EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Ms Purcell	Fatherson Bakery Ltd

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 22 – 25 March 2021
7 April 2021

EMPLOYMENT JUDGE Harding **MEMBERS**
Mr Reeves
Mrs Fox

Representation
For the Claimant: In Person
For the Respondent: Dr Ahmad, Counsel

REASONS

An oral judgment and reasons were provided to the parties at the conclusion of the hearing on 7 April 2021, and a written judgment was promulgated on 12 April 2020. These written reasons are produced following a request for reasons made by the respondent on 12 April 2021.

Case Summary

1 The claimant worked for the respondent as an accountant. Sadly, in May 2019 she suffered a brain aneurysm and haemorrhage which caused her brain

damage. After a period of rehabilitation she returned to work in late August 2019. This case concerns the events surrounding the claimant's return to work. The claimant's case is, in summary, that when she returned to work she found that significant changes had been made to her role. This, she asserts, was extremely stressful for her. It is the claimant's case that she has a particular vulnerability to stress because she now has a coil inserted in her brain and her blood pressure needs to be kept low to manage the coil and the risk of further bleeding. As stress can cause high blood pressure she needs to avoid stressful situations. It is the claimant's case that she was unable to cope with the changes that had been made to the role, causing her a great deal of stress, and forcing her to resign after just six days back at work. The claimant also complains that the respondent brought her back into work without an agreed return to work plan and without having taken medical advice. The respondent's case is essentially that, one or two minor changes aside, the claimant returned to work to the role that she had carried out previously, and that she returned on an agreed phased return.

The Issues

2 The issues to be determined in this case had been set out by Employment Judge Dean following an earlier case management hearing as follows:

Constructive unfair dismissal

3 Did the respondent, by its conduct, breach the implied term of trust and confidence. The conduct relied upon by the claimant as amounting to a breach of that term was identified as:

1 No risk assessment was carried out on the claimant's return to work.
2 No occupational health report was commissioned.
3 No return to work strategy was in place.
4 The claimant's duties had been increased and changed when she returned to work.
5 The respondent failed to appreciate the difficulties with the new job that the claimant described during various meetings. *(Note: this is a change from how this point was recorded in Judge Dean's CMO but further clarification of this complaint was sought from the claimant during this hearing).*
6 The respondent failed to confirm to the claimant the changes in the claimant's terms and conditions of employment in breach of section 4 of the ERA.

4 Did the claimant affirm the contract before resigning and, if not, did the claimant resign at least in part in response to the fundamental breach. If so, has the respondent proved a potentially fair reason for dismissal and if so was the dismissal fair or unfair under section 98(4).

Section 15; discrimination arising from disability

5 It was difficult to understand from the case management order exactly how these claims were put. This is because the list of asserted unfavourable treatment also formed much of the list of those things which were said to be the something arising in consequence of disability that had caused the unfavourable treatment.

6 We therefore spent about an hour at the beginning of this hearing explaining to the claimant the legal structure for this type of claim and then discussing with her how she put these complaints. A revised list of the section 15 claims was then put forward by the claimant as follows:

6.1 The unfavourable treatment is that the claimant's duties had changed and her workload had increased when she returned to work. The relevant decision makers were Mr Smith and Mr Ball. It is the claimant's case that this unfavourable treatment happened because there had been a reduction within the respondent from four directors to one director. The claimant accepts that this reduction in the number of directors did not arise in consequence of her disability.

6.2 The unfavourable treatment is that the claimant returned to work with no return to work strategy in place. The relevant decision maker was Mr Smith. It is the claimant's case that this happened because Mr Smith was far too busy and could ill afford to spend time on her return to work plan. The claimant accepts that Mr Smith being very busy at work is not something that arose in consequence of her disability.

6.3 The unfavourable treatment is that the claimant returned to work without an occupational health report having been commissioned. The relevant decision maker was Mr Smith. It is the claimant's case that this happened because Mr Smith was far too busy to commission a report. The claimant accepts that Mr Smith being very busy at work was not something that arose in consequence of her disability.

6.4 The unfavourable treatment is that the respondent failed to carry out a risk assessment when the claimant returned to work. The relevant decision maker was Mr Smith. It is the claimant's case that this happened because Mr Smith was far too busy to carry out a risk assessment. The claimant accepts that Mr Smith being very busy at work was not something that arose in consequence of her disability.

6.5 The unfavourable treatment is that the respondent failed to consider the claimant's request to return part-time one day a week carrying out HR work. The relevant decision maker is Mr Smith. It is the

claimant's case that this omission occurred because another person had been brought in to cover her role while she was absent and Mr Smith did not want to release this individual. The claimant's case is that this arose in consequence of disability because her absence arose out of her disability, and this person was brought in to cover her absence.

6.6 The unfavourable treatment is that the respondent did not allow the claimant to work flexible hours. The relevant decision maker is Mr Smith. It is the claimant's case that this omission occurred because another person had been brought in to cover her role while she was absent and Mr Smith did not want to release this individual. The claimant's case is that this arose in consequence of disability because her absence arose out of her disability and this person was brought in to cover her absence.

6.7 The unfavourable treatment is the claimant's constructive dismissal. It was agreed that for the purpose of analysing this complaint we would need to identify the conduct, if any, which we had concluded amounted to a fundamental breach of contract and then consider the respondent's reasons for those acts, and whether those reasons were because of something that arose in consequence of disability.

6.8 Added on to this list of issues by the respondent by way of amendment part way through the hearing, without objection from the claimant; did the respondent know or could it not reasonably have been expected to know that the claimant was a disabled person.

Failure to make reasonable adjustments

9 Did the respondent know or could it not reasonably have been expected to know that the claimant was a disabled person.

10 Did the respondent apply the following PCPs:

(a) A requirement that the claimant return to work without a risk assessment being carried out.
(b) A requirement that the claimant return to work without an occupational health report having been commissioned.
(c) A requirement to return to work with no return to work strategy in place.
(d) That the claimant return to work to carry out altered duties and increased duties without prior discussion.

11 Did any of those PCP's put the claimant at a substantial disadvantage. The substantial disadvantage contended for is that;
(a) The claimant was caused to suffer stress,

(b) The claimant felt unable to work, her health had to come first and she had to resign.

12 If so, did the respondent know or could it not reasonably have been expected to know that the claimant was likely to be placed at such a disadvantage by the PCP's.

13 The reasonable adjustments contended for are that the respondent should have;

(a) Permitted the claimant to work one day a week,
(b) Permitted the claimant to undertake duties limited to HR and payroll functions,
(c) Removed the new duties (*note: this is a change from how this adjustment was recorded in the list of issues drawn up by Judge Dean at the earlier case management hearing. It was difficult to understand the adjustment contended for as recorded in that order and consequently the claimant was asked to provide clarification of this point at the start of this hearing. She did so, and the respondent confirmed that there were no objections to the adjustment being recorded as now set out*).

Evidence and Documents

14 For the respondent we had witness statements from Mr Laurence Smith, Director, Mrs Meghan Smith, Director, Mr Mark Lewis, Director, Mr Peter Ball, Accountant and Ms Sarah Rhodes, HR Consultant. For the claimant we had a witness statement from the claimant and statements from Mr Kevin Lees, ex-Director of the respondent, and Ms Jan Warren, a now retired colleague of the claimant's. All witnesses attended to give evidence except Mr Lees, whose statement we read. We also had an agreed bundle of documents running to some 245 pages.

Findings of Fact

15 We set out the majority of our findings of fact in the section that follows. However some further findings, particularly when they also form conclusions, are also set out in the conclusions section below. From the evidence that we heard and the documents we were referred to we made the following findings of fact:

15.1 The claimant started working for the respondent on 29 October 2007. Her effective date of termination was 10 September 2019.

15.2 The respondent is a commercial bakery with three sites in Alcester, Warwickshire. The number of employees employed by the respondent varies, because the business is seasonal, but it employs a minimum of 65 employees up to a maximum of around 100.

15.3 The claimant was employed as the Company Accountant. She worked four days a week, for a total of 30 hours, and she earned just over £40,000 a year gross.

15.4 The claimant was issued with a statement of particulars of employment on 12 May 2008. Under the subheading "Changes to terms of employment" the following was said;
"The Company reserves the right to make reasonable amendments to your statement of particulars of employment. Any changes or amendments to the terms of your employment will be confirmed to you in writing within one month of them taking effect," page 45.

