice to the respondents. No challenge was intimated by the respondent prior to the Final Hearing including at the Preliminary Hearing.

94. Having regard to **Compass,** the Tribunal concludes that it has jurisdiction to consider matters which had occurred after the date of the issue of the initial EC Certificate. It is not considered that there was any relevant challenge intimated prior to the hearing. The Tribunal is satisfied on the facts that these proceedings were proceedings relating to matters in respect of which the individual had provided the requisite information to ACAS. The Tribunal is satisfied that there was a connection between the factual matters complained about in the respondent's claim form and matters that were in dispute at the time of the early conciliation process. The Tribunal concludes that while the claimant's resignation occurred afterwards does not undermine that conclusion.

Issues in this Tribunal claim

Time limits /Just and Equitable

Relevant Law

95. Tribunals have a broader discretion under discrimination law than they do in unfair dismissal cases, where the Employment Rights Act 1996 provides that the time limit for presenting an unfair dismissal claim may be extended where the claimant shows that it was *"not reasonably practicable"* to present the claim in time.

96. Section 123 (1) (b) of EA 2010 is set out above.

97. For the respondent reference, at para 23 of the submission, was made to **British Coal Corporation v Keeble [1997] IRLR 336**. In that case the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33(3) of the Limitation Act 1980 which in turn consolidated earlier Limitation Acts. Section 33(3) deals with the exercise of discretion in civil courts and personal injury cases in England & Wales and requires the

court to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

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

(b) the extent to which evidence which may adduced for either side is likely to be less cogent than if the action had been brought within the time allowed; and

(c) the conduct of the party defending the action after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the party bringing the action for information or inspection for the purpose of ascertaining facts which were or might be relevant to the party bring the action's cause of action; and

(d) the duration of any disability of the party arising after the date of the accrual of the cause of action; and

(e) the promptness with which the party bringing the action acted once s/he knew of the facts giving rise to the cause of action; and

(f) the steps, if any, taken by the party bringing the action to obtain appropriate professional once s/he knew of the possibility of taking action.

98. The Limitation Act 1980 to which **Keeble** refers, does not apply in Scotland, the equivalent legislation being the **Prescription and Limitation Scotland Act 1973 (the 1973 Act)**. However, the 1973 Act does not offer an equivalent codified list of factors to be considered, s19A simply stating:

"19A Power of court to override time-limits etc.

(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

99. Section **123** of **EA 2010** does not make reference to either the Limitation Act 1980 or the 1973 Act. It does not seek to define itself by reference to either statutory model.

100. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the respondent per **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194 at paragraph 19. However: *"There is no … requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard (Abertawe at para 25)"*. It is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

101. If the claim has been brought outside the primary limitation period, then the Tribunal has jurisdiction to consider the claim, if it was brought within such other period as the Tribunal considers "*just and equitable"*.

102. In **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 the Court of Appeal identified that for Tribunals considering the exercise of this discretion *"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."*

Issues in this Tribunal claim

Time limits/ Just and Equitable

Discussion and Decision

103. The complaints, so far as relevantly, before the Tribunal are formulated by reference to s20 and s21 Equality Act 2010. It is asserted by the respondent that some of the claims have been presented out with the statutory limit. That is to say some claims were lodged out with 3 months less one day time limit (allowing for the operation of ACAS early conciliation).

104. The Tribunal considering what may be referred to as the **Keeble** factors, notes that

    1. The claimant's undated grievance which was received by the respondent on **Tuesday 23 April 2019 (the April 2019 Grievance)** set out that "*over the last few days I have contacted*" both ACAS and *"the Equality Advisory Support Service who have advised me of my rights and protections" …*

    2. On **Thursday 23 May 2019** the claimant e-mailed Ms McNamara, and set out by email at 2.45 pm his intention to resign and reasons for doing so and further set out that he had "*contacted ACAS regarding the legality of taking such a move … early conciliation is something they would be able to help with… I have decided not to progress with this step."*

105. The Tribunal concludes, in all the circumstances, that the claimant made a conscious decision to not to raise proceedings in relation those acts which had occurred wholly (and in respect of which there was no continuing act) prior to the earliest date an act could be in time having regard to the time limit provided within s123(1)(a) of EA 2010 including following the advice received by EASS and as set out in his e-mail of **Thursday 23 May 2019.**

106. The Tribunal is satisfied that it is not just and equitable to extend the time limit in respect of;

    1. Complaint in terms of S20, s21 EA 2010 **PCP 1** "*Not carrying out individual risk assessments for employees returning from long term sick, particularly those returning from having a stroke* "(the proposed Risk Assessment PCP), is set out in the context of employees return from long term sick leave "*particularly those return from having a stroke".* The claimant returned to work following the stroke episode, after a short

period and was granted a phased return to work in January 2018. While the claimant was again certified as unfit to attend work from **Friday 6 April 2018** to **Thursday 19 April 2018** for aortic dissection awaiting further investigation, he had no further long-term periods of absence. The Tribunal is satisfied that it would not be just and equitable to extend the time limit in respect of the claimants return from what may arguably be asserted to be a period of long-term ill health absence, and in particular such a long-term absence following a stroke episode. This complaint does not succeed, this Tribunal do not have jurisdiction to consider same; and

2. Complaint in terms of S20, s21 EA 2010 **PCP 2** "*Not obtaining Occupational Health report immediately upon employees returning from long terms sick to see what adjustments should be considered, particularly for those returning from stroke."* (the proposed Occupational Health PCP). The claimant returned to work following the stroke episode, after a short period and was granted a phased return to work in January 2018. While the claimant was again certified as unfit to attend work from **Friday 6 April 2018** to **Thursday 19 April 2018** for aortic dissection awaiting further investigation, he had no further long-term periods of absence. The Tribunal is satisfied that it would not be just and equitable to extend the time limit in respect of the claimants return from what may arguably be asserted to be a period of long-term ill health absence, and in particular such a long-term absence following a stroke episode. This complaint does not succeed, this Tribunal do not have jurisdiction to consider same.

107. This Tribunal does not have jurisdiction to consider those claims and they do not succeed.

Issues for Tribunal

Time Limits/ Continuing Acts s123(1) and (3) of the EA 2010.

Relevant Law

108. The Tribunal notes the EAT in **Hale v Brighton & Sussex University Hospitals NHS Trust** UKEAT/0342/16 (**Hale**) held that the various stages of a disciplinary procedure, which culminated in Mr Hale's dismissal, were considered to constitute an act extending over a period rather than, in the words of Mummery LJ, *'a succession of unconnected or isolated specific acts*', each with its own time limit.

109. The facts of **Hale** were that Mr Hale, a hospital consultant, who was white British, was subjected to the hospital's disciplinary procedure following complaints of race discrimination and harassment being made against him by junior doctors for whom he had responsibility, and who were of Asian origin. The NHS Trust (the respondents) instigated a formal investigation, which concluded that Mr Hale had a case to answer; this in turn led to a disciplinary hearing, which resulted in the complaints being upheld; and the outcome was that Mr Hale was summarily dismissed, and his subsequent appeal turned down. Mr Hale brought proceedings for race discrimination, unfair dismissal and wrongful dismissal. The discrimination claim in that case was expressly directed at the whole disciplinary process from the setting up of the formal investigation through to the dismissal. Tribunal had not considered whether Mr Hale, as asserted in his claim, had been discriminated against in relation to the overall procedure, but rather the Tribunal had only considered each stage separately. Significantly it found that the First Stage, being the decision to open a formal investigation, was discriminatory but held that it was a one-off act, which was out of time and there were no just and equitable reasons for extending time. It rejected the allegations of discrimination in relation to the other stages.

110. The EAT in **Hale,** allowed the appeal. Choudhury J held that, while it was open to the tribunal, to subdivide issue of the overall procedure into three separate questions, it *'should not have lost sight of the issue as formulated'*, which indicated that that complaint as formulated against the overall procedure was "*about a continuing act commencing with a decision to instigate the process and ending with a dismissal'* (para 38). He stated (at para 42): *"By taking the decision to instigate disciplinary procedures, it seems to me that the respondent created a state of affairs that would continue until the conclusion*

of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the respondent would subject the claimant to further steps under it from time to time."

Issues for Tribunal

Continuing Act (s123(1) and (3) of the EA 2010.

