EMPLOYMENT TRIBUNAL

BETWEEN

CLAIMANT	AND	RESPONDENT
Mrs R. Davies		**Gloucestershire Health and Care NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held remotely on the following dates: Monday, the 12th October 2020,
Tuesday, the 13th October 2020
Wednesday, the 14th October 2020
Thursday, the 15th October 2020
Friday, the 16th October 2020
Tuesday, the 24th November 2020 and
Tuesday, the 19th January 2021

Employment Judge: Mr D. Harris

Members: Mr Kayvan Ghotbi-Ravandi
Mrs Lesley Eden

Representation:

For the Claimant: In person
For the Respondent: Miss Martina Murphy (Counsel)

JUDGMENT

1. **The claim of breach of the duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 succeeds to the extent that there was a breach of that duty on the part of the Respondent during the period of the Claimant's employment with the Respondent from June 2018 to the 8th July 2019.**

2. **The claim of disability discrimination under section 15 of the Equality Act 2010 is dismissed.**

3. **The claim of constructive unfair dismissal is dismissed.**

REASONS

The claim

1. By a claim form that was presented to the Tribunal on the 24th September 2019, the Claimant brought the following claims against the Respondent:

   1.1 discrimination arising from disability (under section 15 of the Equality Act 2010);

   1.2. a failure to make reasonable adjustments (under sections 20 and 21 of the Equality Act 2010);

   1.3 unlawful deduction from wages; and

   1.4 unpaid holiday pay.

2. At a preliminary hearing that took place by telephone on the 20th February 2020, the claims of unlawful deduction from wages and unpaid holiday pay were withdrawn and the claim was amended, with the permission of the Tribunal, to include a claim of constructive unfair dismissal.

3. At the outset of the final hearing, it was decided by the Tribunal that all of the remaining liability issues would be decided first and that issues relating to a remedy or remedies, if they arose, would be determined at a later stage.

The liability issues

4. At the preliminary hearing on the 20th February 2020 it was decided, following discussion with the parties, that the following issues fell to be determined by the Tribunal at the final hearing. It is these issues that the Tribunal determined at the final hearing.

Constructive unfair dismissal

5. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches, contended by the Claimant, were as follows:

   5.1 A refusal by the Respondent to comply with the Claimant's requests for reasonable adjustments (as set out in more detail in the issues arising in the discrimination claims);

   5.2 On the 18th October 2019, being informed that her manager, Ms Fletcher, would be attending a forthcoming meeting with the Claimant despite the Claimant's request that a manager other than Ms Fletcher attend the meeting. This was said by the Claimant to have been the 'last straw' in a series of breaches of contract on the part of the Respondent).

6. Did the Claimant resign on the 24th October 2019 because of the contended breaches?

7. Did the Claimant delay before making her decision to resign and thereby affirmed the contract of employment with the Respondent?

8. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of section 98(4) of the Employment Rights Act 1996?

Disability

9. Did the Claimant have a physical or mental impairment at the material time: namely, an inability to concentrate in noisy environments, thus reducing her ability to take instructions, to use the telephone and other routine functions. The Respondent conceded that the Claimant had an impairment to the extent of her ability to concentrate in noisy environments, which amounted to a disability within the meaning of section 6 of the Equality Act 2010, but there was an issue as to whether the Claimant had a disability that was greater than the Respondent's admission.

The claim under section 15 of the Equality Act 2010: discrimination arising from disability

10. The allegations of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 of the Equality Act 2010 were as follows:

    10.1 The provision by the Respondent of an adverse reference to a prospective future employer of the Claimant, on the 4th February 2019, which resulted in her not being offered that position.

    10.2 The reduction of the Claimant's pay, during a period of sick leave, by half on the 24th March 2019 and to nil on the 23rd August 2019.

    10.3 Whether the Respondent, in October/November 2019, refused to address properly the Claimant's queries as to reimbursement of pay and instead telling her to take such queries to the Respondent's occupational health department.

11. Can the Claimant prove that the Respondent treated her as set out in the above paragraph because of the "something arising" in consequence of the disability?

12. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

13. Whether the Respondent knew, or could reasonably have been expected to know, the full extent of the disability alleged by the Claimant.

The reasonable adjustments claim under sections 20 and 21 of the Equality Act 2010

14. Did the Respondent apply the provision, criteria and/or practice ('the provision') generally that the relevant part of its workforce work in a common working area?

15. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled in that she suffered or had:

    15.1 an inability to concentrate in particular on her role of proof-reading documents;

    15.2 difficulty in hearing what other members of staff were saying to her;

    15.3 difficulty remembering instructions; and

    15.4 having to work out-of-hours to compensate?

16. Did the Respondent take such steps as were reasonable to avoid the alleged disadvantage? The reasonable adjustments contended by the Claimant being:

    16.1 the provision of noise-cancelling headphones;

    16.2 access to a quieter office;

    16.3 allowing the Claimant to work at another desk in a quieter area of the open plan office; and

    16.4 the provision of partition screens.

    In relation to this issue, it was noted at the preliminary hearing on the 20th February 2020 that the Respondent accepted that the Claimant had a disability (to the extent of her ability to concentrate in a noisy environment) that was likely to place her at a disadvantage as set out above.

Time/limitation issues

17. The claim form was presented on the 24th September 2019. Accordingly any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) was potentially out of time, so that the Tribunal may not have jurisdiction.

18. Can the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? If so, is such conduct in time?

19. Was any complaint presented within such other period as the Tribunal considers just and equitable?

The evidence

20. The Tribunal heard oral evidence from the following witnesses of fact:

20.1 the Claimant;

20.2 Jim Stone (the Claimant's Line Manager until his retirement in November 2018 (witness for the Respondent));

20.3 Katrina Napthine (Senior Operational Finance Manager (witness for the Respondent));

20.4 Angie Fletcher (Clinical Manager and the Claimant's Line Manager from November 2018 onwards (witness for the Respondent));

20.5 Faye Lynch (HR Manager (witness for the Respondent)).

21. The Tribunal read and considered a trial bundle that ran to 453 pages.

The parties' submissions

22. At the request of the Claimant, as a reasonable adjustment, the Tribunal did not hear oral closing submissions from the parties. Closing submissions were presented by the parties as follows:

22.1 the Respondent produced a written skeleton argument dated the 16th November 2020 that ran to 39 pages;

22.2 the Claimant produced initial written closing submissions that ran to 15 pages and supplementary written closing submissions that ran to 79 pages; and

22.3 the Respondent produced a written reply to the Claimant's written closing submissions that was dated the 30th November 2020 that ran to 10 pages.

Findings of fact

23. In February 2001 the Claimant suffered a massive subarachnoid brain haemorrhage. As a result of the brain haemorrhage, she has been left with a range of permanent impairments resulting from cognitive deficits and left-sided weakness. Relevant to the case, the impairments comprise memory problems, concentration problems and sensitivity to noise and light.

24. On the 3rd March 2014 the Claimant commenced employment with the Respondent's predecessor organisation, known as 2gether NHS Foundation Trust. Her job title was Part-Time Administrator in the Service Experience

Department. She worked 18.5 hours per week and she worked in a quiet office with two other members of staff.

25. On the 26th June 2014, the Claimant underwent a review at work. It was very positive. It was reported that the Claimant had settled in very well with the team and that she had a helpful attitude and an excellent telephone manner.

26. A short time after that first review, another member of staff took up a role in the office in which the Claimant worked. That person's job title was Patient Advice & Liaison Officer. The role required the person to speak to patients over the telephone with the result that the noise level in the office increased.