15.5 Under the subheading "Job Title" the following was said;
"The title of the job which you are employed to do is; Company Accountant. The company may amend your duties from time to time, and in addition to your normal duties you may from time to time be required to undertake additional or other duties as necessary to meet the needs of the business," page 45.

The claimant's duties

15.6 The claimant's duties were set out in her job description, page 52. Her duties and responsibilities included:
Producing annual cash flow forecasts and monthly management accounts enabling the identification of overspend and profitability of the company and providing analytical information to specific divisions i.e. production labour/ingredients costs, distribution costs, key customer turnover. Producing and analysing the year end financial accounts, ensuring timely collection of sales ledger balances falling due with regular customer contact to chase/confirm payments and issuing monthly statements to customers, controlling all bank reconciliations, being responsible for monitoring company expenditure, overseeing accurate processing of all supplier invoices and their regular payment, completing quarterly VAT returns and filing them, generating the monthly payroll run and processing all leavers and starters, together with filing all the associated documentation online with Revenue and Customs, completing year end returns to Revenue and Customs, setting up all new customer/supplier accounts on Sage, and carrying out credit checks on new account customers.

15.7 It was set out in the job description that the claimant would report into one of the then company directors, Mr Kevin Lees.

15.8 The respondent does not have an in-house HR specialist. Before us it was not disputed that the claimant had some responsibilities for HR

type matters - in particular in addition to managing payroll, leavers and starters she was also responsible for tracking annual leave. For other HR matters the respondent has an ongoing relationship with Citation, who provide HR support as and when needed.

The differences between a Financial Accountant and a Management Accountant

15.9 The claimant is what is known as a Financial Accountant. She is not a Management Accountant. Financial accountancy and management accountancy are two different disciplines. Financial accounting is used to present the financial health of a company, primarily to external stakeholders. The accounts allow the board of directors, stockholders, potential investors and financial institutions to see how the company has performed during a specific period of time in the past. Financial accounts are prepared, therefore, primarily for an external audience, albeit some internal reports may also be generated by a Financial Accountant. Accounts must be based on exact figures. Management accounts are prepared for a company's internal community to enable managers to make current and future financial/strategic decisions for their business. Management accounting can be based on estimates or forecasts. Separate training is required for each discipline and for each it typically takes three to four years to qualify.

15.10 It follows from this that a management account is different from a financial account. A management account is produced for internal use, normally for the directors of a company, and can be based on estimated figures. A financial account will be produced for external use and must be based on actual figures.

Sage

15.11 The claimant used Sage accounting software to help her perform almost all of the functions of her role. She has used Sage for the last 30 years. For example, Sage would be used to produce profit and loss and balance sheets, to carry out bank reconciliations, deal with VAT and run the payroll. Year end financial accounts, reports on production and labour costs, the sales ledger balance, processing of supplier invoices, quarterly VAT returns and the monthly payroll were all done via Sage.

15.12 The claimant has very little experience of Excel. Many years prior to the events with which this case is concerned the respondent's IT provider steered the respondent away from the use of Excel and instead encouraged use of an alternative known as CRM.

Management accounts produced by the claimant

15.13 The claimant was required to produce two monthly management accounts. These were a profit and loss account and a balance sheet. These accounts comprised a two page document which was generated automatically each month by the Sage accounting software. Production of these reports required no manipulation of data or intervention from the claimant. The claimant was simply required to select a month and then press a button and Sage would turn out the reports based on historical data. In terms of the claimant's job description these were the monthly management accounts that the claimant was required to produce to enable the identification of overspend and profitability of the company.

15.14 The claimant used two spreadsheets in her role; one was referred to as the ABN reconciliations spreadsheet, and the second was a spreadsheet for gross payroll figures. These were not, however, spreadsheets which were generated by formulae (as Excel spreadsheets are).

15.15 When the respondent required management accountancy type information, this was provided by Mr Kevin Lees, one of four directors. He was required at monthly board meetings to present financial information to his fellow directors which would be used to form the respondent's business strategy. A proportion of the information presented by Mr Lees was generated by the claimant, in the form of the monthly profit and loss account and balance sheet, but Mr Lees would provide a breakdown of these reports and then compare them to his forecasted expenditure, and he would also carry out margin analysis and overspend monitoring. It was this information that would be used to discuss long-term budgets, potential price increases and variances to budget.

15.16 There was no dispute that the claimant performed well in her role.

15.17 In January 2019 the share capital of the respondent was purchased by Vitality House Group Limited, whose directors are Mr Laurence Smith, his wife Meghan Smith and Mr Mark Lewis. Mr Laurence Smith took the business over just 6 weeks before the claimant started her sick leave, for which see below. The purchase of the share capital led to Mr Lees' departure from the business in around April 2019.

The claimant's aneurysm

15.18 On 1 April 2019 the claimant was admitted to hospital for a planned hysterectomy. It was anticipated that she would be absent from work for about 6 weeks. Part way through her recovery, however, she suffered serious complications and was admitted to hospital where she then

developed a brain aneurysm. She suffered a subarachnoid haemorrhage (bleed on the brain) on 22 April. She had an operation on her brain to stop the bleeding, which she had only a 12% chance of surviving, and she then remained on the hospital's high dependency ward for a week before spending a further two weeks on the neurology ward. She now has a coil inserted in her brain to stop the bleeding and it is essential, to manage the coil and the risk of further bleeding, that she does not develop high blood pressure. She takes medication to reduce her blood pressure and needs to avoid stress. The claimant is, we find, very mindful of this risk. She does all that she reasonably can to avoid stress, which could pose a significant risk to her health.

15.19 The claimant was, in fact, fortunate to survive – one third of people who have a subarachnoid haemorrhage die and a further third suffer coma and severe disability. Of the third who do make what the medics consider to be a good recovery, only one third of that third will be able to resume employment, page 185. It can be inferred from this that this type of haemorrhage is something from which very few people recover completely. Recovery from a subarachnoid haemorrhage also tends to be slow, with much of the recovery taking place over a period of 1 – 2 years, page 185.

15.20 Sadly, the haemorrhage caused the claimant brain damage. She initially lost the ability to walk properly, see clearly (she suffered from blurred vision) or use her hands. She was referred for physiotherapy treatment to help improve her physical capabilities, which improved quickly, to the extent that by 3 August 2019 she had regained her driving licence.

15.21 The haemorrhage also caused the claimant cognitive problems, in particular in relation to her short-term memory. This is a common effect of this type of brain aneurysm due to the haemorrhage often causing a reduction in blood flow to the two areas of the brain that are responsible for working memory. She also developed difficulties with processing information, learning new skills and multi-tasking. There can be a gradual improvement in these areas, usually during the first one to two years after suffering the haemorrhage although there is no certainty over the amount of improvement a person might make.

15.22 The claimant was advised early on in her recovery by Headway that short term memory problems are a common side effect of this type of haemorrhage and she was advised by them to keep diaries and notes to help her manage day to day. She started to do so immediately. Over the summer of 2019 the claimant became increasingly aware that she had some issues with her short term memory. She was unable to remember where she had read up to in books, and what she had read previously,

and consequently she stopped reading books. She stopped watching TV series because she could not remember the episodes from one week to the next, she would frequently forget food in the oven and would struggle to compile a shopping list, because she would forget what was needed. She started to leave notes around the house to help her to remember daily tasks.

15.23 The claimant also found it very hard to process information and learn new tasks. Previously learned skills were in tact, but learning to do something new was now very hard for the claimant. However, we find, based on the claimant's verbal evidence, that because she was at home during the summer, and had her family around her, the full extent of the issues that she had processing information and learning new tasks did not become apparent to the claimant until she returned to work in late August 2019, for which see more below. As the claimant put it, it took the return to work to crystallise for the claimant the cognitive difficulties that she now has in relation to processing information and learning new skills.