Discussion and Decision

111. On the evidence adduced, the Tribunal having regard to the issues as formulated, is satisfied that complaints (insofar as they may be relevant PCP's)

1. **PCP 3** "*Assigning specific managers only to specific branches, and not giving adequate consideration to managerial requests to swap branches."* (the proposed Branch Manager Swap PCP); and

2. **PCP 4** "*Not paying for taxi to and from work whilst Access to Work requests to DWP are being considered."* (the proposed taxi payment PCP); and

3. **PCP 5** "*Not maintaining salary levels for disabled employees who require reasonable adjustments to be made to their role to allow them to continue in their role, for a temporary period whilst those adjustments are being implemented"* (the proposed salary maintenance PCP); and

4. **PCP 6** "*Policy on what is deemed to an acceptable staffing level."* (the proposed staffing level PCP).

potentially were continuing acts, and were not discrete (or one-off acts with continuing consequences), and there was a sufficiently causatively link to amount to conduct extending over the period from the claimant's return to work following the stroke episode to include the period immediately up to the initial ACAS conciliation period and further (having regard to **Compass** above) up to the actual date of termination, in terms of **s123** of **EA 2010**. As such the Tribunal concludes that it has jurisdiction to consider them in terms of s20 and s21 of the EA 2010.

Reasonable Adjustments s20 (and s21)

The Statutory Provisions

112. s20 of the EA 2010 provides

Adjustments for disabled persons

20. Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

113. **s21** of the **EA 2010** provides:

s. 21 Failure to comply with duty

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

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

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

Issues in this Tribunal

Disability Discrimination EA 2010 overview

Relevant Case Law Overview

114. HHJ Richardson in **Carranza v General Dynamics Information Technology Ltd** [2015] IRLR 43 commented at para 32 to 33:

"The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability.

The first is discrimination arising out of disability: section 15 of the Act.

The second is the duty to make adjustments: sections 20–21 of the Act.

The focus of these provisions is different.

Section 15 is focused on making allowances for disability: unfavourable treatment because of something arising in consequence of disability is

prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim.

Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage.

Until the coming into force of the Equality Act 2010 the duty to make reasonable adjustments tended to bear disproportionate weight in discrimination law. There were, I think, two reasons for this. First, although there was provision for disability-related discrimination, the bar for justification was set quite low: see section 5(3) of the Disability Discrimination Act 1995 and Post Office v Jones [2001] ICR 805. Secondly, the decision of the House of Lords in Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening*) [2008] 1 AC 1399 greatly reduced the scope of disability-related discrimination. With the coming into force of the Equality Act 2010 these difficulties were swept away. Discrimination arising from disability is broadly defined and requires objective justification."*

Issues in Tribunal

S136 (1) to (3) of **EA 2010 (the burden of proof provisions)**

115. The burden of proof provisions are set out in s.136(1)-(3) EA 2010.

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

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

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

116. In **Igen v Wong** [2005] ICR 931 (**Igen)**, the Court of Appeal provided the following guidance which, although it refers to the former Sex Discrimination Act 1975, it is considered to apply equally to the EA 2010:

‘(1) Pursuant to section 63A of the 1975 Act, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the Claimant. These are referred to below as "such facts".

(2) If the Claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to note the word "could" in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that It is just and equitable to draw in accordance with section 74(2)(b) of the

1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the Claimant has proved facts from which conclusions could be drawn that the employer has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a Tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.'

117. More recently in **Madarassy v Nomura International plc** [2007] IRLR (**Madarassy**) Mummery LJ held at [57] that '*could conclude'* [The EA 2010 uses the words '*could decide'*, but the meaning is the same] meant: *'[…] that*

"a reasonable Tribunal could properly conclude" from all the evidence before it.'

118. However, a simple difference of treatment is not enough to shift the burden of proof, something more is required: **Madarassy** per Mummery LJ at para 56: *'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'*

119. The Court of Appeal in **Anya v University of Oxford** [2001] ICR 847 (at paras 2, 9 and 11) (**Anya**) held that the Tribunal should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged to constitute evidence pointing to a prohibited ground for the alleged discriminatory act or decision. The function of the Tribunal is twofold: first, to establish what the facts were on the various incidents alleged by the Claimant; and, secondly, to decide whether the Tribunal might legitimately infer from all those facts, as well as from all the other circumstances of the case, that there was a prohibited ground for the acts of discrimination complained of. In order to give effect to the legislation, the Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

Issues in this Tribunal claim

Disability Discrimination

EHRC Code of Practice

The Statutory provisions

120. s15 (4) of Equality Act 2006 provides that, the EHRC 2011 Statutory Code of Practice of, shall be taken into account wherever it appears relevant to the Tribunal to do so.

S20 and 21 of EA 2010

Relevant case law

121. The tribunal notes the EAT's decision in **Environment Agency v Rowan** [2008] IRLR 20 (**Rowan**) to which it was referred and **Secretary of State for Work and Pensions v Higgins** [2014] ICR 341 (**Higgins**) which confirms and updates guidance for EA 2010, and which indicates that that the Tribunal should identify and then make clear reasoned findings on:

(1) any relevant PCP.

(2) the identity of non-disabled comparators (where appropriate).

(3) the nature and extent of any substantial disadvantage suffered by the claimant.

(4) any step (or steps) which it would have been reasonable for the employer to take.

122. In **Smith v Churchill Stairlifts** [2006] ICR 542 (**Smith**), while predating the EA 2010, it was sets out in relation to the (fourth)step:

44 There is no doubt that the test …. is an objective test. The employer must take "such steps as it is reasonable, in all the circumstances of the case …" The objective nature of the test is further illuminated by section 6(4). Thus, in determining whether it is reasonable for an employer to have to take a particular step, regard is to be had, amongst other things, to "(c) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities".

45 It is significant that the concern is with the extent to which the step would disrupt any of his activities, not the extent to which the employer reasonably believes that such disruption would occur. The objective nature of this test is well established in the authorities: see Collins v Royal National Theatre Board Ltd [2004] 2 All ER 851 in which Sedley LJ said, at para 20: "The test of reasonableness under section 6 … must be objective. One notes in particular that section 6(1)(b) speaks of 'such steps as it is reasonable … for him to have to take'."

123. Reference was made to **Kenny v Hampshire Constabulary** [1999] IRLR 76 (**Kenny**). In **Kenny,** the claimant, who suffered from cerebral palsy, was offered the post of analyst/programmer subject to the Constabulary being able to make the necessary arrangements for the claimant's needs, which involved a considerable amount of assistance in going to the toilet. Attempts to find volunteers from the department to provide assistance were unsuccessful and suggestions of working at home or attendance by his mother were found to be impracticable, an application was made to the Access to Work scheme for funding for a part time carer but, as it would be some time before a response was forthcoming the Constabulary considered it necessary to finalise the position, it decided to withdraw the job offer. On appeal the EAT held that the statutory language made it plain that the duty to make arrangements concerned job-related matters and therefore the tribunal had not erred in rejecting the complaint.

124. The Tribunal has considered **James v Eastleigh Borough Council** [1990] IRLR 288 (**James**). The respondent relies upon James in demonstration of requirement for neutral rule. James, who had retired and his wife were both 61. His wife was admitted free of charge to attend a leisure centre while he required to pay an admission fee as the operator only provided free admittance, inter alia, to people who had reached state pension age, which in the case of a man was 65 and in that of a woman 60. Since retirement age (as it was then) depended upon gender there was an exact correspondence between the characteristic relied upon the claimant and the protected characteristic of sex.

125. The Tribunal considers that a demonstration of the requirement for a neutral criterion is found in the EAT in **Taiwo v Olaigbe [2013] EAT 0254/12** (**Taiwo EAT**) in which the EAT held that 'the *mistreatment of migrant workers'* did not amount to a valid PCP because this gave rise to a circular argument. Where the issue was whether mistreatment had been caused to a person because of the application of a PCP, it was pointless to argue that the PCP was '*mistreating'* the person. Furthermore, the suggested PCP would apply only to migrant workers, so was not on its face a neutral criterion that disproportionately disadvantaged some of those to whom it applied when

compared with others to whom it applied. An identical conclusion was reached by the EAT in **Onu v Akwiwu 2013 ICR 1039, EAT**, (**Onu EAT**) which also involved a migrant worker who had been mistreated by her employers. The cases were subsequently appealed to the Court of Appeal, which upheld the EAT. Lord Justice Underhill found that the factual situation in these cases had '*nothing to do with the kind of mischief which the concept of indirect discrimination is intended to address'*. He noted that the essence of the complaint was that the employer committed a number of particular acts of mistreatment and stated: '*If those acts do not constitute direct discrimination because the relevant ground was absent, they cannot be converted by some process of abstraction into the application of a discriminatory PCP'*. On the claimants' further appeal, the Supreme Court in **Onu v Akwiwu; Taiwo v Olaigbe** 2016 ICR 756, SC (**Taiwo SC**) took the same view, noting that the exploitation of workers who are vulnerable because of their immigration status is not a PCP that can be applied to workers who are *not* so vulnerable.