27. It was not long after the Patient Advice & Liaison Officer had started work in the office the Claimant began to notice that she was having problems concentrating on her work tasks. She reported the problems to her then Line Manager, Sarah Doherty, which resulted in the Claimant being moved to a quieter office and a referral being made to Occupational Health for the purposes of seeking advice as to the Claimant's fitness for work and any workplace adjustments that may be of benefit to the Claimant.

28. The Claimant was assessed by Occupational Health on the 21st August 2014. The outcome was a report dated the 21st August 2014 in which it was reported that the Claimant was fit for work with some limitations. The overall conclusion was that the Claimant would be able to continue to perform the majority of her role with appropriate adjustments being made such as recording meetings at which the Claimant was required to take minutes and working in a quieter environment. It was also suggested that a practical workplace assessment be arranged and that there be a follow-up Occupational Health assessment, which subsequently took place on the 12th November 2014.

29. It is clear that by the time of the follow-up assessment in November 2014, there had been an improvement to the Claimant's working conditions. It was reported that the Claimant felt well, was coping with her work and felt very well supported. It was also reported that further reasonable adjustments may be required in the future and that periodic reviews would assist in determining the nature of the adjustments that might be required.

30. In August 2015, the Claimant was moved back to her original office in which five members of staff now worked using a system of hot desking. The Claimant immediately began to experience problems because of the noise levels in the office. She was advised by Sarah Doherty to wear ear defenders. The Claimant asked if she could work in a different office but that request was refused.

31. A one-to-one supervision meeting took place on the 6th August 2015 at which the Claimant's difficulties were discussed. The supervisor noted that the noise levels in the office were causing difficulties and that the noise level needed to be addressed.

32. There was a further one-to-one supervision meeting on the 24th September 2015 at which the Claimant reported that wearing the large ear defenders, that she had taken to wearing in the office, was not practical. It was suggested by the supervisor that the Claimant should try smaller ear plugs. It was also proposed that the Claimant could work in the manager's office, which was located nearby, on those days when the manager was not at work.

33. In January 2016, the Claimant was referred, for the third time, to Occupational Health. Her then Line Manager wanted advice about the Claimant's recent frequent short-term sickness absences and any adjustments that should be made.

34. The Claimant was seen by Occupational Health on the 20th January 2016. She was seen by Professor Hawley who reported:

> **In essence, we have a lady with a lifelong set of sequalae from her haemorrhage. She is able to give you effective regular service. It may be that she will have a slightly higher rate of sickness absence because of the residual shunt and the requirements for it to be kept operable. However, there's no medical reason why she shouldn't be able to cope fully with her workload providing we can give her a degree of control over noise and traffic through her work environment.**

Professor Hawley also reported that he felt there was likely to be a problem with the Claimant continuing to use ear defenders at work. Professor Hawley plainly did not see the use of ear defenders as a long-term solution to the difficulties that the Claimant was experiencing due to the noise level in the office.

35. In March 2016, the office in which the Claimant worked was relocated downstairs and a number of adjustments were implemented for the Claimant. She was allocated a desk away from the door into the office and changes were made to the system of daily handovers and meetings for the purposes of enabling the Claimant to concentrate on her work tasks.

36. By June 2016 it was clear that the modest adjustments that had been made for the benefit of the Claimant were producing little beneficial effect. On the 6th June 2016, the Claimant wrote a formal letter of complaint to the Respondent. She reported that she was finding her current working environment increasingly difficult to work in, because of the noise levels. She reported that the earphones that she was using at that time were not helping a great deal.

37. The Respondent's response to the Claimant's complaint was to set up an action plan (at pages 128d and 132-134 in the hearing bundle), which included a fourth referral to Occupational Health. The referral requested advice as to whether the Claimant was fit for her current position and advice on whether any adjustments should be made.

38. The Claimant's fourth assessment by Occupational Health took place on the 19th July 2016. It was Professor Hawley who conducted the assessment. He reported:

> **As you know Rose has a long standing neurological condition. This condition is such that it will affect her sensitivity to light and noise. It may also affect her ability to copy with the unpredictable. I understand from Rose that her current working environment is noisy and unpredictable by its very nature. This clearly plays on some of the susceptible [sic] and vulnerabilities that Rose has. I see no way forward in trying to modify that workplace. I understand from Rose that this is all to do with the nature of the service.**
>
> **It may be that the only way forward within that department is if she had her own quiet and guarded workspace. Ideally this should be in an office. This will allow her to have a degree of predictability and to zone out extraneous noise. The other option would be that we look at redeployment within the trust to a more suitable work environment for her. In any event, I feel a case conference would be helpful to look at these issues and to take the whole thing forward. Rose herself is quite keen to continue to work. This is entirely in keeping with the [sic] nature as a conscientious and committed individual.**

39. The case conference recommended by Professor Hawley was arranged for the 23rd November 2016. On the same day as the case conference, and before the case conference began, the Claimant underwent her fifth assessment by Occupational Health. It was noted by Occupational Health that the Claimant had been relocated to a new office in March 2016 and that prior to the relocation there had been two offices with two members of staff in each office. Following the relocation, there were now seven members of staff, including the Claimant, working in one office. It was noted that the Claimant was "*troubled with the amount of noise*".

40. The case conference took place immediately after the Occupational Health assessment. It was agreed at the conference that temporary redeployment would be sought for the Claimant in the Gloucester area doing administrative work in a less noisy environment with a maximum of four members of staff in the office. It was also agreed that the Claimant would have monthly meetings with her Line Manager so as to focus on any concerns that she might have. It was agreed that if no temporary redeployment was available, then an independent organisation called Access to Work would be asked to perform an independent workplace assessment so as to advise on any adjustments to help the Claimant with her memory difficulties.

41. Following the case conference, there was a further meeting on the 2nd December 2016 to discuss the outcome of the case conference. That meeting was attended by the Claimant, Angie Fletcher and Jim Stone. The view was taken at that meeting that there were no more adjustments that the Respondent could realistically make to the Claimant's office environment but

it was hoped that Access to Work "*may have some ideas*". The view was also expressed that it was important for the Claimant to remain in the office with her six co-workers because of the team environment that the Respondent felt it important to foster. It was made clear to the Claimant that the Respondent was resistant to the idea of her being relocated into a separate office.

42. Following the case conference and the further meeting, the Claimant expressed an interest in seeking redeployment but nothing came of that. No offer of redeployment was made to the Claimant.

43. There was a sixth referral to Occupational Health, which resulted in a sixth assessment that took place on the 12th January 2017. That assessment was conducted by an Occupational Physician called Dr Bailey. He reported that there had been an improvement to the Claimant's working environment. She informed him that the office environment was less noisy and that members of staff were taking more time to help her. Given the improvement to the Claimant's working conditions, it was felt that a further Occupational Health assessment need not be arranged.

44. At a monthly meeting with Mr Stone on the 10th March 2017, the Claimant said that she felt she had to learn to live with the present environment and that she was currently quite happy and was managing well. She was informed at that meeting that no suitable alternative roles were available for her.

45. Later on in 2017 there was a one-to-one supervision meeting with the Claimant. It took place on the 27th October 2017. The Claimant reported that she had no issues with her work, that she was happy with her work and that she was not seeking a new job.

46. In June 2018, another Patient Advice & Liaison Officer joined the team in the Claimant's office. As a result, there was a significant increase in the noise level in the office.

47. On the 18th June 2018, the Claimant wrote as follows to Mr Stone, her Line Manager:

> **Unfortunately, I am finding that the current office environment has become too noisy for me. One of the conditions that my brain haemorrhage left me with is Hyperacusis. This is resulting in my inability to concentrate on work duties, communication, and also impacting on my health in general.**
> **I am able to make adjustments in my personal life, and am hoping to have a discussion with you about what can be done at work.**

48. On the 28th June 2018, a one-to-one supervision meeting took place at which Mr Stone documented the Claimant's concerns that the noise level in the office had increased and that it was affecting her wellbeing and her performance at work. She asked Mr Stone if she could move to what she regarded as the quietest corner in the office. Mr Stone responded that he would speak to Angie Fletcher about that. Mr Stone also informed the Claimant that he thought there

was little more that could be done regarding adjustments to the office environment.