Mr Smith's knowledge of the claimant's condition around the time of the operation

15.24 Whilst the claimant was in hospital the claimant's husband and Mr Laurence Smith spoke three times. Mr Smith was informed that the claimant had suffered a brain aneurysm and that she had undergone a very serious operation which she had only a slim chance of surviving. He was told that she had been on the high dependency unit and had stayed in hospital for an extended period. He was also aware that the claimant had suffered brain damage. He was told, for example, that in the aftermath of the haemorrhage the claimant was experiencing difficulties walking. We base this finding on Mr Smith's verbal evidence to this effect. We find that he did not know that the claimant was taking medication to help her control her blood pressure and he did not know that she had had a coil inserted into her head. On balance we have accepted Mr Smith's evidence on this issue because the claimant accepted that she had not told Mr Smith about either of these matters herself (she asserted her husband had done so) and so we had to weigh up the direct evidence of Mr Smith against a second hand report of what Mr Purcell had said to Mr Smith. We preferred the direct account from Mr Smith.

The recruitment of Mr Ball

15.25 When the claimant started her sick leave for her hysterectomy the respondent had decided to try to cover the claimant's work internally. However, once it became apparent that the claimant was going to be absent for far longer than originally planned, an advertisement was placed with an agency and on 8 May 2019 Mr Peter Ball took up a role as interim

accountant with the respondent. Mr Ball has a different accountancy background to the claimant; he is a management accountant as opposed to a financial accountant. Mr Ball was engaged to work five days a week.

The extent of the changes made to the claimant's role

15.26 Perhaps the key factual dispute between the parties was whether the respondent/ Mr Ball made such significant changes to the claimant's role that, by the time the claimant returned to work, she was required to return to an entirely different role to the one she had left. Sadly, the evidence concerning the role that the claimant had carried out versus the role as it was carried out by Mr Ball was unsatisfactory. We say this not to be critical of the parties but to explain the difficulties that we faced when approaching our fact finding exercise in relation to this matter. The claimant had not, in her witness statement, explained what her role had entailed day-to-day or month-to-month and neither had she explained what changes she asserted had been made to her role. The respondent, likewise, had not provided us with any evidence in their witness statements as to what the claimant did day to day and only limited evidence regarding Mr Ball. Numerous accounting spreadsheets had been included in the bundle but neither the claimant nor the respondent had provided any explanation as to how the spreadsheets worked or what the relevance of them was. In the circumstances we have had to do the best we can on the evidence that was before us.

15.27 What was clear from the evidence, and indeed was not disputed, was that Mr Ball used Excel and produced reports and other information for management within Excel, whereas the claimant had run all her reports from Sage. He did so because he lacked familiarity with Sage, whereas he was very used to working with Excel.

15.28 We find that Mr Ball created and set up between 9 – 11 Excel workbooks (he could not be sure of the exact number). Each workbook would itself comprise a number of different spreadsheets, which would all generate data through the use of formulae. For example he had a workbook for "Aged debtors", page 144. This was a workbook which analysed companies who owed the respondent money and how long that money had been owed for. He also had a workbook for Sales Order Returns, page 147. This analysed the number of credit notes raised for customers in relation to returned goods and, using certain data from Sage, the spreadsheet was able to identify the reason for return (eg torn wrapper, change of heart etc), as well as the volume of returns. This was not an analysis that could be carried out within Sage.

15.29 He created an FB Sales Analysis Master which looked at 2018 sales data to provide forecasts for sales in 2019 at Christmas, page 163.

He created a workbook for sales promotions, page 167. In this workbook, using sales data from Sage, he was able to analyse what happened to items which were on a sales promotion looking at the volume of sales before, during and after the promotion. Sage was not capable of producing this report in the same way – three reports would have needed to be run for the three periods of time in question (i.e. before, during and after the promotion). We find that this was not something that would ordinarily have been dealt with by the claimant at all, it would have been dealt with by the sales logistics team. We do so because the claimant was clear in her verbal evidence that this was the case.

15.30 He created an FB Packing Master workbook, page 169, something which had previously been the responsibility of Mr Lees. He also created a workbook for the profit and loss and balance sheet management accounts. This workbook had a large number of spreadsheets, at least 10, which analysed various matters such as profit and loss, balance sheet, cash flow and profit and loss variance.

15.31 We do not accept the claimant's evidence that in total Mr Ball created 69 separate Excel spreadsheets because it was evident from the spreadsheets that were in the bundle that some were duplicates and some were copies of the same spreadsheet but with the results showing on one page and the formulae which produced those results, and sat behind them, showing on another page. However, taking into account that Mr Ball created between 9 – 11 workbooks, and given that it was not disputed that each workbook contained a number of spreadsheets, and that the management accounts workbook contained multiple spreadsheets, we do find that he likely created somewhat in excess of 40 spreadsheets, all of which were designed to analyse in some detail various aspects of production, sales, cash flow and profit.

15.32 The claimant's principal assertion was that was this extensive use of Excel spreadsheets demonstrated that her role had changed from a Financial Accountant role to a Management Accountant role. We do not find this to be the case. We accept the verbal evidence of Mr Ball and find that what he was doing was covering (most aspects) of the claimant's role, which remained as set out in the claimant's job description. However, we do find that *the way* in which the claimant's duties were being carried out fundamentally changed in the following respects.

15.33 Firstly, the claimant did not use Excel day-to-day at all; she used Sage. Mr Ball hardly used Sage; he used Excel day-to-day. Moreover, what Mr Ball introduced, through his use of Excel workbooks, was the regular production of detailed analytical information which was then more readily available to management than it otherwise would have been. This cannot be said to be a change in the duties set out in the claimant's job

description, which included, after all, provision of analytical information to specific divisions of the business. But it represented a wholesale change to how the claimant's duties were carried out, and in this sense there was a significant change in what the role entailed day-to-day.

15.34 Moreover we find that the adoption of this methodology and approach also entailed an increase in the duties of the role as compared to the duties carried out by the claimant; in particular there was, we find, an increase in the amount of analytical information being produced. We make this finding for the following reasons. Mr Ball was working full-time five days a week, whereas the claimant had worked four days a week. We accept this initially might have been because Mr Ball was having to catch up on a backlog of work, given that the claimant had gone off sick on 1 April and he started work on 8 May, but he remained on a contract for five days a week throughout the duration of his engagement with the respondent. This, in our view, was indicative of an increase in workload. We also took into account that the sheer volume of additional spreadsheets (some 40 or so as we have set out above), many of which as we understand it required to be produced on a monthly basis, would necessarily have entailed an increase in the role's workload. A large volume of spreadsheets were now being produced, most of which had not been produced before, and some of which related to areas which had previously been outside of the claimant's area of responsibility (for example the Packing Master workbook). Additionally, whilst some Excel spreadsheets replaced reports previously produced by the claimant in Sage (for example the profit and loss account and balance sheet), the spreadsheets were more detailed than those which had been produced previously. The two page profit and loss and balance sheet produced by the claimant, for example, became a workbook with in excess of 10 spreadsheets. This increase in the suite of information being generated came about because Excel was much more readily able to carry out analysis of data, and the business liked it and requested it.

The claimant's sick notes

15.35 The claimant was initially signed off sick from work for eight weeks from 8 May, page 198. The sicknote stated that she was off sick with intracranial pathology, page 198. By early June the claimant was back home from hospital and on 7 June she was visited by a work colleague Ms Warren. After this the claimant texted Mr Laurence Smith asking to arrange a meeting, page 219. He said that he would get back to her, but did not in fact do so.

15.36 On or around 18 July the claimant submitted a sicknote to the respondent in which she was assessed as unfit for work because of a

subarachnoid haemorrhage, and she was signed off sick until 3 August 2019, page 197. Mr Smith saw this sick note.

15.37 There was no further contact between the respondent and claimant until, on 6 August, the claimant contacted her colleague Jan Warren. She texted her to say that she was not sure what was going on at work but that she was hoping to meet up with Mr Smith to talk about a phased return, page 221. She stated that she was thinking of a return at the start of September and asked if Ms Warren knew anything. Ms Warren then liaised with Mr Smith and a meeting was arranged for 8 August.