126. The Tribunal has considered **Tarbuck v Sainsbury Supermarkets** Ltd [2006] IRLR 664(**Tarbuck**). In Tarbuck the Tribunal had upheld a complaint of disability discrimination under the former DDA, in part on the basis that there had been failures to make reasonable adjustments to accommodate the employee's disability by failing to provide necessary equipment, proper and adequate support for her job-seeking during an "*at risk"* period when the employer had put her on notice of redundancy, and in the failure to subsequently consult with the employee in order to agree the particular steps to be taken to eliminate her disadvantage in the competition for jobs within the company. At the EAT Mr Justice Elias (President) set out

> *"72. Accordingly whilst, as we have emphasised, it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so— because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments— there is no separate and distinct duty of this kind.*

73. We are reinforced in this view by the fact that the examples of reasonable adjustments given in Section 6(3) of the Act do not include this duty. Whilst these examples are not intended to be exhaustive, as the Mid-Staffordshire case noted, in our view if there were to be an obligation of this nature imposed on the employer, then we would expect it to be spelt out in very clear terms.

74. We were referred to the Code of Practice which also states that the obligation to consult is an aspect of making an appropriate reasonable adjustment. In our judgment this takes matters no further for two reasons. First, whether the failure to consult is capable of being treated as a failure to make a reasonable adjustment is a matter of law; and in any event we have no doubt that this passage in the Code is so framed precisely to reflect the ruling in the Mid-Staffordshire decision."

127. The Tribunal has considered **Scottish & Southern Energy plc v Mackay** [2007] UKEATS/000775/06 (**Mackay**), the EAT noted that the Tribunal had proceeded on the basis of (an incorrect as identified in Tarbuck) concession that a failure to carry out an adequate investigation could amount to a failure to make a reasonable adjustment. In Tarbuck the EAT commented that "*whilst we accept that a failure to investigate may in principle amount to disability related discrimination, and such a conclusion would not be inconsistent with the Tarbuck case, that was not the conclusion which the Tribunal reached here."*

128. The Tribunal has considered **O'Hanlon v Comrs. for Revenue and Custom** [2007] IRLR 404 (**O'Hanlon**). In **O'Hanlon** the Court of Appeal found that while extending sick pay for a disabled employee was not precluded, it would be a rare and exceptional case that it would amount to a reasonable adjustment. The Court of Appeal concluded that the EAT had been entitled to find that the employer had made reasonable adjustments in refusing to give full pay whilst absent for reasons of disability after the expiry of a contractual period of six-month full pay period. The employee's case was the particular application of the policy to her would amount to discrimination. However, the only reason given for not applying the sick pay rules to the employee herself was the

additional pressure placed on her by financial hardship feeding into her depression. The appeal tribunal had been right to dismiss that reason. LJ Hopper set out:

> *"67. In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances. We say this for two reasons in particular.*
>
> *68. First, the implications of this argument are that Tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Of course we recognise that tribunals will often have to have regard to financial factors and the financial standing of the employer, and indeed s.18B(1) requires that they should. But there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is perforce relatively limited, and a claim which if successful will inevitably apply to many others and will have very significant financial as well as policy implications for the employer. On what basis can the tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which perforce the tribunal will know precious little about? The tribunals would be entering into a form of wage fixing for the disabled sick.*
>
> *69. Second, as the tribunal pointed out, the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in s.18B(3) are of*

this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what might be reasonable in any particular case, but none of them suggests that it will ever be necessary simply to put more money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work."

129. The Tribunal has considered **Project Management Institute v Latif** [2007] IRLR 579, (**Latif**). In **Latif,** the EAT Elias J (President of the EAT) concluded that Tribunal had erred in its approach to the burden of proof. The EAT noted that it was not correct to suggest that in every case the claimant would have to provide the detailed adjustments that would require to be made before the evidential burden would shift. However, it would be necessary for the respondent to understand the broad nature of the adjustment proposed and be given sufficient detail to enable him/her to engage with the question of whether it could reasonably be achieved (or not). The EAT concluded that while the employee had for the first time during the Tribunal hearing, suggested a particular step which on the face of it could deal with the substantial disadvantage faced by the employee, the question was then whether the employer had acted reasonably in failing to take that step. It was not a case where the employer required to engage with a vague assertion that some step might have been possible though none could be specifically identified.

130. The Tribunal has considered **Lincolnshire Police v Weaver** [2008] ALL ER (D) 291 (Mar) (**Weaver**). In **Weaver** Elias J (as he was then) set out that the Tribunal had assessed the reasonableness of allowing the employee onto the retention scheme merely by focusing on the claimant's position while it had been obliged to engage with the wider operational objectives of the employer (and in that case in particular, the desire to liberate posts for restricted officers). Furthermore, the Tribunal had reached its conclusion on the basis that the

employee would have remained in his post anyway. That was an unjustified premise. Moreover, the Tribunal had considered that the employer had deliberately adopted a policy which operated to the disadvantage of disabled people. That was not a relevant consideration to have taken into account.

131. The Tribunal has considered **Newcastle City Council v Spires** [2011] UKEAT/0034/10 (**Spires**). In **Spires**, Lady Stacey in the EAT held that the Tribunal was not entitled to hold that the respondent was in breach of a duty to make a reasonable adjustment which had not been identified as an issue in the case. **Chapman v Simon** [1994] IRLR 124 and **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664 applied. The Tribunal's finding that the respondent should have *"explored*" medical redeployment was insufficient and did not address the specific reasonable adjustment put forward – namely, that the claimant ought to have been placed upon the redeployment register. The reasonable adjustment in issue, that the claimant ought to have been placed upon the redeployment register was remitted to the Tribunal.

132. The Tribunal has considered **Burke v College of Law** [2012] EWCA Civ 37 820 (**Burke**) confirmed that where a number of adjustments had been made it was natural to and appropriate to consider the adjust as a whole. The Court of Appeal concluded that the Tribunal was entitled to consider that it would have been difficult to consider the various adjustments that had been made to time, location and supervision in isolation. It had been entirely appropriate for the tribunal to have considered the adjustments as a whole and that was what it had done. The Tribunal had engaged with the issue of the reasonableness of the adjustments and the employer was entitled to refuse further adjustment sought (as to time and supervision). It had identified the effects of the claimant's disability and how they had placed him at a disadvantage compared to others and had explained that the various adjustments made by the defendants, when taken together, had addressed those effects. The EAT had also considered that reasonable adjustments had been made to the time requirement. In the circumstances, a finding that reasonable adjustments had been made had been inevitable.

133. In the Supreme Court decision of **Chief Constable of West Yorkshire Police & Another v. Homer** [2012] UKSC 2015 (**Homer**) Baroness Hale stressed that: *"To be proportionate, a measure must be both an appropriate means of achieving a legitimate aim (and reasonably) necessary to do so."*

134. **Newcastle upon Tyne NHS Foundation Trust v Bagley** [2012] UKEAT/0417/211 (**Bagley**) was referred to for the respondent. In **Bagley** the EAT held that the Tribunal had erred in finding that the employer had failed to implement various reasonable adjustments in respect of the employee following her return to work after an accident: none of the "*provisions, criteria or practices*" identified by the tribunal were capable on analysis of being *"provisions, criteria or practices"*. The EAT held that the if the substantial disadvantage is not because of a disability, then the duty with not arise. In **Begley** the EAT noted that the Tribunal had accepted as a PCP, the treating of Personal Injury Benefit "*applications as routine, allocating them to a junior employee who has no idea what to do while one takes leave and then not checking up on progress when one returns".* The EAT commented that this "cannot *sensibly be said to be a PCP at all. It is simply a recitation of the facts as they were perceived to be by the Tribunal in this case…. In any event neither PCP places the Claimant at a substantial disadvantage because of her disability. The disadvantage that the Tribunal had in mind appears to be the Trust's failure to process her PIB application"* over a period of some months "*However, the failure to process that application was not in fact a cause of any disadvantage to the Claimant"* on the facts. While a return to work had been available, she had not returned to work because it would have meant a reduction in pay, while her PIB application was being processed. "*She could not afford a reduction in pay because of the size of her mortgage payments and her family circumstances (her husband was then out of work… In line with O'Hanlon,* supra *and RBS v Ashton, supra*, *paying the Claimant 85% pay for 60% work would not have been a reasonable adjustment because of the implications that such an alteration might have for the Trust generally in respect of employees working part-time (whether because of work-related or non-work-related disability or because of other personal circumstances such as the need to care for a child or sick relative, etc.)."*