49. Though he had promised to speak to Angie Fletcher about the Claimant's proposal that she move to what she regarded as the quietest corner in the office, Mr Stone was slow to report back to the Claimant. It was not surprising, given the daily difficulties that she was experiencing in her workplace, that the Claimant became frustrated with Mr Stone's apparent lack of progress in dealing with her request to be moved to a part of the office that she felt would be an improvement for her.

50. On the 5th July 2018 the Claimant spoke to Mr Stone about the matter and Mr Stone bluntly stated that the answer was 'no' to the Claimant's request that she be moved to a different desk in the office. The Claimant was informed that a new member of staff would have to go on that desk because it was near Mr Stone's desk and she would need to sit near him. Following that conversation, the Claimant sent Mr Stone an email informing him that she felt extremely let down and not able to come into work the following day. The Claimant was then absent from work for one week and the reason given for the absence was work-related stress.

51. On the 12th July 2018, at the end of her week's absence from work, the Claimant had a conversation with Angie Fletcher. A note was made of that conversation, which was signed by the Claimant (at pages 167-169 in the hearing bundle). The Claimant was informed by Ms Fletcher that she would be unable to be relocated to another office and that she had to stay in the noisy office (as the Tribunal found it to be because of the increased number of staff working therein) in order to support other staff and the service being provided to patients. Ms Fletcher suggested that the Claimant move to another desk but not the desk that the Claimant wanted to move to. The Claimant suggested that she resort to wearing ear defenders as she had done in the past but she was told by Ms Fletcher that that would not be appropriate because of the need for the Claimant to hear the telephone and other colleagues. Matters were left on the basis that the Claimant would return to work the following day and that there would be another referral to Occupational Health. That would be the seventh such referral. A little later that day, having reflected on the desk move suggested by Ms Fletcher, the Claimant sent an email to Ms Fletcher to say that that proposed deck would be unlikely to improve the Claimant's working conditions and that she would stay at her current desk.

52. A return-to-work interview took place on the 13th July 2018. It was recorded that the reason for the Claimant's absence was work-related stress due to noise disturbance and feeling unsupported. There was a discussion about adjustments that could be made, which included a change to the Claimant's method of training, redeployment and a change of desk. The Claimant declined the suggested change of desk as she felt it would not represent an improvement for her. She felt the noise would be just as bad there as at her current desk.

53. The seventh Occupational Health assessment took place on the 16th August 2018. It was requested in order for the Respondent to be given advice as to whether the Claimant was fit for her current position and advice as to any adjustments that should be made. The assessment was undertaken by Miss Carolyn Taylor, an Occupational Health Nurse Advisor. Miss Taylor reported to the Respondent as follows:

> **As you are aware Rose has had a recent short-term absence due to a stress reaction triggered by her difficulties at work.**
> **Rose has a significant past medical history having suffered a brain haemorrhage 16 years ago, which unfortunately left her with a degree of brain injury.**
> **Rose kindly shared a 2011 clinical report generated from an assessment with a clinical psychologist. This report outlines her long-term brain injury and specific deficits.**
> **This permanent injury affects her day-to-day cognitive function in terms of her short-term memory and inability to concentrate with background noise. She also suffers with a degree of photophobia or sensitivity to light and therefore finds a noisy, well illuminated office a difficult environment to work in.**
> **…**
> **Rose does require adjustments to her role in terms of a quiet area to work, with suitable lighting. I would strongly recommend a DSE workstation assessment be conducted; this assessment would highlight areas needing to be addressed to accommodate her specific needs.**
> **Alternatively, you may wish to ask Rose to contact Access to Work to carry out an independent, comprehensive assessment.**
> **If you feel any of these adjustments are operationally difficult, then you should, in the first instance, discuss this with your HR Department. Any deviance from the recommended adjustments should be appropriately risk assessed.**
> **…**
> **Rose is unlikely to function well in her role without adjustments which accommodate her long-standing brain injury and its effect on her cognitive function.**
> **…**
> **As an Occupational Health professional I have a duty to advise you that, in my opinion, this individual is likely to meet the criteria for protection under the disability provisions of the Equality Act … Please note that an employer is only required to make adjustments that are reasonable in order to accommodate or modify within the workplace.**
> **…**
> **It would be prudent to consider appropriate adequate adjustments before redeployment is pursued.**

54. Having sought independent advice from the Occupational Health Department, the advice given by Miss Taylor was very clear. Reasonable adjustments were

required in order to assist the Claimant function well in her work role. The Respondent received that advice on the 16th August 2018.

55. Having been given that clear advice by Miss Taylor, the Tribunal was interested to see what action was taken by the Respondent. The evidence revealed the following chronology of events.

56. Angie Fletcher met the Claimant on the 12th September 2018. In the meantime, the Claimant was continuing to work in conditions that were difficult for her because of her disability. Ms Fletcher informed the Claimant that a DSE workplace assessment would be arranged. Ms Fletcher also informed the Claimant that a new work task might be about to be introduced in the office, relating to the processing of survey feedback, and that the Claimant would be able to do that task for 1-and-a-half days per week from Ms Fletcher's office (i.e. in a quite environment). Ms Fletcher stated that it was not known, at that stage, when that new task might start. There was also a discussion about possible redeployment for the Claimant but no concrete proposals were put forward by Ms Fletcher. The Claimant was also told, in clear terms by Ms Fletcher, that there were no further adjustments that could be made to the working conditions in the Claimant's current office environment.

57. Some seven weeks after Miss Taylor had made the recommendation, the Respondent got round to conducting the DSE workplace assessment in the Claimant's office. No satisfactory explanation was given by the Respondent for arranging that assessment. The assessment was conducted by Mr Stone. From what the Tribunal could tell, it appeared to be a largely pointless exercise. The tick-box form that Mr Stone completed was at pages 194-203 in the hearing bundle.

58. To assist Mr Stone complete the form, he was given some basic instructions on the first page of the form. It was stated that the checklist should be worked through, ticking 'yes' or 'no' against each risk factor and if 'no' were ticked, then that would require investigation and/or remedial action by the assessor, who should record his/her decisions in the "Action to take" column. Mr Stone was reminded on the form that he, as the assessor, should check later to see that actions that he had recommended be taken, had in fact been taken and that the problem had been resolved.

59. On page 8 of the form, Mr Stone was confronted with the following question when he was conducting the DSE workplace assessment: are levels of noise comfortable? He ticked 'no'. He left blank the "Action to take" column.

60. Save that the Tribunal was able to make a finding that Mr Stone had ticked the boxes on the DSE workplace assessment checklist, it was difficult for the Tribunal to assess what else he had done. There was no evidence that he had instigated any sort of investigation after ticking 'no' to the question whether noise levels were comfortable in the Claimant's office or that he had taken any remedial action of any kind and it was clear that he had not identified any action to be taken. Had he done so, he would have identified that action in the "Action to take" column on the form. Given the way that he had gone about

the assessment, there was no need for him to carry out any subsequent checks to see if his recommendations had been implemented for the simple reason that he had not made any recommendations. It is for those reasons that the Tribunal regarded Mr Stone's DSE workplace assessment as a pointless exercise. It fell far short of what might reasonably be expected as a genuine attempt at conducting a DSE workplace assessment. It was of no assistance whatsoever in identifying any adjustments that were needed to the Claimant's workplace.