The 8th August return to work discussion

15.38 When this meeting took place the claimant was, in fact, no longer signed off as unfit to work, her sick note had expired on 3 August, see above. The meeting lasted for about an hour. It took place at the respondent's premises and the initial part of the meeting was between the claimant and Mr Smith. The claimant and Mr Smith spent about 35 minutes talking about the claimant and her family and the remainder of the time talking about the respondent. There was, we find, some discussion about how the claimant's recuperation was going. Mr Smith knew that the claimant's driving licence had been taken off her and he was told that it had been returned. We find, on the basis of Mr Smith's verbal evidence, that he knew about the claimant's "path of recovery" and we find that there were discussions about the improvements that were being made in the claimant's physical capabilities, particularly in relation to walking. The claimant explained that she was getting stronger and had been going out for walks and could manage to go up and down stairs now. The claimant also informed Mr Smith that there had been problems with her eyesight and that she had required physiotherapy.

15.39 We accept the claimant's verbal evidence and find that she told Mr Smith that she was forgetful and was having to leave notes around the house to help her remember things, and that they had a "bit of a laugh" about that. We also accept the claimant's verbal evidence and find that she told Mr Smith that she could not watch TV series any more, and could only watch programmes that were a one off, and that she had stopped reading books, albeit she did not specifically explain to him why this was the case. We infer and find, however, given that the context of this discussion was about the effects on the claimant of her haemorrhage, that Mr Smith must have realised that the claimant's issues with reading and watching TV were linked to her haemorrhage and the memory difficulties that she was describing.

15.40 We have accepted the claimant's account of the meeting for the following reasons. Firstly, on Mr Smith's own account, he talked about the

claimant and her family for 35 minutes. Given the severity of the claimant's illness, of which he was well aware, we considered it highly improbable that there would have been no discussion during these 35 minutes about how the claimant was doing and what impact the haemorrhage had had on her day to day. Additionally, we considered that the severity of the claimant's illness, and the serious impact it had on her, would inevitably have made the effects of it at the forefront of the claimant's mind, thus making it very likely that some discussion about this would have taken place.

15.41 That said we find, based on the claimant's impact statement, pages 182- 183, that she was feeling very positive at this time, she was pleased with the progress that had been made on her physical recovery and was keen for things to get back to normal and return to work. We infer from this, and from the general lack of detail from the claimant about what she told Mr Smith during this meeting that, more likely than not, the claimant did not spend a great deal of time with Mr Smith explaining to him about her cognitive issues. Moreover the claimant was not in any event, at this point, aware of the level of cognitive difficulties that she was suffering from in relation to processing information and learning new skills, see paragraph 15.23 above, and it follows from this that this was not discussed with Mr Smith during the meeting.

15.42 We reject Mr Smith's evidence that the claimant proposed to him that she worked two days in August and then returned at the beginning of September straight back into working her four-day week, and that it was he who proposed to the claimant that she should have a phased return to work.

15.43 We prefer the claimant's evidence and find that it was the claimant who proposed to Mr Smith that she have a phased return to work, working two days a week from the last week in August through to the end of September before reverting to 4 days a week in October. We prefer the claimant's evidence for the following reasons. As set out above, paragraph 15.37, the claimant had texted her colleague Ms Warren on 6 August saying that she wanted to talk to Mr Smith "about a phased return to work." Accordingly, it was evident from this text that before the meeting had taken place with Mr Smith what the claimant had in mind was a phased return to work. We also considered it inherently unlikely, given the severity of the claimant's illness, and her concerns about stress and managing her blood pressure, that she would have wanted to return straightaway to working four days a week. It is more likely she would have wanted to ease in gradually.

15.44 Mr Smith immediately agreed to the claimant's proposal. It was also agreed that Mr Ball would remain in post during the claimant's phased return to help with the handover.

15.45 Mr Ball was present for the second part of this meeting when the discussion turned to work-related matters. We find, based on his verbal evidence, that it was not explained to the claimant that Mr Ball had been using Excel to produce the management accounts and other analytical data. Nor was she given any idea of the volume of reports now being produced.

15.46 However, Mr Smith, we find, had made a decision that he wanted the claimant to continue with Mr Ball's methods of working; specifically he expected and required her to use the Excel spreadsheets day-to-day to produce the accounts and analytical data that Mr Ball had been producing. We make this finding for the following reasons. It was not disputed that when the claimant returned to work Mr Ball immediately set about explaining to the claimant how all of the spreadsheets worked; a clear indicator that the claimant was expected to continue with the spreadsheets. We took into account the verbal evidence of Mr Ball, which was that there was an expectation that the claimant would use Excel and the spreadsheets when she returned to work. Additionally, as we set out below, when the claimant returned to work she did not in fact use the Sage system once - a clear indicator that Excel was to be her focus going forward. Lastly we took into account that Mr Smith himself, during a subsequent grievance interview about the events with which this case is concerned, stated that he liked the way that Mr Ball had completed the accounts but did not want to pressure the claimant into taking on the new methods too quickly, page 119. Again this seemed to us to be a clear indicator that the requirement going forward was that the new methods of working (use of the Excel spreadsheets) were to be taken on by the claimant.

15.47 Whilst Mr Smith had decided on our findings therefore that he wanted the claimant to continue with Mr Ball's methods of working, this was not communicated to the claimant. She was given no warning that on her return to work she would be required to work in a completely different way to that which she had done previously. We also find, based on Mr Smith's verbal evidence, that the Excel reports were not, in fact, essential to the business because the data produced by them could ultimately, one way or another, mainly be generated via Sage.

<u>The claimant's return to work</u>

15.48 The respondent did not seek occupational health advice or any other form of medical advice before the claimant returned to work. Neither

did it carry out a risk assessment. The claimant did not suggest any of these things and the respondent did not consider it. It did not enter Mr Smith's mind that such a report or assessment might be necessary; he considered that his conversation with the claimant, and the agreement about the phased return to work, was sufficient. There was no further conversation with the claimant about what might be required to help her settle back into work over and above the conversation on the 8 August.

15.49 The claimant returned to work on 26 August, working on 26 and 27 August that week. She was shocked to find that Mr Ball was using numerous Excel spreadsheets to carry out her role.

15.50 As it was month end the claimant's first two days back at work were spent working on the payroll Excel spreadsheets only. Mr Ball sat with the claimant to demonstrate to her how the spreadsheets worked. The claimant immediately started to struggle. She was being required to learn a new skill, which entailed both being able to process what she was being told and being able to remember it. She found it very difficult and had to repeatedly ask for help. The claimant, in particular, found it very hard to understand the formula aspects of the spreadsheets. She had not worked with formula spreadsheets before and did not understand what each formula did. Mr Ball would explain how something worked and she would not be able to understand it and she quickly became frustrated and upset. It was only at this point that she started to appreciate that she had difficulties learning new skills.

15.51 Whilst we accept the evidence of Mr Smith and Mr Ball and find that there was no expectation that the claimant would herself *create* an Excel spreadsheet (which would require knowledge of the formula and how to input the formula into cells on the spreadsheet), it was expected, as we have set out above, that she would use Mr Ball's spreadsheets in order to produce her reports and to produce the additional suite of information now being provided by Mr Ball to management. We also accept the evidence of the claimant and find that she was told that she might need to make changes to some of the formula in some of the spreadsheets in order to generate certain data.

15.52 The claimant, we find, found the situation completely overwhelming. The way that the role was being carried out had changed substantially and she immediately became anxious and stressed about this. She was also overwhelmed by the sheer number of spreadsheets and the increase in work these entailed. She worked long days to try to get to grips with the changes and make up the knowledge deficit, working 9 or 10 hour days despite being on a phased return to work.

15.53 Mr Smith and the claimant had a quick catch up meeting on her first day back at work. She did not, at that point, reveal the extent of her difficulties to Mr Smith, simply saying to him that she had found her first day quite daunting. She maintained a positive tone and emphasised how excited she was to get back to work.

15.54 The claimant's second day back at work was 27 August. The claimant encountered exactly the same level of difficulty with understanding the spreadsheets, and in particular the formulae behind the spreadsheets, as on her first day. The claimant, Mr Smith and Mr Ball had a quick catch up meeting that day. The claimant stated during this meeting that she was struggling with the spreadsheets and did not understand what she was supposed to do. She told Mr Ball and Mr Smith that she was finding it really hard but said that she wanted to learn and adopt the processes. Mr Ball told the claimant that there were very useful tutorials about Excel on YouTube. There was not, we find, any suggestion or discussion about the possibility of reverting to how things had been done previously. To the contrary Mr Smith stated that Mr Lees way of doing things had been very old-fashioned.