135. The Tribunal has considered **Nottingham City Transport Ltd v Harvey** [2013] EqLR 4 (**Harvey**). In **Harvey** the EAT held that an employer's one-off flawed application of its disciplinary process to a disabled employee through failing to conduct a reasonable investigation into alleged misconduct had not amounted to a provision, criterion or practice for the purposes of establishing disability discrimination by way of a failure to make a reasonable adjustment stating at para 22 that "*it seems plain to us that the Tribunal erred in law by identifying the particular flawed disciplinary process that the Claimant underwent as being something that fell within the heading "provision, criterion or practice", and, … , as showing that because of his disability those aspects caused a disadvantage over others who were not disabled, when it may seem obvious that a failure to consider mitigating circumstances and a failure reasonably to investigate is likely to cause misery whoever is the victim.".* In summary there must be a causative link between the PCP and the substantial disadvantage so identified. The substantial disadvantage must *"arise out of"* the PCP. It is not sufficient, merely to identify that an employee has been disadvantaged in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered. That would be to leave out of account the requirement to identify a relevant PCP. The EAT (Langstaff J) set out in para 18 that;

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

136. Further **Harvey** identifies there must be a causative link between the PCP and the substantial disadvantage. It is insufficient that to identify that simply that an employee has been disadvantaged and to conclude that had the employee not been so disabled they would not have suffered, re **Harvey** para 17:

> ***"****[17] In applying the words of the DDA, and we have little doubt in cases in future dealing with the successor provisions under the Equality Act 2010, it is essential for the tribunal to have at the front of its mind the terms of the statute. Although a provision, criterion or practice may as a matter of factual analysis and approach be identified by considering the disadvantage from which an employee claims to suffer and tracing it back to its cause, as … was indicated ... in* ***Smith …*** *it is essential, at the end of the day, that a tribunal analyses the material in the light of that which the statute requires; Rowan says as much, and* ***Ashton*** *reinforces it. The starting point is that there must be a provision, criterion or practice; if there were not, then adjusting that provision, criterion or practice would make no sense, as is pointed out in* ***Rowan.*** *It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. …. there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP."*

137. In relation to a need for (the possibility of) repetition **Fox (father of Fox, deceased) v British Airways plc** [2015] EAT 0315/14 **(Fox**) Her Honour Judge Eady QC stated: '*Certainly it is hard to see how an individual dismissal could, of itself, be a policy or a criterion (although it may certainly result from either). As for whether it could be a practice, I would approach this term in the same way as did the EAT in Harvey; that is, as suggesting some degree of repetition. An individual dismissal might certainly result from the application of a particular practice but it is hard to see how it could be a practice as such'.*

138. The Tribunal has considered **Sanders v Newham Sixth Form College** [2014] EWCA Civ 734 (**Sanders**), In **Sanders** the Court of Appeal concluded that an

employer could not make an objective assessment of the reasonableness of proposed adjustments unless it appreciated the nature and the extent of the substantial disadvantage imposed upon the employee by the provision, criterion or practice. Thus, an adjustment to a working practice could only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in that was the proposition that an adjustment would only be reasonable if it was tailored to the disadvantage in question and the extent of the disadvantage was important, since an adjustment which was either excessive or inadequate would not be reasonable. LJ Laws set out at para 14:

> *"[14] In my judgment these three aspects of the case – nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments – necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable."*

139. The Tribunal has considered **Doran v DWP** [2014] UKEAT/0017/14 (**Doran**). In **Doran,** the EAT held that no duty to make reasonable adjustments arose when the claimant was certified as unfit for any work and had given no indication of when she might be able to return to work. At para 43 the EAT noted that *"[43] ... On the facts of this case, there was no indication from the Claimant that she was fit to return to work if adjustments were made for her. Her medical certificates were to the effect that she was not fit for any work. The ET was entitled to find that the ball was in her court to discuss the offer of the*

post of administrative assistant with a phased return when she became fit to do some work. She did not become fit until September 2010. That was after the period of six months. The ET accepted that the Respondent would normally consider dismissal when absence had lasted for a period in excess of that. In my opinion, the ET was entitled to hold … that the duty to make reasonable adjustments was not triggered in the present case because the Claimant did not become fit to work under reasonable adjustments. "

140. Both parties referenced **G4S Cash Solutions (UK) v Powell** [2016] IRLR 820 (**G4S**). In **G4S**, following a period of disability related absence, Mr Powell began agreed to move to a lower grade role while retaining his previous higher salary. He was subsequently advised that this lower grade role was not permanent and if alternative work could not be found he would be dismissed on medical grounds. In response to a grievance the employer offered to make the lower grade role permanent but at a reduced salary rate (a 10% reduction) than the agreed operational rate. The claimant refused to accept the reduction to the agreed operating rate and was dismissed. The EAT concluded that the Tribunal had not erred in concluding that employer had failed to make the reasonable adjustment of allowing the claimant to work at the new role at the previously agreed and applied salary rate (which reflected the previously higher grade and which had operated by agreement. The EAT (Judge D Richardson) set out that

> *"39. The real issue related to the adjustment. Was it reasonable for the respondent to have to place the claimant in the key runner role while keeping his existing pay?*
>
> *40 The question whether the claimant's pay should be protected in this way was the real issue in the case: the respondent had been prepared to offer him the key runner job at the lower rate of pay. He, however, wished to retain the rate of pay which he had been led to believe was long term and which he had actually been paid for the last year. This was what the respondent was asked to consider at the time it dismissed him. …*

> *41 The duty to make reasonable adjustments is not a duty to consider; it is a duty to take a concrete step or steps. If it was not objectively reasonable for the respondent to have to take a particular step, it would not be in breach of duty merely because it had failed to consider taking it…. Read as a whole, the employment tribunal decided that it was objectively reasonable for the respondent to have to take the step in question.*
>
> *…*
>
> *60 I do not expect that it will be an everyday event for an employment tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent – but I can envisage cases where this may be a reasonable adjustment for an employer to have to make as part of a package of reasonable adjustments to get an employee back to work or keep an employee in work. They will be single claims turning on their own facts: see O'Hanlon. The financial considerations will always have to be weighed in the balance by the employment tribunal: see Cordell. I make it clear, also, that in changed circumstances what was a reasonable adjustment may at some time in the future cease to be an adjustment which it is reasonable for the employer to have to make; the need for a job may disappear or the economic circumstances of a business may alter."*

141. For the claimant, reference was made to **Northumberland Tyne and Wear NHS Foundation v Ward** [2019] UKEAT024918 & UKEAT001319 (**Ward).** Ms Ward suffered from (CFS/ME) made it more likely that she would have higher absences than other employees. In 2011, the Respondent made an adjustment to its sickness absence management policy whereby she could have up to 5 absences in a 12-month period before triggering the policy instead of the standard 3 absences. That adjustment operated for a period of almost 4 years. However, the adjustment was abruptly removed in 2015. Whilst the Respondent made other adjustments, such as a reduction in working hours, the Claimant was unable to meet the attendance requirements under the policy

and was subjected to the various stages of the absence management process leading eventually to her dismissal. Her complaints of discrimination because of something arising in consequence of her disability and for failure to make reasonable adjustments (under ss.15 and 20 of the *Equality Act 2010* ("the 2010 Act") respectively) were upheld by the Employment Tribunal as was her claim of unfair dismissal, albeit that it was held that there was a 50% chance that she would have been dismissed within 4 months in any event. The Respondent appealed on the grounds that: (a) the decision on the s.20 claim was inadequately reasoned, (b) the Tribunal erred in its approach to justification; (c) the decision on unfair dismissal, which was based on the findings on justification, was similarly flawed; and (d) the decision on the *Polkey* reduction was inadequately reasoned. The EAT dismissed that the liability appeal as (a) the Tribunal had not erred in its approach to the claim for reasonable adjustments and gave adequate reasons for its decision; (b) the Tribunal was entitled to deal with justification in the way that it did, particularly given that this was a case where an adjustment that had worked well for years was abruptly removed without cause; (c) as there had been no error in the justification decision, the challenge to the unfair dismissal claim fell away ; and (d) the *Polkey* decision was adequately reasoned. This Tribunal does not consider that Ward is of assistance, the effective reasonable adjustment, although others were made, relied upon in Ward was implemented and subsequently removed. There is, it is considered, no material equivalence with the factual matrix in the present case.