61. On the 31st October 2018, Ms Fletcher became aware, after reviewing the Claimant's timesheets, that the Claimant had stayed on at work on the 19th October 2018 until 6.15pm. The reason for that was because the Claimant, due to her struggles with the noisy environment in the office, was having to stay on late to complete her work after others had left to go home and when the office was therefore quiet. In an email to the Claimant on the 31st October 2018, Ms Fletcher appeared to have made the assumption that the Claimant was taking longer to complete her work than might be expected and that a review of the Claimant's workload might be required. That was missing the point. It was not the Claimant's workload that was the problem. It was the difficult working conditions for the Claimant, arising from her disability, that meant that she was unable to complete her work during normal office hours in the noisy office. It was a surprise to the Tribunal that Ms Fletcher appeared not to have considered that it was the difficult working conditions in the office for the Claimant, about which Ms Fletcher was well aware from the report by Miss Taylor in August 2018, that might have been responsible for the Claimant staying late in the office after others had gone home.

62. On the 1st November 2018, the Claimant sent the following email to Ms Fletcher:

> **This is to let you know that I won't be at work today or tomorrow. I've been having headaches and nausea the last few days so will be taking it easy.**
> **I will phone you in the morning of 14th November 2018, after my annual leave, to discuss somewhere else to work as I do not feel able to work in the current office environment anymore due to the level of noise.**
> **As I have explained many times, noise greatly affects my ability to concentrate – the earphones are not enough! You emailed me to ask why I stayed late on 19th October 2018 and added 1 hour and 15 minutes to my timesheet as Toil for this; something I've done previously. I did not note my work duties that day but do recall it was an extremely busy day with many phone calls coming in and out, work requests via email, etc. I stayed late to type up the minutes of the staff meeting two days before, and saved 2 final response letters that needed to be sent the following Monday.**

63. In the event, the Claimant's last day at work was on the 31st October 2018. She did not return to work after that date. She subsequently resigned from her employment with the Respondent on the 24th October 2019.

64. Ms Fletcher responded promptly to the Claimant's email on the 1st November 2018. She sent the following email to the Claimant:

> **Many thanks for informing me that you are unwell today, I hope that you are feeling better soon.**
> **Unfortunately I will be on leave on 14th November so could you contact me by Friday 9th November 2018 please if you need to talk with me and also to inform me of your intention to return to work.**
> **In the meantime I will refer you to Working Well as I note you have raised concerns about the working environment again, I will send you a copy of the referral that I send.**

65. The Tribunal finds that it cannot have come as too much of a surprise to Ms Fletcher that the Claimant was continuing to experience difficulties with her working conditions. Those difficulties had been clearly flagged up in Miss Taylor's Occupational Health report dated the 16th August 2018 and Ms Fletcher would have been well aware that no adjustments had been made to the workplace since that report of the 16th August 2018.

66. On the 30th November 2018, the Claimant made an application for financial support to the Access to Work organisation. Access to Work is a publicly funded support programme that aims to help disabled people start or stay in work. Regrettably, that application was not processed quickly. It appeared that it was delayed because the Respondent had not responded to a request for information made by Access to Work. It subsequently transpired that the application had been closed down in March 2019 because the Respondent had not been in touch with Access to Work. The reason for the Respondent's lack of engagement in the Claimant's application for financial support from Access to Work was because the Respondent was about to move premises and the Respondent felt that the assessment to be made by Access to Work of the Claimant's workplace should be conducted at the new premises and not the Claimant's current place of work.

67. When chasing up her application for financial support and discovering that the application had been shut down, the Claimant successfully applied for her application to be re-opened. Her workplace was subsequently assessed by Access to Work on the 14th June 2019 and a package of financial support for the Claimant was approved by Access to Work on the 2nd July 2019. The package included the following aids:

67.1 the purchase of ClaroRead Plus V7 software;

67.2 training on the software;

67.3 the purchase of a Philips DVT6010 digital voice tracer;

67.4 training in the use of the digital voice tracer;

67.5 the purchase of noise cancelling headphones;

67.6 the purchase of a Plantronics HL10 handset lifter;

67.7 the provision of a support worker.

The cost of the package was £1,718.40 and the Respondent's contribution to that cost would have been £1,047.68.

68. Going back to the events that occurred towards the end of 2018, the Claimant attended a meeting on the 23rd November 2018 that was attended by Angie Fletcher, Faye Lynch and the Claimant's Union representative. The purpose of this meeting was to discuss Miss Taylor's Occupational Health report dated the 16th August 2018. This was the second such meeting; the first having taken place on the 12th September 2018.

69. The new task of processing survey feedback was discussed again but it was clear that the Respondent had no idea when that might start and no idea of the scale of the task. The Claimant was told that she would not be able to work from home because of the difficulties that that would cause the Respondent in transporting confidential information to her home. There was a discussion about how the Claimant's periodic training might be modified but that, of course, would not assist the Claimant's daily working conditions in the office. The Claimant was informed that Ms Fletcher was of the view that reasonable adjustments had been offered to the Claimant (including the desk move that the Claimant had declined) in an attempt to accommodate her needs and that Ms Fletcher was finding it difficult to know what further adjustments might be offered. The Claimant was informed that a DSE workplace assessment had been conducted and that she was welcome to have a copy of it.

70. It was understandable that the Claimant would have left the meeting on the 23rd November 2018 believing that no further adjustments would be carried out to her work or her workplace. The clear message from the Respondent was that they had done all that they reasonably could and that they could not think of anything else to do. There was the possibility of being able to do some survey feedback processing in a quiet space but there was no indication as to when that work might start. The prospect of redeployment was also mentioned but no offers of redeployment were made. It was just the process of redeployment that was explained to the Claimant.

71. In January 2019, the Claimant applied for the post of Audio Typist/Admin Assistant at Gloucestershire Hospitals NHS Foundation Trust. The Claimant discussed the application with Ms Fletcher and there was an email dated the 1st February 2019, from Ms Fletcher to Faye Lynch, in which that discussion was mentioned. Ms Fletcher said, "*I discussed completing her sick time on the reference and she said she has been honest with the recruiters*".

72. In light of the contents of that email from Ms Fletcher to Ms Lynch, the Tribunal was satisfied that there had been a discussion between the Claimant and Ms Fletcher regarding the job application and reference as asserted by Ms Fletcher in her evidence to the Tribunal. Accordingly, the Tribunal found as a fact that the Claimant had discussed her job application with Ms Fletcher in January 2019 before making the application. Ms Fletcher informed the Claimant that she would be happy to provide a reference for her and she informed the Claimant that she thought that the job would be perfect for her. Ms Fletcher was genuinely positive about the job application. She informed the Claimant that most references required the referee to give details about the applicant's sickness record and that, if requested to do so by the prospective employer, Ms Fletcher would need to include that information as part of the reference. The Claimant's response to that was to inform Ms Fletcher that she had discussed her absence record with the prospective employer and that they were aware that the Claimant was currently on sick leave due to an unsuitable working environment. The Claimant indicated to Ms Fletcher that she understood that Ms Fletcher would need, if requested by the prospective employer, to provide details of the Claimant's sickness record. Knowing that that was the case, the Claimant was content that Ms Fletcher would continue to be her referee for the new job. She did not seek to change referees.

73. The Claimant was interviewed for the new job on the 18th January 2019 and on the 24th January 2019 she was informed that she had been successful, subject to references.