15.55 The claimant's third day back at work was Monday 2 September. The claimant continued to struggle with understanding both the spreadsheets and the formulae despite having spent hours at home watching tutorials on YouTube and trying to understand how Excel worked. The claimant spoke with Mr Smith that day and told him she was struggling with the formulas. The situation did not improve on her fourth day back at work, Tuesday 3 September. On this day the claimant had a meeting with both Mr Smith and Mr Ball. She was tearful and upset and told Mr Smith that she could not understand the role.

15.56 It was not disputed that at some point during one of these conversations, we do not know not exactly when, Mr Smith offered the claimant both internal or external training on Excel. He also said that he would see if Mr Ball could write a small user manual to help the claimant with the spreadsheets.

<u>An offer to revert to how the role was done before?</u>

15.57 One of the most significant areas of factual dispute between the parties was whether or not Mr Smith had said to the claimant that she could revert to just using Sage to carry out her role. Mr Smith's evidence was that he made this offer a number of times and Mr Ball also stated that he had heard Mr Smith make this offer on one occasion. The claimant denied any such offer had been made.

15.58 We did not find this an entirely easy factual dispute to resolve in the main because we found Mr Ball to be a credible witness and he was clear this offer was made on one occasion. However, we found, on the balance of probabilities, that this offer was not made. Dr Ahmad, for the respondent, suggested that the claimant's recollection could not be relied upon because of her short-term memory difficulties. We did not consider that these difficulties were such that it could be said that the claimant's evidence on this issue should be treated as unreliable for the following reasons. The person to whom the claimant's job was most important was the claimant herself. It was a role she had enjoyed with the respondent for the last 12 years and she was clearly very keen to get back to work as it represented a return to normality. In these circumstances we think it very unlikely that such an offer would have been something the claimant would have then forgotten, even allowing for her cognitive impairments. For the same reasons we also think it likely that had such an offer been made then the claimant would have seized upon it there and then.

15.59 In any event when we stood back and considered this issue in context we considered that there were a number of factors which undermined the respondent's version of events. Firstly, in October 2019, so a matter of weeks after the claimant's resignation had occurred, both Mr Smith and Mr Ball wrote out a detailed chronology of events, see paragraph 15.47 below. Mr Ball at page 75 set out his recollection of the solutions offered by Mr Smith to the claimant to assist her which *did not* include allowing her to revert back to how things were done previously. We considered that a significant omission. Mr Smith also addressed in the chronology what help was offered to the claimant, page 77, and he likewise failed to mention that he had offered to allow her to revert to how things were done previously. Again a significant omission. It was also striking that Mr Mark Lewis, who dealt with the first stage of the claimant's grievance, told us in evidence that he knew this offer had been made. Yet there was no mention of this in his grievance outcome letter, pages 88-90.

15.60 Moreover, a grievance interview was held with Mr Smith on 17 December, see paragraph 15.76 below) and once again he did not mention that he had offered to allow the claimant to revert to how things were. In fact he stated that he "liked the way that James had completed the accounts" adding that he "in no way wanted to pressure the claimant into taking on these new methods to quickly," page 119. These comments are not consistent with having told the claimant she could revert back to how things were. Mr Ball was also interviewed for the grievance. He did on this occasion make a reference to the claimant being able to revert to old style presentation but, consistently with Mr Smith, he said that this was "until the claimant was comfortable with the new set up," page 118. At most, therefore, what was being described was that the claimant had been offered some time to come up to speed on Excel. That was reflected in the

grievance outcome letter also. In fact the first time that the respondent clearly asserted that an offer had been made to the claimant that she could simply revert back to how things were was in the respondent's ET3. By that time, of course, the parties were engaged in litigation and the natural inclination would have been for the respondent to adopt the best position possible for their case. For these reasons we considered the contemporaneous account of events to be more reliable.

The events of 9 September

15.61 The 9 September was the claimant's fifth day back at work. The claimant had not used Sage once since she had returned to work. To the claimant this underlined exactly how extensive the day to day changes in how the role was carried out were. She was, by now, extremely worried about the level of stress that the changes to her role and the increase in her workload were placing on her. She was worried in particular about what impact this might have on her health given her need to avoid stress in order to help manage her blood pressure to avoid the risk of complications with the coil/ a further bleed on the brain.

15.62 Matters did not improve for the claimant. She spent the entire morning with Mr Ball going through Excel spreadsheets but became very stressed, anxious and tearful in front of her team. She left work early. She was so upset that both Ms Warren and Mr Ball were concerned about whether she was fit to drive herself home.

15.63 There was a dispute between the parties as to whether the claimant and Mr Smith had a conversation that day. The respondent's evidence was that the claimant spoke to Mr Smith and told him that she wanted to resign from her role after speaking with her family, and that he suggested she go home early and reflect on matters and speak to her family again. His evidence was that she then returned to the business on 17 September and confirmed that she wanted to resign, paragraph 8 Mr Smith's witness statement.

15.64 Before us in evidence Mr Smith readily accepted that this latter part of his witness statement was wrong and that the claimant had in fact verbally resigned on 10 September. He maintained, however, that she had also tried to resign on 9 September and that he had told the claimant to leave early and reflect on it.

15.65 On balance we reject Mr Smith's evidence. Mr Smith's memory of the events around this time was clearly unreliable, given the manifestly inaccurate description of events he provided in his witness statement about the claimant having resigned on 17 September.

15.66 Accordingly we accept the claimant's evidence and find that she did not meet with Mr Smith that day and say to him that she wanted to resign from her role. She simply sent Mr Smith a text in which she apologised for leaving work early that day upset. Mr Smith sent a very supportive text message back to the claimant apologising for missing her when she left work and saying;
"I am so sorry the return has been so uncomfortable. When you have had a chance to speak to your Lawrence (a reference to the claimant's husband) then let's catch up. Let me know your plans for the next few days and I'm very happy to meet up off-site to chat over things. As I shared earlier I am committed to supporting anything you need and please do talk. I am also very conscious that you are not to be under any stress and I want to support you in any way I can," page 222.

The claimant's resignation

15.67 Just before 6.00AM the following day, 10 September, the claimant asked to meet with Mr Smith early before her colleagues had arrived in the office. The claimant had decided that she was not able to carry out the role in the way that it had now been set up. Returning to work to increased and altered duties was causing her a great deal of stress and she was worried about the impact of this stress on her blood pressure. She did not feel that she could remain in post when the changes to her role were causing her significant stress, because there were potentially substantial risks to her health in doing so. She considered also that the respondent had not appreciated the level of difficulty that she was in, despite having told them about this in meetings. Her health had to come first and consequently she had decided that she had no option but to resign.

15.68 The claimant told Mr Smith that she did not wish to leave but that she felt she had to do so because she was unable to understand the changes that Mr Ball had implemented. She was upset and tearful. She said she was resigning because she did not know how to do her job any more.

15.69 The claimant asked if it might be possible to have a job one day a week carrying out HR functions for the respondent. HR, of course, had to a limited extent been part of the claimant's role. Mr Smith responded that he would think about it but he could not commit to anything. With the claimant's consent some of her colleagues were then informed that she had resigned.

15.70 The claimant and Mr Smith met again on 17 September. Mr Smith told the claimant that he had not had the opportunity to pursue her suggestion concerning HR work one day a week. In fact he was of the view that until he had recruited to fill the claimant's role it would not be

possible to make a decision on the claimant's suggestion because only then would he know the aspects of the work that the new recruit could cover. The claimant and Mr Smith met again on 23 September when the claimant came into work to collect some cakes for a Macmillan coffee morning. Mr Smith asked the claimant to confirm her resignation in writing and he also told her that he was not in a position to discuss her proposal concerning working part-time as an HR manager until he had recruited.

15.71 On 30 September the claimant sent the respondent a letter headed constructive dismissal, pages 68 – 69. In this letter she stated that new and additional processes had been implemented by Mr Ball and that she was unaware that there would be such considerable changes to her overall role. She stated that she felt she was placed in a position whereby she had no alternative other than to resign from a role which she loved but felt she could no longer do. She also referred to having suggested that she could work part time focusing on HR matters and she recorded that Mr Smith had responded this could be an option but that he would have to find a replacement for her role first, page 69. She did not state in this letter that one of her reasons for resigning was because the respondent had failed to obtain an occupational health report.