142. The Tribunal has had regard to the Court of Appeal decision in **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160 (**Griffiths**) which identifies the need for care when framing a PCP. The context in Griffiths was absences and the application of absence management policies. The correct PCP was not the particular absence policy itself, but rather the underlying requirement, reflected in the policy, to "*maintain a certain level of attendance at work so as to avoid disciplinary sanctions".* Further the Court of Appeal in **Griffiths** set out "*So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed: the uncertainty*

is one of the factors to weigh up when assessing the question of reasonableness." (Elias LJ at paragraph 29).

143. Both parties referenced **Ishola v Transport for London** [2020] IRLR 368 (**Ishola**). In the Court of Appeal considered an appeal in relation to termination on grounds of medical incapacity. The former employee appealed, arguing that too narrow and technical an approach had been taken to the reasonable adjustments claim, in that the tribunals below should properly have found that the employer had a PCP of requiring the claimant to return to work without concluding a proper and fair investigation into grievances raised by him, which he said were not properly and fairly investigated prior to his dismissal. The Tribunal had held there was no PCP operated by the former employer because the alleged requirement was a one-off act in the course of dealings with one individual. The EAT upheld that conclusion. The claimant contended that an ongoing requirement or expectation that a person should behave in a certain manner (here, return to work despite the outstanding grievances) was a '*practice'* within the meaning of s 20(3). At the Court of Appeal Simler LJ set out that:

> ***"37*** *In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.*
>
> ***38*** *In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are*

generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.

39 *In that sense, the one-off decision treated as a PCP in Starmer is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to 'practice' as having something of the element of repetition about it. In the Nottingham case in contrast to Starmer, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way."*

144. The Tribunal notes that the content of the former s.18B DDA1995 is now largely replicated by paragraph 6.23 onwards of EHRC Code of Practice:

- Extent to which taking the step would prevent the effect in relation to which the duty is imposed

- Extent to which it is practicable for the employer to take the step
- The financial and other costs which would be incurred by the employer in taking the step and the extent to which it would disrupt any of his activities
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance with respect to taking the step
- The nature of the employer's activities and the size of his undertaking.

145. The issue for the Tribunal is not disadvantage in a general sense but rather whether there was a disadvantage in comparison with people who were not disabled**. Smith** (above) and **RBS v Ashton** [2011] ICR 632 (**Ashton**) at para 14 that "*… an employment tribunal—in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination—must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled"*

146. Further, and in light of the factual matrix in the present case, having regard to the EHRC 2011 Statutory Code of Practice including para 3.11, the Tribunal is satisfied that there is no relevant matter arising from the Code.

Discussion and Decision

Relevant Law

PCP 3 "*Assigning specific managers only to specific branches, and not giving adequate consideration to managerial requests to swap branches."*

147. A swap by Branch Manager branch by necessity involves at least the agreement of two Branch Managers. While there was evidence of that the claimant had (before date) communicated to the respondent a proposal that he move to another branch. The panel notes that the claimant asserted, in his

written evidence, the specific requirements of the Queens Park Branch distinguishing same from other Branches he had worked at was no evidence before the Tribunal that any other Branch Manager had offered to take part in a swap with the claimant. The Tribunal observes that the claimant in his evidence in chief identified that Queens Park branch had different requirements due to the nature of the majority of the transactions. The Tribunal concludes that there was no such practice.

Discussion and Decision

Relevant Law

PCP 4 "*Not paying for taxi to and from work whilst Access to Work requests to DWP are being considered."*

148. The Tribunal notes that the claimant elected to apply to Access for Work in December 2018, he did not notify the respondent of same. The claimant commented on Access to Work, not in the written grievance but during the Grievance Hearing. The respondents were made aware of the status of the claimant's Access to Work on. The claimant elected to transfer to Patrick branch some days later. At no point did the claimant provide receipts or incurred taxi costs to the respondents, requesting that the respondent met same, nor did the claimant advise the respondent that he was proposing to take a taxi to and or from work and request that the cost be met. The respondent was not made aware of any issues with travel until…

Discussion and Decision / Relevant Law

PCP 5 "*Not maintaining salary levels for disabled employees who require reasonable adjustments to be made to their role to allow them to continue in their role, for a temporary period whilst those adjustments are being implemented"*

149. The respondent had a practice of ensuring that employees, including the claimant received relevant contractual sick pay arrangements including 5 days contractual pay and thereafter pay at the rate provided in terms of the applicable Statutory Sick Pay Regulations including Social Security

Contributions and Benefits Act 1992 and Statutory Sick Pay (General) Amendment Regulation 1982 all as amended, which payments are not recoverable by the employer from its NI contributions amounts paid by way of SSP in terms of the Statutory Sick Pay Act 1994. The respondent had declined to make any adjustment to the respondent's uniform pay arrangements in June 2018, in response to the claimants request on Thursday 31 May 2018 for a review of their sick pay policy, which the claimant felt was unfair (to him). The only evidence before the Tribunal in relation to a disabled employee whose role, the respondent offered to alter was that of the claimant. As such the Tribunal does not consider that this proposed PCP amounts to more than a one-off event.

150. In any event the claimant's position was unlike that of **G4S** above. In **G4S** the respondent had accepted that pay preservation was a reasonable adjustment notwithstanding a reduction in the role. Having reached such an agreement, the employer **(G4S**) sought to change that existing arrangement which it had accepted was a reasonable adjustment. In the present case the respondent did not offer to maintain the claimants pay were offering him the lower paid role of Branch Assistant. The Tribunal accepts in all the circumstances that it would not have been a reasonable adjustment for the claimant pay to be preserved, for any period, at the same level of the respondent's employees who operated as Branch Manager in both their Patrick and other stores and at an enhanced pay rate to other Branch Assistants, having regard to the wider implications including as identified as **Weaver** above. The preservation of pay in these circumstances is not accepted as a relevant PCP.

Discussion and Decision

Relevant Law

PCP 6 "*Policy on what is deemed to an acceptable staffing level."*

151. The Tribunal does not consider that any relevant evidence was presented, other than to the effect that the respondents, in seeking to support the claimant, arranged to secure additional staff. In so far as it may be relevant having regard to the claimants, assertion at (iii) bullet point 8, the Tribunal accepts, on the

evidence adduced, that there were no Branch Manager vacancy posts available at the material time and in particular until after expiry of the notice period provided by the claimant following upon his notification to the respondent of his decision to resign.

Constructive unfair dismissal

Relevant Law

152. Section 94(1) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed 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."*

153. The leading case relating to constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221 (**Western Excavating**) in which it was held that in order to claim constructive dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach; the final act must add something to the breach even if relatively insignificant; if she does so, and terminates the contract by reason of the employer's conduct and she is constructively dismissed.

154. The Tribunal has considered the further cases referred to by the claimant set out above.

155. The Tribunal notes that in a complaint of constructive unfair dismissal, Langstaff P in **Wright v North Ayrshire Council** [2014] ICR 77 (**Wright**) at paragraph 2 set out that in considering such a claim "*that involves a tribunal looking to see whether the principles in* ***Western Excavating (ECC) v Sharp*** *[1978] IRLR 27 can be applied" and sets out 4 issues to be determined:*

"that there has been a breach of contract by the employer";

"that the breach is fundamental or is, as it has been put more recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract";

"that the employee has resigned in response to the breach, and that"

"before doing so she has not acted so as to affirm the contract notwithstanding the breach"

156. As set out above, the resignation must be in response to the breach. Further, as Langstaff P confirmed in **Wright** para 10, the correct position with regard to causation was set out in the judgment of Keane LJ in **Meikle v Nottinghamshire County** [2004] IRLR 703 at paragraph 33:

'…the repudiatory breach by the employer need not be the sole cause of the employee's resignation…there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the "effective cause" of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives.... The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation …' and although not quoted by Langstaff P above, Keane LJ concludes "It is enough that the employee resigns in response, at least in part, to fundamental breaches of contract by the employer."

157. Langstaff P in Wright at para 15 continues "*The point does not rest simply on the judgment of the Keene LJ in Meikle, a judgment agreed to in that case by Thorpe LJ and Bennett J, but also was put in words which I doubt could be*

bettered by Elias J as President of the Appeal Tribunal in Abbycars (West Horndon) Ltd v Ford [2008] All ER (D) 331 (May)..: 'On that analysis it appears that the crucial question is whether the repudiatory breach played a part in the dismissal. …It follows that once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon.' That expression of principle was not material to the actual decision of the Appeal Tribunal in Abbycars but it is one which we wholeheartedly endorse.".