74. Ms Fletcher subsequently completed a reference for the Claimant in the following terms:

> **1) <u>How long have you known the applicant, and in what capacity?</u>**
> **I have worked with Rose as her Manager since I commenced with the Trust in September 2016. Rose has been in her current role with our Trust since March 2014.**
>
> **2) <u>If you were the applicant's former employer, please state:</u>**
> **a) <u>The reason for the applicant leaving your organisation.</u>**
> **N/A**
> **b) <u>The dates the applicant was employed with you.</u>**
> **N/A**
>
> **3) <u>Please comment on the applicant's reliability and punctuality.</u>**
> **Rose has always been reliable and punctual attending work. Rose has had some unplanned absences due to a long term health condition.**
>
> **4) <u>Please comment on their relationships with colleagues, superiors, and customers/patients.</u>**

Rose has established a working relationship with her current colleagues and is able to communicate with patients, staff and external organisations via telephone and email.

5) <u>Please comment on their organisational skills and their ability to work independently.</u>
Once given direction and understands the task Rose is able to work independently to complete a variety of administration tasks.

6) <u>Please comment on the applicant's sickness record. Does this sickness record give you cause for concern?</u>
Rose has been absent from work due to a long term health condition and difficulties she has with this relating to her current work environment since 1st April 2018 on two occasions, once for a week and secondly a period of sickness that commenced on 1st November 2018 and currently continues.
Rose sickness record reflects the difficulties that she has working within her current role and it is hoped that this would improve within a role and environment more suited to her.

7) <u>Please comment on how well you think the applicant would perform in this role.</u>
Having discussed the challenges in Rose's current work environment with Rose I feel the role of audio typist would suit Rose's skill set and her keen attention to detail. The environment and type of work would be a positive move for Rose.

75. Ms Fletcher sent the reference to the prospective employer on the 4th February 2019.

76. On the 5th February 2019, the Claimant was contacted by the prospective employer and was told that the employer had concerns about the Claimant's sickness record and the Claimant explained about the difficulties that she had experienced at work due to her disability. The following day, the 6th February 2019, the Claimant was informed that she had been unsuccessful in the job application.

77. No claim of disability discrimination has been brought by the Claimant against the prospective employer arising from its decision to withdraw the conditional offer of employment. The Claimant holds Ms Fletcher to be responsible for the loss of that job opportunity.

78. On the 29th February 2019, the Claimant submitted a formal grievance to the Respondent setting out her allegations of disability discrimination that largely

form the basis of her subsequent claim to the Tribunal. The allegations were set out in a 9-page document at pages 232-240 in the hearing bundle.

79. On the 8th March 2019, the Claimant dropped down to half-pay due to her continued sick leave. The drop in pay was in accordance with the contractual position regarding sick pay as set out in the Claimant's contract of employment with the Respondent.

80. On the 14th March 2019, the Respondent acknowledged receipt of the Claimant's grievance and informed her that it was the Respondent's intention to deal with the grievance in accordance with its grievance policy. Under that policy, the first stage in dealing with the grievance was an informal meeting with the Claimant's Line Manager, Ms Fletcher. The Respondent therefore proposed an informal meeting with Ms Fletcher or, if the Claimant preferred to meet another manager, then that could be arranged.

81. On the 27th March 2019, the Claimant, at her request, received a copy of the reference that Ms Fletcher had sent the prospective employer on the 4th February 2019.

82. On the 3rd April 2019, the Claimant informed the Respondent that she wished future meetings to be held with a manager other than Ms Fletcher on the ground that much of her work grievance concerned Ms Fletcher.

83. On the 11th April 2019, the Respondent informed the Claimant that the informal grievance meeting would be with Ms Katrina Napthine and that Ms Lynch would also be present at the meeting. The Claimant was also informed that she could bring a Union representative or work colleague to the meeting for support.

84. The informal grievance meeting took place on the 29th April 2019. The Claimant was accompanied at the meeting by a friend, Martyn Hoydan.

85. A summary of the grievance meeting and its outcome was set out in a letter dated the 20th May 2019 from Ms Napthine to the Claimant. The outcome of the meeting was that the following adjustments were proposed by the Respondent:

    85.1 The Claimant would be moved to a quieter desk in the office and the Respondent proposed that the new desk would be the PA/Administrator's desk at the far end of the office.

    85.2 The Claimant would be provided with noise-cancelling headphones.

    85.3 The Claimant's telephone at work would be configured to ensure that it had a flashing light to indicate an incoming call to assist the Claimant answer the phone when she was wearing the noise-cancelling headphones.

85.4 Partition screens would be installed around the Claimant's desk to reduce the noise levels and distractions to which the Claimant was exposed in the office.

86. As to the Claimant's request that she not have any further meetings with Ms Fletcher, the Respondent's position was that it would not be possible for the Claimant to have regular meetings with a manager outside of her team but it would be possible for the Claimant to have work meetings with a Band 7 manager in the team (i.e. a person other than Ms Fletcher).

87. As to the Claimant's complaint about the job reference that had been provided by Ms Fletcher, the Respondent proposed that any future references would be limited to a purely factual job reference.

88. On the 21st May 2019, the Claimant wrote to the Respondent saying that she was keen to see the reasonable adjustments fully implemented as soon as possible so that she could return to work.

89. On the 30th May 2019, the Claimant sent a detailed letter to Ms Napthine, setting out the Claimant's response to Ms Napthine's letter that had set out the outcome of the grievance meeting. In response to the Respondent's proposed adjustments, the Claimant stated that the desk that she would like to occupy in the office was the desk at which the Service Experience Officer currently sat and not the PA/Administrator's desk. As to the other adjustments, the Claimant stated that they were "*very helpful and encouraging*". The Claimant also indicated that she was content with the proposal that her work meetings be held with a Band 7 manager. As to the Respondent's proposal regarding a purely factual future reference, the Claimant said that she was happy with that but she would want the wording to be agreed with her before it be provided to a prospective employer.

90. On the 18th June 2019, the Claimant was asked by the Respondent to confirm whether she regarded her grievance as resolved or whether she felt it had not been resolved. To that end, the Respondent wished to have a meeting with the Claimant on the 2nd July 2019 to be attended by Ms Lynch.

91. On the 21st June 2019, the Claimant wrote to the Respondent to say that she did not regard her grievance as resolved because she had not been given "*specific details*" regarding the implementation of the agreed adjustments.

92. By the 2nd July 2019, the Access to Work financial support package had been approved.

93. On the 8th July 2019, Ms Napthine wrote to the Claimant to say that the Respondent had received the details of the Access to Work financial package and that the Respondent's IT Department had been contacted regarding the technical equipment that would need to be purchased. Ms Napthine also confirmed that the Claimant would be able to move to the desk that she had requested, that the noise-cancelling headphones will be purchased and that the partition screens were ready to be installed prior to the Claimant's return to work. As to the Claimant's grievance concerning her sick pay, Ms Napthine

stated that the sick pay was being dealt with I accordance with the Respondent's sick pay policy.

94. On the 20th July 2019, the Claimant wrote to the Respondent, saying that she was ready to return to work as soon as she received confirmation that all the agreed adjustments were in place.

95. There then followed an exchange of emails regarding possible dates for a meeting with the Claimant at which the Respondent wanted to discuss how it could support her return to work. The message from the Claimant was that she was not well enough to attend a work meeting. The response from the Respondent was to make a referral to its Occupational Health Department and an appointment was fixed for the 30th September 2019.

96. On the 12th September 2019, the Claimant confirmed that she was well enough to attend a consultation meeting regarding a reorganisation that the Respondent was going through (namely, a merger between 2gether NHS Foundation Trust and Gloucestershire Care Services). That meeting took place on the 20th September 2019. There was a discussion at the meeting about the adjustments that would be needed at the new workplace. The Claimant was informed that the necessary adjustments (i.e. noise-cancelling headphones, partition screens and a telephone with a visual prompt) would be looked into but that should not stop the Claimant's return to work in the current workplace for the time being. The date for the proposed move to the new workplace, following the merger, was not then known. The Claimant was informed that the adjustments in the current workplace could be transferred to the new workplace.