15.72 Mr Smith responded to this letter stating that he was concerned by the contents of it and he said that he felt the claimant might have resigned in haste, page 70. He gave the claimant the opportunity to retract her resignation. He also stated that he was treating the letter as a grievance letter and invited her to attend a formal grievance hearing.

15.73 The claimant did not retract her resignation.

15.74 Mr Ball and Mr Smith prepared a detailed three page chronology for the purposes of this grievance. In terms of what offers of support had been made to the claimant, Mr Ball recorded that Mr Smith had offered the claimant more time with him (i.e. more time with Mr Ball), independent training or the provision of less detailed management accounts, page 75. Mr Smith recorded that he had offered full Excel training either on or off-site and to see if Mr Ball could write a small user manual for the claimant to use, page 77.

15.75 A grievance meeting took place with the claimant on 16 October. The hearing was conducted by Mr Mark Lewis, a director of the respondent. Mr Lewis wrote to the claimant on 24 October to inform her that the points raised in her letter were not accepted by the respondent, pages 88 – 89. Mr Lewis did not assert in this letter that the respondent had made an offer to the claimant that she could revert to her previous way of working.

15.76 The claimant appealed this letter by way of letter dated 28 October, pages 91 – 93. The respondent arranged for the appeal to be heard by Sarah Rhodes of Citation who, it was decided, would then produce a report on the appeal to be considered by Mrs Meghan Smith, Director of the respondent. Ms Rhodes held a meeting with the claimant on 22 November 2019. She also held telephone interviews with Mr Smith and Mr Ball on 17 December and 16 December respectively, pages 118 and 119. In terms of recalling what offers of help had been made to the claimant, Mr Ball stated during his interview that the claimant had been offered internal or external training or to revert to the old style of presentation until she was comfortable with the new setup, page 118. Mr Smith stated that he had liked the way that Mr Ball had completed the accounts but in no way wanted to pressure the claimant into taking on the new methods too quickly, page 119.

15.77 On 19 December 2019 Mrs Smith wrote to the claimant rejecting her grievance appeal, pages 140 – 142.

15.78 At some point, we know not exactly when, a person was recruited to carry out the claimant's role. That person has reverted to using Sage to produce the reports and management information.

The Law

Knowledge of the disability

16 For the purposes of both a section 15 claim of discrimination arising from disability and a claim of a failure to make reasonable adjustments the employer must either know that the employee is disabled at the relevant time, or it must be something which the employer could reasonably be expected to know. As to what constitutes knowledge of the disability there is no need for the employer to know the precise nature of the medical condition. **Jama v Alcohol Recovery Project UKEAT/0602/06.** However the employer does have to know (actually or constructively) the relevant facts – i.e. that the employee is suffering from an impairment with the characteristics identified in section 6 of the Equality Act, namely an impairment which has a substantial and long-term adverse effect on the claimant's ability to carry out her normal day to day activities, **Wilcox v Birmingham CAB Services UKEAT/0293/10** and **Gallop v Newport City Council [2013] EWCA Civ 1583**. These are conclusions of fact, **Liberata**. The employer does not have to know that these facts would be considered in law to be a disability, **Donelien v Liberata Uk Ltd UKEAT/0927/14**. The employer must have the requisite knowledge (or deemed knowledge) at the material time, i.e. at the time when the discrimination occurred.

17 As referred to above, a finding that the employer does not have actual knowledge of the disability is not the end of the tribunal's task, it must go on to

consider whether the respondent had constructive knowledge. As was explained in **A Ltd v Z UKEAT0273/18** it is for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to her physical or mental health, or (b) that that impairment had a substantial and (c) long- term effect. This is also emphasised in the 2011 ECHR Code of Practice paragraph 5.14: "It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'. Paragraph 5.15: "An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

18 It is not, however, incumbent upon an employer to make every enquiry where there is little or no basis for doing so **Ridout v TC Group [1998] IRLR 628; Secretary of State for Work and Pensions v Alam [2010] ICR 665.** Reasonableness must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code, **A Ltd v Z**, paragraph 23.

19 When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: …… because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already done so]", per Langstaff P in **Donelien** EAT at paragraph 31.

20 For the purposes of the reasonable adjustments claim there is a further requirement; as Mr Justice Underhill explained in the case of **Wilcox v Birmingham CAB Services UKEAT/0293/10** the meaning of Section 4A(3)(b) (as it was then, Schedule 8 paragraph 20 as it is now) is that an employer is under no duty under section 4A to make an adjustment unless the employer knows (actually or constructively) *both* (1) that the employee is disabled *and* (2) that the employee is disadvantaged by the disability in the way set out in section 4A(1). Element (2) will not come into play if the employer does not know element (1). See also paragraph 6.19 of the Code; "For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case."

Failure to make reasonable adjustments

21 The reasonable adjustments duty is contained in Section 20 EA10 and further amplified in Schedule 8. In short, the duty comprises of three requirements. If any of the three requirements applies, they impose a duty to make reasonable adjustments. Section 21 provides that a failure to comply with one of the three requirements is a failure to comply with the duty to make reasonable adjustments by A (A being the employer or other responsible person) and amounts to discrimination, Section 21(1) and (2).

The first requirement is the requirement set out at Section 20(3) and is as follows:

> "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."

22 The approach that a Tribunal should take to these claims is set out in the judgment of HHJ Serota QC in **Environment Agency v Rowan** [2008] IRLR 20, repeating the guidance given in **Berriman v Smiths Detection – Watford Ltd** [2005] ALL ER (D) 56 (Sep) EAT and followed by HHJ McMullen QC in **Ferguson v Barnet Council** [2006] All ER (D) 192 (Dec) EAT. That approach requires us to identify, relevantly:

(a) the relevant arrangements (PCP) made by the employer
(b) …..
(c) the identity of non-disabled comparators (where appropriate), and
(d) the nature and extent of the substantial disadvantage suffered by the Claimant (as a result of the arrangements).

Only then can the Employment Tribunal go on to consider whether any proposed adjustment is reasonable; in particular, to determine what adjustments were reasonable to prevent the PCP placing the Claimant at a substantial disadvantage.

23 What amounts to a provision, criterion or practice is to be given a very wide meaning. It can include policies, the terms on which employment is offered, arrangements for dividing up work, who gets what job, the essential functions of the job and job descriptions, **Archibold v Fife Council**. There has been some debate as to the extent to which a one off decision can be a practice. This issue has now been definitively resolved by the Court of Appeal in **Ishola v Transport for London [2020] EWCA Civ 112**. The Court of Appeal confirmed that the words provision, criterion or practice carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Paragraph 38; "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 the hypothetical similar case arises." Therefore although a one-off decision or act can be a practice, it is not necessarily one. In **Carreras v United First Partners Research UKEAT/0266/15** it was held that an expectation or assumption (in this case to work late) was sufficient to be a requirement. This was upheld by the Court of Appeal, **2018 EWCA Civ 323**.

24 A substantial disadvantage is one that is more than minor or trivial, section 212 EQA. Whether or not such a disadvantage exists in a particular case is a question of fact. It is the PCP that must place the claimant at the disadvantage **Nottingham City Transport Ltd v Harvey UKEAT/0032/12**, and the substantial disadvantage should be identified by taking into account what it is about the disability which gives rise to the problems and effects which put the claimant at the substantial disadvantage identified. It is essential to find the nature and extent of the disadvantage which the claimant is placed at by reason of the PCP**, Newham Sixth Form College v Sanders [2014] EWCA Civ 734**. Using a comparator may help with this exercise as the purpose of the comparator is to establish whether it is because of disability that a particular PCP/ physical feature/ auxiliary aid disadvantages the disabled person in question. However there is no requirement to identify a comparator, see paragraph 6.16 of the 2011 Code of Practice on Employment. In other words it is important to identify precisely what substantial disadvantage the adjustment is required to remedy and what it is about the disability that gives rise to this substantial disadvantage, **Chief Constable of West Midlands Police v Gardner UKEAT/0174/11.**

25 When considering whether the proposed adjustment is reasonable we have to apply an objective test. Ultimately it is view of Tribunal as to what is reasonable that matters not the view of respondent, even if the respondent's view is genuinely held, **Morse v Wiltshire County Council [1998] ICR 1023** and **Collins v Royal National Theatre Board [2004] EWCA Civ 144.** As was emphasised in the case of **RBS v Ashton [2011] ICR 632** the focus is not on the process adopted by the respondent or the reasoning of the respondent by which a possible adjustment is considered. It is irrelevant to consider the respondent's thought processes leading to the making or failure to make a reasonable adjustment. The obligation is to make an adjustment which objectively is reasonable. The Act when it deals with reasonable adjustments is concerned with outcomes, not with assessing whether those outcomes have been reached by any particular process, or that process is reasonable or unreasonable. In considering whether a proposed adjustment is reasonable it is particularly important that we consider the extent to which taking the step in question would alleviate the substantial disadvantage. **Enviroment Agency v Rowan [2007] UKEAT/0060/07.**

26 Paragraph 6.28 of the Code states that;

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.