Discussion and Decision

Constructive dismissal

158. The Tribunal's conclusion is that, there was no fundamental or repudiatory breach of contract. While the claimant asserts in submissions at para 74 that the manner in which the respondent dealt with the claimant' disability between December 2017 and August 2019 led to a complete breakdown in trust and confidence, the Tribunal disagrees. The Tribunal does not accept on the evidence that there was any failure on the part of the respondent to consider matters relating to the claimant's medical condition so far as the claimant elected to make the respondent aware of same. The claimant did not advise the respondent, in any meaningful way, of any ongoing issues until **Friday 22 March 2019** when, in response to being advised that the respondent's SBDM would be providing a briefing to the claimant, of respondent's plans relating to the Queens Park Branch the following week, the claimant having advised that he was felling okay "*suggested he might need to stand down as manager if his health does not improve"*. The claimant in his subsequent meeting with the respondent's SBDM on **Thursday 28 March 2019** advised that he was diagnosed with **Chronic Post Stroke Syndrome** which manifest with vertigo attacks, anxiety, spatial awareness as a result of his artery dissection/stroke in December 2017. He described that he was "*on various medical treatments to manage this*". That condition was not reflected in the claimant requested April 2019 Medical Report of **Wednesday 24 April 2019** from Dr Slavin which set out that he had *"made a good physical recovery from his stroke episode in the*

sense that the subtle signs of inco-ordination that we picked up initially resolved fairly quickly". While, in that report she set out that he had developed (at some point) a number of symptoms secondary to the stroke episode the respondent sought a medical report on Thursday April 2019 in response to the claimant's request for alternate workplace, offered a created post as Assistant at their Patrick branch. The claimant elected to notify of his decision to resign on Thursday 23 May 2020 after having been notified that day that his December Access to Work Application would result in a letter from Access to Work in a couple of days, and requested clarification from the respondent if the Assistant created post was still available, which offer the respondent maintained and confirmed. The claimant thereafter accepted that role and having done so subsequently confirmed his resignation from the Assistant branch role at Patrick on 31 July 2019.

159. There was no fundamental or repudiatory breach of contract by the respondent which led to the claimant's decision to resign. The claimant's resignation was not in response, either in part of in full, in response to any fundamental breaches of contract by the respondent. No fundamental breach of contract by the respondent took place. The claimant had elected to take the Partick Assistant role, having initially rejected it because of the consequential reduction, having and subsequently rather than await the outcome of his own December 2018 Access to Work application, despite it having been suggested that it would be a matter of days for it to be completed he decided to take the Assistant role at Partick. There was no fundamental breach of contract which led (either in part or in full) to the claimant's decision to accept the Assistant role at Partick. Having taken that role there was no fundamental breach of contract which led (either in part or in full, or at all) to the claimant's decision to offer his resignation with a period or notice. Nor was there any fundamental breach of contract leading which led (either in part or in full, or at all) to the claimant's decision to terminate his employment. The respondent had not undertaken to offer any alternate Branch Manager role, no alternate Branch Manager role was available.

Recommendations

160. The claimant in the ET1 had sought a recommendation in terms of s124(2) (c) of EA 2010. The recommendation was not particularised. The respondent in submission argued that there was no pled notice of the proposed recommendation. In submissions the claimant argued for

1. That the respondent makes it a companywide policy to instruct risk assessments;

2. Occupational Health reports immediately after an employee returns from a serious illness; and

3. That the respondent ensures that it consults with the employee regarding what adjustments could be made to their role to enable them to remain in employment; and

4. That Ramsdens staff undergo training in disability discrimination and in particular the employer's obligations in terms of making reasonable adjustments.

Relevant Law

In respect of recommendations

161. Having regard to the **Lycée Charles de Gaulle v Delambre** [2011] EqLR 984 (**Delambre**) the Tribunal considers that only recommendation which are practicable should be made. There is no mechanism for enforcing the implementation of recommendations.

162. By reference to the written submissions in relation to the proposed PCP1 "*Not carrying out individual risk assessments for employees returning from long terms sick, particularly those returning from having a stroke* "(the Risk Assessment PCP), although not the particularised Further and Better Particulars (which do not refer to Management of Health and Safety at Work Regulations 1999), it is understood that the claimant seeks to rely upon Regulation 3 of the Management of Health and Safety at Work Regulations 1999 SI 1999/3242, all in accordance with the general duties in the Health and Safety at Work etc Act 1974. While the specific terms of Reg 3 (and indeed Regulation 14) were not provided, the Tribunal notes that:

163. **Regulation 3** provides:

"3 Risk assessment

(1) Every employer shall make a suitable and sufficient assessment of

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions …"

164. Regulation 14 provides:

"14 Employees' duties

(1) Every employee shall use any machinery, equipment, dangerous substance, transport equipment, means of production or safety device provided to him by his employer in accordance both with any training in the use of the equipment concerned which has been received by him and the instructions respecting that use which have been provided to him by the said employer in compliance with the requirements and prohibitions imposed upon that employer by or under the relevant statutory provisions.

(2) Every employee shall inform his employer or any other employee of that employer with specific responsibility for the health and safety of his fellow employees—

(a) of any work situation which a person with the first-mentioned employee's training and instruction would reasonably consider represented a serious and immediate danger to health and safety; and

(b) of any matter which a person with the first-mentioned employee's training and instruction would reasonably consider represented a shortcoming in the employer's protection arrangements for health and safety,

in so far as that situation or matter either affects the health and safety of that first mentioned employee or arises out of or in connection with his own activities at work, and has not previously been reported to his employer or to any other employee of that employer in accordance with this paragraph."

165. Further Section 7 of the Health and Safety at Work etc Act 1974 provides that it is the duty of every employee while at work

(1) to take reasonable care for the health and safety of themselves and of other persons who may be affected by their acts or omissions at work; and

(2) as regards any duty or requirement imposed on their employer or any other person by or under any of the relevant statutory provisions, to co-operate with them as far as is necessary to enable that duty or requirement to be performed or complied with.

166. The Enterprise and Regulatory Reform Act 2013 amended the Health and Safety at Work etc Act 1974, s 47 by virtue of s69 removing the standard of strict liability from such health and safety regulations.

167. The Enterprise and Regulatory Reform Act 2013 did not remove the broad obligation, under reg 18 of the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242 reg 18) to have carried out (and if necessary, act on) an assessment when an employee has notified the employer in writing of her pregnancy, or that she has given birth within the past six months or is breastfeeding (SI 1999/3242 reg 18).

168. In **Bunning v GT Bunning & Sons Ltd** [2005] EWCA Civ 104 (**Bunning**), to which the claimant refers in their submission for PCP1, the Court of Appeal, on appeal from the EAT, in a judgment issued February 2005, held, where inadequacy of the risk assessment was conceded by the employer and a

finding of sex discrimination was not contested on appeal, as arguable that a company's repeated failure to adequately carry out its pregnancy related risk assessment obligations under (the then applicable) s16 of the Management of Health and Safety at Work Regulations 1999 Regulations could constitute a fundamental breach of the implied term of trust and confidence sufficient to entitle an employee to terminate a contract of employment.

169. In **Spencer v Boots the Chemist Ltd** [2002] EWCA Civ 1691 (**Spencer**) (to which the claimant refers in their submission for PCP1) the Court of Appeal (Civil Division) in a decision issued in October 2002, considered an appeal by a counter pharmacist, appealing against the decision of the County Court to dismiss his claim for damages against his former employer. The former employee contended that risk assessments, ought to have been carried out in accordance with Reg 4 of the Management of Health and Safety at Work Regulations 1992, would have revealed a risk which would have required steps to have been taken in order to satisfy the employers common law duty to take reasonable care for the health and safety of its staff. The Court of Appeal held, dismissing the appeal, that although the County Court had an "*expert's clear view that there was a failure to carry out the assessment"* such an assessment would probably have revealed a situation which had been less than ideal and might have involved increased elements of risk, the risks had not been of such a nature that it would have been incumbent on any reasonable employer to have taken steps to counter them or which would have been likely to lead in any foreseeable way to injury of the kind suffered if they had not been taken.

170. The obligation, which was not impacted by the Enterprise and Regulatory Reform Act 2013, in relation to risk assessment in relation to an employee who is pregnant is limited. Reference is made to the EAT and the Court of Appeal in turn, in **Madarassy v Nomura International Ltd** [2007] IRLR 246 (**Madarassy**), which concluded there is no absolute obligation on an employer to conduct a separate risk assessment for each employee who discloses her pregnancy. The particular issue in that case was whether there should have been a risk assessment of the possible risks from using a computer during the claimant's pregnancy. The Court of Appeal agreed with Nelson J in the EAT that the Tribunal was in error in upholding this part of Ms Madarassy's claim,

since there was no evidence before it that the claimant's work was of a kind which could involve risk to her or her unborn baby.