97. On the 24th September 2019, the Claimant presented her Claim Form to the Tribunal.

98. On the 25th September 2019, the Respondent wrote to the Claimant setting out, in clear terms, its proposals regarding the agreed adjustments. The Claimant was informed that the Respondent would purchase noise-cancelling headphones for her, that an Occupational Health assessment had been fixed for the 30th September 2019 and that a meeting with the Claimant before her return to work would be helpful to ensure that all the adjustments were in place at the time of the return to work. The Respondent indicated that the proposed meeting would be attended by Ms Fletcher because the person that the Respondent had intended to step into Ms Fletcher's shoes for the meeting, Ms Lauren Edwards, would not be available. The Claimant was informed that she would be welcome to bring support to the meeting. She was also reminded that the Respondent would need a medical certificate from her GP, confirming that she was fit to return to work.

99. On the 26th September 2019, the Claimant wrote to the Respondent to say that she was pleased that the noise-cancelling headphones were going to be purchased but that it was unfortunate that the Respondent was proposing a meeting with Ms Fletcher.

100. On the 30th September 2019, the Claimant attended her eighth appointment with Occupational Health and a report was prepared the same day by Dr Momeda Deen, Accredited Specialist in Occupational Medicine. Dr Deen noted that the Claimant informed him that if adjustments were made, then she would be able to return to work. She also told Dr Deen that no action had as yet been made by Occupational Health and Access to Work. That was plainly misinformation given by the Claimant to Dr Deen. By that stage, as the Claimant was well aware, there were agreed adjustments that the Respondent was indicating would be made upon the Claimant's return to work. Dr Deen recommended that the Respondent have a formal meeting with the Claimant at the earliest opportunity to discuss the Claimant's workplace concerns.

101. On the 11th October 2019, the Claimant was informed that she was formally appointed to the role of Administration Assistant in the Respondent's merged organisation with effect from the 1st October 2019. On the 17th October 2019, the Claimant confirmed her acceptance of the appointment.

102. On the 18th October 2019, the Respondent wrote to the Claimant requesting that a date be fixed for the meeting, which had previously been postponed on a number of occasions, to discuss her return to work. The Respondent's letter stated:

> **… You are welcome to bring support to the meeting as previously agreed.**
> **As you have queried the meeting taking place with Angie Fletcher, as explained in my email dated 25 September 2019 it was originally intended that Lauren Edwards, Deputy Director for Engagement, would meet with you. However, as Lauren is not available at this time it has been necessary to arrange the meeting with Angie Fletcher. Matt Norvill, Complaints Manager and myself will also be present at the meeting. It has been suggested that Matt joins the meeting as he will be your direct line manager going forward. I hope that Matt being present at the meeting will enable us to agree a suitable way forward.**
> **With regards to the equipment recommended for you by Access to Work, this was to be ordered and put in place as you are aware, however you advised that you were not sure at this stage whether you require all of the equipment and support recommended by Access to Work. It was, and still is, our intention to discuss this with you at the meeting, as detailed in my email of 25 September 2019. This is to ensure that the equipment is fit for purpose due to the cost/use of public money if you do not think the items will be of benefit to you.**
> **However, I can confirm that the noise-cancelling headphones have been ordered for you without going through Access to Work as you had requested and that there are in the office for you to use on your return to work.**

103. On the 22nd October 2019, the Claimant sent an email to the Respondent saying that she would not be able to attend a meeting with the Respondent on the dates that had been proposed (the 23rd or 24th October 2019).

104. A little later on the 22nd October 2019, the Claimant sent a detailed email to the Respondent saying that she did not think it would be appropriate to hold a meeting "*until matters progress with regard to the Employment Tribunal*".

105. On the 23rd October 2019, the Respondent responded to the points that had been raised by the Claimant in her email of the 22nd October 2019. The Respondent stated that it remained committed to facilitating the Claimant's return to work. The Claimant responded promptly to that email, on the same day, saying that she agreed to attend the meeting with the Respondent on the 24th October 2019 at which Ms Fletcher would be present.

106. Some hours later, on the 23rd October 2019, the Claimant sent a further email to the Respondent, saying that she was not well enough to attend the meeting on the following day. She added:

> **Most of the correspondence I have received from my employer has a negative tone where I have felt attacked and ignored. The amount of time and effort for a small request is astonishing and exhausting. I have previously felt and currently feel there is no genuine case or concern to help me return to work and therefore struggle at the thought of yet another meeting especially where you insist a person I have complained must attend.**

107. On the 24th October 2019, the Claimant resigned from her employment with the Respondent. The reasons given for her resignation were as follows:

> **Please accept this letter of resignation from my position as Administration Assistant with the Gloucestershire Health and Care NHS Foundation Trust (formerly the 2gether NHS Foundation Trust).**
> **I feel that I am left with no choice but to resign in light of recent correspondence received and ongoing issues with my employer. As per the terms of my contract, my last day of work will be 21 November 2019.**

108. On the 4th November 2019, the Respondent wrote to the Claimant requesting a meeting "*to discuss options other than your resignation*". The Claimant replied on the 6th November 2019, saying that she would not be attending any further meeting and that her decision to resign was final.

The law

109. The Tribunal reminded itself of the following statutory provisions relevant to the claims brought by the Claimant.

110. Relevant to the claim of constructive dismissal are the following provisions of the Employment Rights Act 1996:

> **95 Circumstances in which an employee is dismissed**
> **(1) For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection 2 …, only if):**
> **…**
> **(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**
>
> **98 General**
> **(1) In determining for the purposes of this Part whether the dismissal or an employee is fair or unfair, it is for the employer to show-**
> **(a) the reason (of, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
> **(2) A reason falls within this subsection if it-**
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
> **(b) relates to the conduct of the employee,**
> **(c) is that the employee was redundant, or**
> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under and enactment.**
> **…**
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-**
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

111. Relevant to the issue of disability are the following provisions of the Equality Act 2010:

> **6. Disability**
> **(1) A person (P) has a disability if-**
> **(a) P has a physical or mental impairment, and**
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.**

112. The Tribunal also had regard to the *Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability*, which was issued by the Secretary of State under section 6(5) of the Equality Act 2010 on the 10th February 2011 and which was brought into effect on the 1st May 2011.

113. Relevant to the claim brought under section 15 of the Equality Act 2010 are the following provisions of the 2010 Act:

> **15 Discrimination arising from disability**
> **(1) A person (A) discriminates against a disabled person (B) if-**
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

114. Relevant to the claim brought under sections 20 and15 of the Equality Act 2010 are the following provisions of the 2010 Act:

> **20 Duty to make adjustments**
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take**

such steps as it is reasonable to have to take to avoid the disadvantage.

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

21 Failure to comply with duty

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

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

115. Relevant to the time limit issue raised in the proceedings are the following provisions of section 123 of the Equality Act 2010:

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.

116. The Tribunal also read and considered the following cases, many of which were referred to by the parties in their written submissions:

Archiebald v. Fife Council [2004] UKHL 32;

Project Management Institute v. Latif [2007] IRLR 579;

Monmouthshire County Council v. Harris (UKEAT/0332/14/DA);

Secretary of State for Justice v. Dunn (UKEAT/0234/16/DM);

T-Systems Limited v. Lewis (UKEAT/0042/15/JOJ);

Basildon and Thurrock NHS Foundation Trust v. Weerasinghe [2016] ICR 305;

Pnaiser v. NHS England [2016] IRLR 170;

Birtenshaw v. Oldfield [2019] IRLR 946

IPC Media Limited v. Millar [2013] IRLR 707;

Western Excavating (E.C.C.) Limited v Sharp [1978] ICR 221;

Lewis v. Motorworld Garages Limited [1985] IRLR 465;

London Borough of Waltham Forest v. Omilaju [2005] IRLR 35;

Woods v. W.M. Car Services (Peterborough) Limited [1982] IRLR 413;

Buckland v. Bournemouth University Higher Education Corporation [2010] IRLR 445;

Wright v. North Ayrshire Council [2014] IRLR 4;

Abbeycars (West Horndon) Limited v. Ford (UKEAT/0472/07/DA);
Weathersfield Limited v. Sargent [1999] ICR 425;

Cockram v. Air Products plc [2014] IRLR 672;

The Home Office (UK Visas & Immigration) v. Kuranchie (UKEAT/0202/16/BA);

Williams v. The Governing Body of Aldermen Davies Church in Wales Primary School (UKEAT/0108/19/LA);

O'Hanlon v. Commissioners for HMRC [2007] EWCA Civ 283;

Nottinghamshire County Council v. Meikle [2004] IRLR 703.