Section 15: discrimination arising from disability

27 Discrimination arising from disability is defined in section 15 Equality Act 2010 as follows:

> "(1) A person (A) discriminates against a disabled person (B) if -
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

28 Paragraph 5.6 of the 2011 Code makes it clear that is in assessing whether there has been discrimination arising from disability there is no need to carry out a comparative exercise. It is only necessary for a claimant to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

29 The EAT in the case of **IPC Media Ltd v Millar [2013] IRLR 707** gave some helpful guidance as to the approach to be taken in these cases. Mr Justice Underhill (as he was then) explained that as with other species of discrimination an act or omission can occur *because of* a proscribed factor as long as that fact operates on the mind of the putative discriminator consciously or subconsciously to a significant extent, **Nagarajan.** The starting point is to identify the individual responsible for the act or omission in question. Then it is necessary to consider what their thought processes, conscious or subconscious were. The focus should be on whether the putative discriminator was consciously or subconsciously influenced by the "something", see also **Pnaiser** paragraph 31. Just as there may be more than one reason or cause for the treatment in a direct discrimination

context, so there may be more than one reason in a section 15 case. The "something" need not be the sole or even the main cause for the treatment, it is enough that it has a significant (more than trivial) influence, paragraph 31 **Pnaiser v NHS England UKEAT/0137/15**.

30 A tribunal must then determine whether "the something" arises in consequence of the claimant's disability. The expression "arising in consequence of" can describe a range of causal links – i.e. there may be more than one link between the "something" and the disability, paragraph 31 **Pnaiser**. Whether the something does arise in consequence of the disability is a question of fact to be assessed robustly, **Pnaiser**. Unlike when assessing whether the "something" was the reason for the unfavourable treatment this stage of the causation test (whether the "something" arose in consequence of the claimant's disability) is an objective question that does not depend on the thought processes of the alleged discriminator, **Pnaiser**. It requires consideration of whether objectively there is a causal link between the disability and the "something". It is a matter of fact not belief and it is not therefore a requirement that the putative discriminator knew that the "something" arose in consequence of the claimant's disability, **City of York Council v Grosset [2018] EWCA Civ 1105** and **Pnaiser**.

31 The EAT in both **Pnaiser** and **T-Systems Ltd v Lewis UKEAT/0042/15** commented that if there are many links in the chain of causation it will likely be harder to establish the requisite connection between the "something" and the disability. The 2011 Code explains it thus: that there must be a connection between whatever led to the unfavourable treatment and the disability, paragraph 5.8. Consequences means the result, effect or outcome of a person's disability, Code of Practice on Employment 2011, paragraph 5.9.

Constructive dismissal

32 When dealing with a constructive dismissal claim there are two questions to be considered;
Firstly are the circumstances in Section 95(1)(c) of the ERA met (i.e. has there been the dismissal) and if so is the dismissal fair or unfair under Section 98 of the ERA.

33 So far as the first issue is concerned a contract of employment may be brought to an end in a number of different ways. It is only if the termination of the contract amounts to a dismissal in law that an unfair dismissal claim can be pursued. Section 95(1) of the Employment Rights Act 1996 defines the circumstances in which an employee is dismissed. The relevant part states as follows:

> "For the purposes of this Part an employee is dismissed by his employer 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."

34 In order to establish that there has been a dismissal the leading authorities show that the claimant must prove on the balance of probabilities five matters namely: 1. The existence of a relevant express or implied contractual term. 2. There must be a breach of contract on the part of the respondent and this may be either an actual breach or an anticipatory breach. 3. The breach must be sufficiently important (fundamental) to justify the Claimant resigning, or else it must be the last in a series of incidents which justify her leaving. 4. She must leave in response to the breach and not for some other unconnected reason. 5. She must not delay too long in terminating the contract in response to the employer's breach otherwise she may be deemed to have affirmed the contract.

35 The term relied on in this case is the implied term of trust and confidence. The House of Lords in **Malik v. BCCI [1997] IRLR 462** held that the term was an obligation that:
"The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." The implied obligation covers a wide range of situations in which a balance has to be struck between an employer's interests in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited. The burden lies on the employee to prove the breach on a balance of probabilities.

36 In **Hilton v Shiner Ltd Builders Merchants [2001] IRLR 727** the EAT described the words "reasonable and proper cause" as set out in **Malik** as being vital words with which Lord Steyn qualified the test. It was explained thus at paragraph 22: in order to determine whether there has been a breach of the implied term, two matters have to be determined. The first is whether, ignoring their cause, there have been acts which are likely on the face of them seriously to damage or destroy the relationship of trust and confidence between employer and employee. The second is whether that act has no reasonable and proper cause.

37 In **RDF Media Group v Clements [2007] EWHC 2892 (QB)** it was held that where the employer claims that he had reasonable and proper cause for his conduct, it is for the employee to prove the absence of reasonable and proper cause. And that (on the basis of first principles) whether there is reasonable and proper cause must be determined objectively; the subjective intentions of the employer, though admissible in evidence, are not determinative of the issue. (Whilst this judgment has not been followed in part, this aspect of the judgment has not been called into question). See also **Sharfudeen v T J Morris Ltd t/a Home Bargains UKEAT/0272/16** in which the EAT confirmed that a

consideration of whether the employer has acted without reasonable and proper cause is part of the **Malik** test and that this question is to be answered objectively.

38 The case of **Woods v WM Car Services (Peterborough) Ltd [1982] ICR 639** is authority for the proposition that to constitute a breach of the implied term it is not necessary to show that the respondent intended any repudiation of the contract. The tribunal's function is to look at the respondent's conduct as a whole and determine sensibly, reasonably and objectively whether it is such that it would entitle the employee to leave. As the test is an objective one the perceptions of the employee are also not determinative. Even if the employee genuinely but mistakenly views the acts as hurtful and destructive of trust and confidence this is not enough. The act or acts must destroy trust and confidence judged objectively. The case of **Safeway Stores v Morrell [2002] IRLR 9** is authority for the proposition that a finding that there has been a breach of the implied term of trust and confidence will mean, inevitably, that there has been a fundamental or repudiatory breach going to the root of the contract.

39 When considering whether or not the dismissal was fair a tribunal is required to apply the familiar tests set out in section 98 but with the necessary modifications that, since there has been no actual dismissal, firstly the " reason" that has to be identified for the purposes of sub section (1) is the employer's reason for the conduct which has been held to be a repudiatory breach, and secondly that it is, likewise, that conduct whose reasonableness has to be considered under sub section (4), **Berriman v Delabole Slate Ltd [1985] ICR 546**.

Submissions

40 Dr Ahmad, for the respondent, reminded us at the outset of his verbal submissions that the claimant had at the start of this hearing conceded that certain of her complaints of discrimination arising from disability did not amount to unfavourable treatment because of something arising in consequence of disability, and accordingly those complaints must fail. We were then addressed in a great deal of detail on the facts of the case as the respondent asserted them to be. Dr Ahmad urged us to resolve any disputes of fact in the respondent's favour. Mr Smith and Mr Ball, he submitted, were reliable witnesses whereas the claimant was not. In particular it was well documented, he submitted, that the claimant was someone who had problems with her short-term memory and her recollection was likely, therefore, to be unreliable. We were not addressed in any detail on the law.