171. For the claimant again in relation to their PCP1, reference was made to **Bailey v Devon Partnership NHS Trust** [2014] 2014 WL 3387689 (**Bailey**). In **Bailey** a claim had been made, by a psychiatrist, for common law personal injury damages related to a severe depressive disorder which she suffered upon her first breakdown on 7 July 2008 and its subsequent recurrence in 2010. The claim was dismissed at first instance, in the High Court (Queen's Bench Division). The Court had held that the employer was in breach of its duty under the Management of Health and Safety at Work Regulations 1999 reg.3, in the context of the then applicable section 22 (the court itself makes reference to changes in 2003, though not to the subsequent changes, referred to below, in 2013) of the Regulations, to undertake a risk assessment and as a result failed to implement its own policy for the assessment of stress. It however, concluded that a more thorough investigation would not have identified any imminent risk to the claimant's health. The Court of First Instance noted from para 264

> *"264. The initial exclusion of civil liability no doubt played a central role in the failure of risk assessments to receive the prominence expected after the implementation of the Framework Directive by the Management Regulations 1992. In one of the few cases taken to appeal in Spencer v Boots the Chemist [2002] EWCA Civ 1691 the Court of Appeal held that a failure to undertake a risk assessment did not equate to, but was evidence of, a breach of the common law duty of care.*
>
> *265. The Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment Regulations) 2003 (in force from 27 October 2003) changed the legal landscape and introduced a very significant change to the 1999 Regulations in that they removed the majority of the exclusion for civil liability previously contained at regulation 22 of the 1999 Regulations. It was only after October 2003 that an employers failure to carry out risk assessments became a regular feature of case law.*

> *266. As a result of this background it is perhaps not surprising that there was limited focus on the role of risk assessments in the earlier cases concerning liability for work related stress despite the intended importance of the risk assessment as a cornerstone of modern European health and safety law. Indeed such is the importance it has now been recognised as arguable that a company's repeated failure to adequately carry out its risk assessment obligations under the 1999 Regulations would constituted a fundamental breach of the implied term of trust and confidence sufficient to entitle an employee to terminate a contract of employment; see Bunning v GT Bunning & Sons Ltd [2005] EWCA Civ 104 (per Wall LJ).”*

172. **Bailey** as a First Instance decision is not considered to be of assistance. **Bunning** and **Spencer** are considered to be distinguishable on their facts and the context of the respective decisions.

173. The Tribunal notes the decision of the Supreme Court **Kennedy v Cordia (Services) LLP** [2016] UKSC 6 (**Cordia**). In **Cordia**, Ms Kennedy appealed against a decision of the Scottish Court of Session (Inner House) holding that her employer Cordia, wholly owned by a local authority, was not liable for her injuries sustained when she slipped on an icy path while conducting a home visit to one of her employer's clients on 18 December 2010. There had been severe wintry conditions in central Scotland for a number of weeks prior to that date, with snow and ice lying on the ground. Mrs Kennedy was driven to the house by a colleague, who parked her car close to a public footpath leading to the house. The footpath was on a slope, and was covered in fresh snow overlying ice. It had not been gritted or salted. After taking a few steps along the footpath, she slipped and fell to the ground, injuring her wrist. Cordia had conducted a risk assessment in 2005 which assessed the risk of slipping and falling in inclement weather when travelling to and from clients' homes in the relevant area as *'tolerable*'. A further risk assessment was carried out in 2010. What constituted safe adequate footwear was left to the judgment of the employees. Ms Kennedy had been given a hazard

awareness booklet and advised to wear safe, adequate footwear in inclement weather.

174. The Supreme Court, in **Cordia** noted that

[85] The Management Regulations are intended primarily to implement the Framework Directive. Regulation 3(1) provides:

'Every employer shall make a suitable and sufficient assessment of—the risks to the health and safety of his employees to which they are exposed whilst they are at work; …

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions …'

[86] The statutory provisions referred to in reg 3(1) are those contained in Pt I of the Health and Safety at Work etc Act 1974 ('the 1974 Act') and…

[88] In relation to civil liability, s 47(2) of the 1974 Act provided at the relevant time, prior to its amendment by s 69 of the Enterprise and Regulatory Reform Act 2013, that breach of a duty imposed by health and safety regulations (ie regulations made under s 15): 'shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise.' Regulation 22 of the Management Regulations, as it stood at the relevant time, provided that breach of a duty imposed on an employer by the regulations did not confer a right of action in any civil proceedings in so far as the duty applied for the protection of a third party (i.e. someone other than an employee). The regulations therefore contained no bar to liability towards an employee, subject to the requirement imposed by s 47(2) that the breach of duty 'causes damage'.

[89] The importance of a suitable and sufficient risk assessment was explained by the Court of Appeal in the case of Allison v London Underground Ltd .., [2008] IRLR 440.. . Smith LJ observed at para [58] that insufficient judicial attention had been given to risk assessments in

the years since the duty to conduct them was first introduced. She suggested that that was because judges recognised that a failure to carry out a sufficient and suitable risk assessment was never the direct cause of an injury: the inadequacy of a risk assessment could only ever be an indirect cause. Judicial decisions had tended to focus on the breach of duty which led directly to the injury. But to focus on the adequacy of the precautions actually taken without first considering the adequacy of the risk assessment was, she suggested, putting the cart before the horse. Risk assessments were meant to be an exercise by which the employer examined and evaluated all the risks entailed in his operations and took steps to remove or minimise those risks. They should, she said, be a blueprint for action. She added at para [59], cited by the Lord Ordinary in the present case, that the most logical way to approach a question as to the adequacy of the precautions taken by an employer was through a consideration of the suitability and sufficiency of the risk assessment. We respectfully agree."

175. In Cordia, the Supreme Court was considering a factual matrix where an employee arrived on a site and not where, as here, a Manager had operated as same in a Branch for a number of years.

176. The Tribunal notes that the Court of Appeal gave considerable regard to the guidance notes in **Gravitom Engineering Systems Ltd v Parr** [2007] EWCA Civ 967(**Gravitom**). In **Ellis v Bristol City Council** [2007] EWCA Civ 685 (**Ellis**) a case concerning the equivalent 1992 Workplace Regulations, the Court of Appeal expressly approved of the consideration of such codes, notes and other official publications emanating from the relevant government departments as an aid to construction in civil proceedings.

177. The HSE guidance "*Health and safety for disabled people and their employers"* published in 2015 sets out that "*There is* ***no requirement to carry out a specific, separate, risk assessment for a disabled person.*** *If you become aware of a worker (or others, e.g. visitors) with a disability, you* ***may*** *need to review your existing risk assessment to make sure it covers risks that might be present for them".*

178. The Tribunal notes that the Court of Appeal in **Stewart (now White) v Lewisham and Greenwich NHS Trust** [2017] EWCA Civ 2019 (**Stewart**) Lord Justice Hamlin references Hale LJ in **Koonjul v Thameslink Healthcare Services** [2000] PIQR P123 (**Koonjul**) to the effect that employer's duty to carry out a Risk Assessment under Regulation 4 of the Manual Handling Regulations 1992 only arises where there is a real risk of injury.

Regulation 4 provides that

(1) Each employer shall—

(a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or

(b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured—

(i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them…,

(ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable, and

(2) Any assessment such as is referred to in paragraph (1)(b)(i) of the regulation shall be reviewed by the employer who made it if—

(a) there is reason to suspect that it is no longer valid; or….

(b) there has been a significant change in the manual handling operations to which it relates;

and where as a result of any such review changes to an assessment are required, the relevant employer shall make them.

(3) In determining for the purposes of this regulation whether manual handling operations at work involve a risk of injury and in determining the appropriate steps to reduce that risk regard shall be had in particular to (factors including) …

(d) the results of any relevant risk assessment carried out pursuant to regulation 3 of the Management of Health and Safety at Work Regulations 1999;

179. As she stated at pp126-127*: "…there must be a real risk, a foreseeable possibility of injury; certainly nothing approaching a probability. I am also prepared to accept that in making an assessment of whether there is such a risk of injury the employer is not entitled to assume that all his employees will on all occasions behave with full and proper concern for their own safety. I accept that the purpose of regulations such as these is indeed to place upon employers obligations to look after their employees' safety which they might not otherwise have."* LJ Hamlin continues "*However, in making such assessments there has to be an element of realism. As the guidance on the Regulations points out in Appendix 1 at paragraph 3 ... a full assessment of every manual handling operation could be a major undertaking and might involve wasted effort. It then goes on to give numerical guidelines for the purpose of providing an initial filter which can help to identify those manual handling operations deserving more detailed examination. It also seems clear that what does involve the risk of injury must be context-based. One is therefore looking at this particular operation in the context of this particular place of employment and also the particular employees involved."*

180. In relation to the claimant second proposed recommendation, this is understood to be intended to be read alongside the claimant's position in relation to its proposed PCP2 "*Not obtaining Occupational Health report immediately upon employees returning from long terms sick to see what adjustments should be considered, particularly for those returning from stroke."*

181. The Tribunal notes, in relation to this proposed recommendation that, as in the present case at the outset following the stroke episode, in any instance in which an employee is absent due to ill health beyond the period that can be

self-certified, he or she may have obtained — and provided to the employer — *a 'Statement of Fitness for Work'* (often described as a *'fit note'*) from the doctor who is responsible for his or her care, in terms of the Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 SI 2010/137).