The Tribunal's Decision

117. The Tribunal decided the claims brought by the Claimant in the following order.

The issue of disability

118. It is clear to the Tribunal that the Claimant's mental impairments extended beyond the concession made by the Respondent regarding the Claimant's disability. That concession was limited to the Claimant's ability to concentrate in noisy environments. The Tribunal's finding, in respect of disability, was that the impairments extend to memory problems, general difficulties in

concentrating and sensitivity to noise. The Tribunal's findings in that regard were supported by the views expressed by the Respondent's Occupational Health Department in reports that were produced following assessments of the Claimant on eight separate occasions during the period of the Claimant's employment with the Respondent: namely, the 21st August 2014, 12th November 2014, 20th January 2016, 19th July 2016, the 23rd November 2016, the 12th January 2017, the 16th August 2018 and the 30th September 2019.

The claim that the Respondent had failed to comply with the duty to make reasonable adjustments

119. The Tribunal reminded itself that the Claimant must not only establish that the duty to make reasonable adjustments has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached.

120. Demonstrating that there is an arrangement causing substantial disadvantage envisages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.

121. That is not to say that in every case a claimant would have to provide the detailed adjustment that would need to be made before the burden will shift to a respondent. It will, however, be necessary for a respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

122. If the burden of proof shifts to the respondent, then it is for the respondent to prove that it complied with the duty to take such steps as were reasonable to avoid the substantial disadvantage or that that proposed adjustment could not reasonably be achieved.

123. The alleged "provision, criterion or practice" ('PCP') in this case is that the Respondent imposed a requirement "that the workforce work in a common working area".

124. The Respondent conceded that, at all material times, it had applied the alleged PCP.

125. The Respondent also agreed that the Claimant's disability had the effect that she had a reduced ability to concentrate in noisy environments and that this was a substantial disadvantage. The Tribunal went further, however, and decided that the agreed PCP put the Claimant, having regard to the nature and extent of the disability as found by the Tribunal, at a substantial disadvantage over two distinct periods of time. The PCP put her at a substantial disadvantage in that she had difficulty, in the noisy environment in the small open plan office, on concentrating on her work, difficulty in hearing what other members of staff were saying to her, difficulty remembering instructions and she had to work out-of-hours to compensate.

126. In the judgment of the Tribunal there were two distinct periods of time when the agreed PCP put the Claimant at a substantial disadvantage. The first period of time was from August 2015 to March 2017. It was clear to the Tribunal that the substantial disadvantage to which the Claimant had been put by the agreed PCP was no longer present by March 2017. At that time, the Claimant was managing well with her work and was happy with her work. The substantial disadvantage to which she had been put by the PCP had fallen away, largely because the number of people working in the office had reduced, due to absences, with the result that the noise in the office, and its disabling effects upon the Claimant, had reduced.

127. The second period of time when the agreed PCP put the Claimant at a disadvantage was from June 2018 and it persisted up until the Claimant and the Respondent finally agreed the adjustments that were to be made to the Claimant's work and her workplace on the 8th July 2019. It was in June 2018 that a new Patient Advice & Liaison Officer began work in the office with the result that the noise levels in the office increased to the point that the Claimant, once again, was put to a substantial disadvantage by the ongoing requirement that she had to work in the common working area. That substantial disadvantage persisted until July 2019 when agreement was finally reached as to the adjustments that were required. By that stage it was agreed that the Claimant could move to the quieter desk of her choice, that she would be provided with noise-cancelling headphones and a flashing phone system and that partition screens would be installed around her desk.

128. The next question for the Tribunal to consider was whether the Respondent, during the two periods of substantial disadvantage identified above, had taken such steps as were reasonable to take in order to avoid the substantial disadvantage. On that question, the Tribunal was satisfied that the Respondent had not taken such steps as it was reasonable to take to avoid the substantial disadvantage to which the Claimant was put by the agreed PCP. The Respondent's case was that it had taken reasonable steps throughout the period of time that the Claimant had complained about the difficulties she was encountering in the office environment. The Tribunal disagreed. The Tribunal was satisfied that the provision of noise-cancelling headphones, access to a quieter part of the office and the provision of partition screens were reasonable steps that it was reasonable for the Respondent to have taken within a short period of time of the Respondent becoming aware of the problems that the Claimant encountered during the first period of substantial disadvantage identified above and then, again, within a short period of time after the start of the second period of substantial disadvantage identified above. The Respondent did not take those steps until July 2019 when it agreed to implement the adjustments sought by the Claimant.

129. Agreement having been reached as to the adjustments that were to be made to enable the Claimant to return to work in the open plan office, the Claimant then, in the judgment of the Tribunal, put up unnecessary barriers to her return to work. Her position was that she wanted to be satisfied that the agreed adjustments had been implemented before she returned to work. The

Tribunal, however, was satisfied that there were no reasonable grounds for the Claimant to doubt that the Respondent would implement the agreed adjustments before the Claimant returned to work. The Tribunal was satisfied that the Respondent was genuine in its assurances to the Claimant that the agreed adjustments would be implemented before her return to work and what delayed the Claimant's return to work, thereafter, were the Claimant's unfounded concerns that the agreed adjustments might not be implemented.

130. It follows that the Tribunal was satisfied that there were two distinct periods when the Respondent was in breach of the duty to make reasonable adjustments. The first period was from the 1st September 2015 (i.e. a short time after the start of the first period of substantial disadvantage identified above in August 2015) to March 2017 and the second period was from the 1st July 2018 (i.e. a short time after the start of the second period of substantial disadvantage identified above) to the 8th July 2019.

131. In respect of the first of those periods of breach of the duty to make reasonable adjustments, the Tribunal was satisfied that the Claimant's claim was out of time. The Tribunal was satisfied that there was no continuing breach of the duty to make reasonable adjustments from March 2017 to June 2018. During that period, the Claimant was not being put to a substantial disadvantage by the agreed PCP. The failure to make reasonable adjustments during the period from September 2015 to March 2017 had become a past failure by the end of March 2017.

132. The Tribunal was also satisfied that it was not just and equitable to extend time to bring the claim for disability discrimination arising from the breach of the duty to make reasonable adjustments during the period from September 2015 to March 2017. The reasons for the Tribunal so finding was because of the passage of time and because the Claimant had the benefit of Union advice throughout the period from September 2015 to March 2017 and beyond. In those circumstances, it was not, in the judgment of the Tribunal, just and equitable to extend time to bring the claim of breach of the duty to make reasonable adjustments in respect of a breach that had come to an end by the end of March 2017.

133. As to the breach of the duty to make reasonable adjustments during the period from the 1st July 2018 to the 8th July 2019, the claim in respect of that period is not out of time and the Claimant succeeds in that claim.

The claim that the Respondent was in breach of section 15 of the Equality Act 2010 (discrimination arising from disability)

134. The Tribunal approached this claim on the basis that there are four main elements, identified by section 15 of the 2010 Act, that must be established for a claim to succeed: namely-

134.1 Firstly, there must be unfavourable treatment.

134.2 Secondly, there must be something arising in consequence of the disability. The consequence may include anything that is the result,

effect or outcome of a disabled person's disability. Some consequences are likely to be obvious, such as where the disability causes a claimant to be ill and absent from work so that absence is a consequence. It is a question of fact for a Tribunal to decide whether something does, in fact, arise in consequence of a claimant's disability.

134.3 Thirdly, the unfavourable treatment must be because of the something arising in consequence of the disability. This is likely to involve a consideration of the thought processes of the putative discriminator in all but the most obvious cases in order to determine whether the something arising in consequence of the disability operated on the mind of the putative discriminator. If so, the treatment will have been because of the "something" even if there were other reasons for the impugned treatment.

134.4 Fourthly, unfavourable treatment because of something arising in consequence of disability will not amount to unlawful discrimination if the alleged discriminator can show that the treatment is a proportionate means of achieving a legitimate aim and therefore justified. The authorities on this objective balancing exercise demonstrate that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim. When considering whether a respondent has discharged the burden of showing objective justification, the Tribunal should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly.

135. Further, "*something arising in consequence of B's disability*" involves two steps for the Tribunal. There are two links in the chain, both of which are causal. The tribunal has first to focus on the words "because of something", and therefore has to identify "something" – and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages.

136. Turning to the facts of the present case, the first allegation of discrimination arising from disability related to Ms Fletcher's reference that was given to the prospective employer on the 4th February 2019. In the judgment of the Tribunal, this was a misconceived claim. The unfavourable treatment that the Claimant suffered was the withdrawal of the job offer, not the provision of the reference. Even if it could be argued, contrary to the Tribunal's view, that the reference itself amounted to unfavourable treatment of the Claimant because of something arising from her disability, the Tribunal was satisfied that the Respondent had shown that the provision of the reference was a proportionate means of achieving a legitimate aim. The legitimate aim was providing a reference that was true, accurate, fair and not misleading. The reference was a proportionate means of achieving that aim, particularly as there had been a discussion between the Claimant and Ms Fletcher, in advance of the reference

being provided, in which Ms Fletcher had informed the Claimant that she would have to provide details of the Claimant's sickness record if asked to do so, and the Claimant had not demurred from that. It was also relevant that the Claimant had informed Ms Fletcher that she had already discussed her condition and sickness record with the prospective employer, so Ms Fletcher would not have believed that she was saying in the reference, in respect of the Claimant's sickness absence, anything that the prospective employer was unaware of.

137. The second and third limbs of the claim under section 15 of the 2010 Act related to the reduction of the Claimant's pay, during her sick leave after the 1st November 2018. The Claimant contended that the reduced pay was unfavourable treatment because of something arising in consequence of the Claimant's disability. Having regard to the principles set out in *O'Hanlon v. Commissioners for HMRC* [2007] EWCA Civ 283, the Tribunal rejected that argument. The Court of Appeal in the case of *O'Hanlon* upheld the Employment Appeal Tribunal's decision that it is reasonable for an employer to place limits on the amount of sick pay paid to a disabled employee. The Tribunal accordingly found that the Claimant's reduced sick pay after the 1st November 2018 up until the time of her resignation on the 24th October 2019, in accordance with the Respondent's sick pay policy, did not amount to discrimination arising from the Claimant's disability.

138. In relation to the issue of remedy, however, for the successful part of the claim for breach of the duty to make reasonable adjustments, the Tribunal took the view that the Claimant's reduced pay from the 1st November 2018 to the 8th July 2019 (i.e. the date of confirmation by the Respondent that all of the sought adjustments were agreed) was recoverable as a loss. Having regard to the principles set out in the case of *Nottinghamshire County Council v. Meikle* [2004] IRLR 703, that loss was directly referrable to the Respondent's breach of the duty to make reasonable adjustments during the period from July 2018 to the 8th July 2019. The quantum of that loss is to be determined at the remedies hearing.

139. The Claimant also contended that the Respondent in October and November 2019, had refused to address properly the Claimant's queries as to reimbursement of her pay and had improperly informed her to take her queries to the Respondent's Occupational Health Department. It was contended that that conduct amounted to discrimination arising from disability. On that part of the claim, the Tribunal was satisfied that the Respondent had dealt appropriately with the Claimant's queries regarding her pay in October and November 2019, as it had done before those months, and that there had been nothing improper in the Respondent's request that the Occupational Health Department consider, at the appointment on the 30th September 2019, whether the Claimant's sickness absence was wholly or mainly attributable to her NHS employment. That request had been made because the Claimant had requested in August 2019 that the Respondent pay her an NHS Injury Allowance. As a result of that request it was reasonable for the Respondent to seek advice from the Occupational Health Department as to whether the conditions for such a payment were met in the Claimant's case: namely,

whether her absence was wholly or mainly attributable to the Claimant's NHS employment.

140. It follows that the claim under section 15 of the 2010 Act shall be dismissed.

The claim of constructive unfair dismissal

141. In the claim of constructive unfair dismissal, it is for the Claimant to show that she was entitled to treat herself as dismissed by the Respondent by reason of a fundamental breach of contract on the part of the Respondent. In respect of the last straw doctrine, the Tribunal reminded itself that the quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of contract on the part of the Respondent. The act complained of does not have to be of the same character as the earlier acts but its essential quality, when taken in conjunction with the earlier acts complained of, amounts to a breach of the implied term of trust and confidence. The final straw must contribute something to that breach although what it adds may be relatively insignificant.

142. Furthermore, if the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need for the Tribunal to examine the earlier history to see whether the alleged final straw does in fact have that effect.

143. On the basis of the evidence it heard, the findings of fact that it made and the principles of law summarised above, the Tribunal was not satisfied that the Claimant had shown that she was entitled to treat herself as dismissed by the Respondent by reason of a fundamental breach of contract on the part of the Respondent.

144. Though there had been breaches on the part of the Respondent to make reasonable adjustments as identified above, by the time of the Claimant's resignation on the 24th October 2019 the Respondent had made it clear to the Claimant that the agreed adjustments would be implemented upon her return to work. Though there had been delay in making the reasonable adjustments during the period from July 2018 to the 8th July 2019, there was no reasonable basis for the Claimant to conclude, at the time that she resigned, that the Respondent was not genuine in its intention to implement the agreed adjustments. The Respondent had agreed to the Claimant's request for reasonable adjustments by the time that she resigned and it could not reasonably be said that the Respondent was refusing to implement the agreed adjustments. By delaying before making her decision to resign the Claimant had, in effect, affirmed the contract of employment following the Respondent's breach of the duty to make reasonable adjustments, which breach had come to an end on the 8th July 2019.

145. As to the alleged final straw on the part of the Respondent (namely, informing the Claimant that Ms Fletcher would attend the meeting to discuss the Claimant's return to work), the Tribunal was satisfied that that act on the part of the Respondent did not, of itself or by way of cumulative contribution to

previous acts, amount to a breach of contract by the Respondent. In the judgment of the Tribunal the Respondent had given a reasonable explanation for Ms Fletcher's attendance at the proposed meeting and had made it clear to the Claimant that future work meetings would be with a Band 7 manager other than Ms Fletcher, as the Claimant had requested. In the circumstances, the Tribunal was satisfied that there had been no fundamental breach of the contract of employment as alleged by the Claimant. The claim for constructive unfair dismissal is accordingly dismissed.

146. Finally, it is confirmed that the decision-making of the Tribunal in this case was unanimous.

Employment Judge David Harris
Date: 28 March 2021

Judgment and Reasons sent to the parties: 01 April 2021

FOR THE TRIBUNAL OFFICE

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