182. Such a Fit Note gives the doctor the option of declaring the patient either *'not fit for work'* or '*may be fit for work taking account of the following advice'.*

183. This note is intended indicate the nature of the illness, the period of absence that is initially expected and what the employee might be capable of doing on his or her return. The employer may not approach the GP directly without the employee's consent, because of the doctor's duty of confidentiality to the patient. The employer will need to comply with its obligations under the Access to Medical Reports Act 1988 in relation to a report prepared by a medical practitioner responsible for the worker's care, including providing an employee the right to see any medical report before it is released.

184. The Access to Medical Reports Act 1988 gives individuals rights in respect of reports relating to their health that have been prepared by a medical practitioner '*who is or has been responsible for the clinical care of the individual'*. Under the Act:

1) an employer who wishes to contact an employee's doctor must notify the employee in writing and must secure his or her written consent before doing so

2) in giving such notification, the employer must inform the employee of his or her right to withhold consent, to have access to the report and to then withhold consent for it to be supplied, and to request amendments to the report

3) if the employee states that he or she wishes to have access to the report, the employer must tell the doctor when making the application and at the same time let the employee know that the report has been requested

4) the employee must contact the doctor within 21 days of the date of the application to make arrangements to see the report

5) if the employee considers the report to be incorrect or misleading, he or she can make a written request to have it amended

6) if the doctor refuses to amend the report, the employee has the right to ask him or her to attach a statement to the report reflecting the employee's view on any matters of disagreement

7) the employee has the right to withhold consent to the report being supplied to the employer.

185. There is an exemption from the rights to access under 7 of the 1988 Act where '*disclosure would in the opinion of the practitioner be likely to cause serious harm to the physical or mental health of the individual or others or would indicate the intentions of the practitioner in respect of the individual'*. Further the 1988 Act only covers reports prepared by a medical practitioner responsible for the worker's care. If a report is requested by an occupational health consultant, instructed for instance by an employer, an individual's rights to access may be limited to those provided by the EU General Data Protection Regulation (No.2016/679) and the Data Protection Act 2018.

186. In **O'Donoghue v Elmbridge Housing Trust** 2004 EWCA Civ 939, CA **(O'Donoghue)** the Court of Appeal upheld a Tribunal's finding of fair dismissal where an employee failed to co-operate in consenting to the employer obtaining medical evidence from their independent medical adviser. The employee had announced her decision to retire and when her application for free accommodation was refused, she decided to continue working but was continuously off work on health grounds. The employer issued the employee with a consent form which contained, under cl 2, that the employee consented to the employer's independent medical advisers releasing any relevant clinical information to the designated officer responsible for the employee. However, after lengthy correspondence, it had failed to secure the employees co-operation and terminated her contract. The Tribunal held that the employer's

decision to dismissal for incapability was within the range of reasonable responses in view of the employee's refusal to co-operate.

Discussion and Decision in relation to claimant proposed recommendations

187. The Tribunal notes the respondent's position in summary to be that it did not have notice as to what recommendations the claimant proposed the Tribunal would make.

188. While the Tribunal does not have jurisdiction to consider the complaint in terms s20, 21 EA 2020 PCP 1 *"Not carrying out individual risk assessments for employees returning from long terms sick, particularly those returning from having a stroke* "(the Risk Assessment PCP), the Tribunal as above notes that the claimant seeks a recommendation that the respondent makes it a companywide policy to instruct risk assessments. In so far as it may be relevant, the Tribunal concludes, on the evidence, that at no point was the respondent aware of any risk to the claimant's health and safety necessitating the creation of any separate risk assessment in relation to the claimant. Such a recommendation would, the Tribunal considers operate in contradiction to existing HSE guidance "*Health and safety for disabled people and their employers"* set out above and published in 2015 which sets out that "*There is* ***no requirement to carry out a specific, separate, risk assessment for a disabled person.*** *If you become aware of a worker (or others, e.g. visitors) with a disability, you* ***may*** *need to review your existing risk assessment to make sure it covers risks that might be present for them".*

189. While the Tribunal does not have jurisdiction to consider the complaint in terms s20, 21 EA 2020 PCP 2 "*Not obtaining Occupational Health report immediately upon employees returning from long terms sick to see what adjustments should be considered, particularly for those returning from stroke.*" (the Occupational Health PCP), the Tribunal notes that the claimant seeks a recommendation in equivalent terms. In so far as it may be relevant, the Tribunal considers that such a recommendation would, in effect remove, the ability of an employee to decline to co-operate in the production of an Occupational Health adviser appointed by an employer, where for instance an employee considers that their own GP is more appropriate/ and or that no such

medical assessment is merited. The effective limitation of the Access to Medical Records Act 1988 in relation to occupational health reports may impact on an employee's decision. In all the circumstances the Tribunal does not consider that such a recommendation is appropriate.

190. The Tribunal declines to make any recommendation including those proposed by the claimant in their submissions;

1. The proposed recommendation that the respondent makes it a companywide policy to instruct risk assessments "*after an employee returns from a serios illness",* fails to have regard to full terms of the Management of Health and Work Regulations 1999 including those set out at regulation 14. The claimant was the Branch Manager, he was operationally responsible for the Queens Park Branch. The Tribunal, so far as it may be relevant, considers that he retained responsibility to give notice to the respondents including via informal meetings with Mr Carson of how and when he considered the various symptoms impacted on his health and safety, in the context of the Branch and the claimant as the employee involved (ref **Stewart** and **Koonjul** above). It was the respondent, Ms McNamara who raised the question of whether a risk assessment had been carried out. In response that question being raised the claimant simply confirmed that no such risk assessment had been carried out. The issue of such a recommendation without context of the appropriateness (beyond an employee returning from a serious illness which may not of itself pose "*a real risk"* (ref **Stewart** and **Koonjul** above) is not supported by the existing HSE guidance (ref **Ellis** and **Gravitom** above).

2. (*The instruction of*) Occupational Health reports immediately after an employee returns from a serious illness. There is no definition of what amounts to a serious illness. It cannot be assumed that all employees who return after a period of

absence following *"a serious illness"* would welcome an assessment by a medic other than their own GP. It cannot be assumed that in all cases retuning employees following *"a serious illness"* would necessitate a medical assessment. To so require would be to undermine the employee employer relationship. There are existing mechanisms for provision of information to employer including GP generated Fit Notes. As set out above reports by Occupational Health are not directly subject to the Access to Medical Records Act.

3. The proposed recommendation that the respondent ensures that it consults with the employee regarding what adjustments could be made to their role to enable them to remain in employment. It cannot be assumed that in every case all employees who return after a period of absence following *"a serious illness"* would wish or seek an adjustment. The recommendation is considered to be too vague. Further the Tribunal considers that the imposition of such a requirement may dissuade employees from openly engaging with their employers.

4. That Ramsdens staff undergo training in disability discrimination and in particular the employer's obligations in terms of making reasonable adjustments. There is no specification as to the proposed provider, specific content and quality of such training. The Tribunal does not consider that such a recommendation is merited in all the circumstances of the present case.

Conclusion

1. None of the claimant's claims succeed.

2. The claimants claim in terms of s20 and 21 of the EA 2010 in respect of each of the 6 asserted PCP's do not succeed; and

3. The claimant's claim for constructive unfair dismissal does not succeed for the reasons set out above.

4. The Tribunal in reaching these conclusions has been minded to avoiding a fragmented approach, being conscious of the diminishing the cumulative effect of primary facts and the inferences which may be drawn and considered the totality of the evidence.

5. In coming to this view the Tribunal have applied the relevant case law.

6. If there are further submissions which either party considers it is necessary, in the interests of justice, to address supplemental to their respective existing submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

R McPherson
Employment Judge

06 January 2021

Date of Judgment

Date sent to parties **30 January 2021**