41 The claimant told us that work had been a part of her life and that she had worked for 30 years and was an independent woman. She told us that she had loved her job and instead of getting support from the respondent to help her to return she had been made to feel useless. She told us that as a result of the

respondent's actions her mental health had deteriorated and said that she had spoken the truth all the way through the tribunal procedure.

Conclusions and further Findings of Fact

Failure to make reasonable adjustments

Knowledge of the disability

42 We firstly considered what, on our findings, the respondent (Mr Smith) actually knew at the relevant time. He knew that the claimant had developed an aneurysm and, on our findings, that she had suffered a subarachnoid haemorrhage, paragraphs 15.24 and 15.36. He knew that the claimant had undergone a very serious operation on her brain and that there had been a slim chance of surviving that operation, paragraph 15.24. He knew that after the operation the claimant had stayed in hospital for several weeks, paragraph 15.24. He knew that the claimant had suffered brain damage which meant that she was unable to drive and had difficulties walking for several months, paragraph 15.38. He knew that she needed physiotherapy to help improve the physical side effects of the haemorrhage, paragraph 15.38. On our findings he also knew that the claimant was experiencing problems with her memory; in particular that she was forgetful and used notes to help her remember her daily tasks, and that she was unable to read books or watch TV series, paragraph 15.39. He had actual knowledge, therefore, of the impairment and actual knowledge that the impairment had caused substantial adverse effects on the claimant's ability to carry out normal day to day activities namely; reading, watching TV, remembering daily household chores and tasks, walking and driving.

43 The same cannot be said for the difficulties that the claimant had processing information and learning new skills. Mr Smith did not have actual knowledge of this and neither did the claimant herself initially. She only began to realise that she had problems in this area on her return to work. Consequently, in relation to constructive knowledge of the difficulties in processing information and learning new skills, had the respondent made enquiries of a medical professional, or indeed the claimant herself, on or before the claimant's return to work there was no evidence before us to suggest that the respondent would have been advised that the claimant had these difficulties. Accordingly, we conclude the respondent has proved it was unreasonable for it to be expected to know about these particular substantial adverse effects.

44 As to the problems with the claimant's eyesight, the evidence concerning this was so limited that we are not in a position to make any findings of fact concerning what, if any, the adverse effects on the claimant's day to day activities were. We say this because the claimant led no evidence in her witness statement as to what the effects of the haemorrhage on her eyesight were. There

was reference within the documents to the claimant suffering some blurred vision, and in the impact statement there was mention of the claimant going short sighted in one eye and long sighted in the other, but nowhere in the documents we were taken to was there a description of what exactly was wrong with the claimant's eyesight and, more importantly, how serious the effects were, how it affected her day to day, and when it started and when it stopped. It follows from this that we cannot make any findings as to what Mr Smith knew, actually or constructively, concerning any substantial adverse effects on day to day activities caused by the claimant's eyesight problems.

45 The real issue, it seemed to us, was whether Mr Smith had actual or constructive knowledge at the relevant time that any of the substantial adverse effects about which he knew were long term. For these purposes, of course, the definition of long term includes likely to last 12 months or more or likely to last the rest of the claimant's life. Some of the substantial adverse effects about which he knew were in fact short term; specifically the claimant's inability to drive and her difficulties with walking. These issues had resolved completely, so far as we know, by August 2019. Those adverse effects that are long term about which he knew are the claimant's short term memory problems.

46 Mr Smith did not have actual knowledge at the relevant time that the claimant's short term memory problems, in particular her inability to read books, watch television series and remember daily chores, were long term. However, we conclude that the respondent has not shown that it was unreasonable for it to be expected to know at the relevant time that these substantial adverse effects were long term; i.e. were likely to last 12 months or more. We reach this conclusion for the following reasons. Mr Smith knew of the severity of the claimant's illness, he knew she had nearly died and he knew the amount of time that she required to have off sick from work after the haemorrhage (4 months). He knew, therefore, of the cause of the adverse effects and the severity of the illness, both of which are factors which make it more likely that the substantial adverse effects may well last 12 months or more. Additionally, he knew that over 4 months after the haemorrhage had happened the claimant had ongoing problems with reading, watching TV and remembering daily tasks, a timescale which does not suggest that recovery from these issues would be over the short term and a timescale that stands in contrast to the relatively rapid recovery in respect of physical capabilities. Moreover, it is important to remember that an employer must do all they can reasonably be expected to do to find out if a worker has a disability. In this case a simple question to a medical professional would have informed the respondent that recovery tends to be slow and what recovery there is tends to take place over a period of one to two years, paragraph 15.19.

<u>The PCPs</u>

<u>Did the respondent apply a PCP of a requirement to return to work without a risk assessment</u>

47 We concluded that the claimant has not proved that a PCP was applied to her of being *required* to return to work without a risk assessment. This is not a case in which it can be said that the claimant was requested to return to work without a risk assessment or indeed that there was an expectation or assumption that she would do so. The reality, on our findings of fact, was that no one (neither the respondent nor the claimant) turned their minds to the issue of a risk assessment at all, paragraph 15.48. It was an omission. An omission can constitute a *practice* but there was absolutely no evidence led by the claimant (or the respondent) which would have enabled us to find as a fact that bringing people back to work without a risk assessment was a practice adopted by this respondent. There was no evidence to suggest that this was something that had happened to anyone else in the past or that it would happen again in the future if a similar situation arose. On the evidence that was before us it was a one off omission in relation to the claimant alone. That cannot be a PCP. Accordingly, this claim fails.

Did the respondent apply a PCP of a requirement to return to work without an Occupational Health Report

48 We concluded that the claimant has not proved that a PCP was applied to her of being required to return to work without an occupational health report. This claim fails for exactly the same reasons as the complaint that there was a requirement to return to work without a risk assessment. There was simply no evidence to support a finding that this was either a requirement or a practice adopted by the respondent. Accordingly, this claim fails.

Did the respondent apply a PCP to the claimant of requiring her to return to work with no return to work strategy in place?

49 This complaint fails on the facts. There was a return to work strategy in place. As set out above it had been agreed by the respondent and the claimant that she would return on a phased return to work over 5 weeks, working 2 days a week and supported by Mr Ball whilst she did so, paragraphs 15.43 and 15.44. Whether that strategy was adequate or not is another matter, but that is not an issue that falls to be considered as part of this complaint.

Did the respondent apply a PCP that the claimant return to work to increased and altered duties?

50 We conclude that the claimant has proved that this PCP was applied to her. As set out above, while she was absent from work Mr Ball introduced entirely new methods of working to the role which meant that the daily tasks of the role were substantially different to those which the claimant had been carrying out, paragraphs 15.32 and 15.33. We have also found as a fact that there was an increase to the duties, paragraph 15.34. Moreover, the claimant

was expected and required, when she returned to work, to continue to work in this way, paragraph 15.46.

51 The substantial disadvantage which the claimant asserted this caused her was stress, leaving her feeling unable to work, her health had to come first and she had to resign. The claimant's case was that what it was about the disability that gave rise to these disadvantages was that she needed to avoid stress where possible to keep her blood pressure low in order to manage the ongoing risk of a bleed/ the coil in her head. It was the claimant's case that the requirement to return to increased and altered duties caused her a great deal of stress and, because of her particular vulnerability to stress, this left her unable to continue in the role. We have found as a fact that there was a need for the claimant to avoid stress and keep her blood pressure low, paragraph 15.18, to manage the ongoing health risks. We have found as a fact that the requirement to return to altered and increased duties caused the claimant a great deal of stress and worry, paragraphs 15.49, 15.50, 15.52, 15.54, 15.55, 15.61 and 15.62. We have found as a fact that the stress on the claimant was so significant that she felt she could not remain in post; her health had to come first and consequently she decided that she had no option but to resign, paragraph 15.67. Accordingly, the claimant has proved the disadvantages contended for, which were clearly substantial disadvantages given the potential health risks and the inability to continue in role. Indeed, the respondent did not seek to suggest that if we were to find the claimant had proved these disadvantages they were anything other than substantial.

52 The next question for us was whether Mr Smith (or anyone else in the respondent) knew, either actually or constructively, that the claimant was likely to be placed at these disadvantages by her disability as a result of the application of the PCP. In terms of the claimant's particular vulnerability to stress, the respondent did not actually know that the claimant needed to avoid stress to keep her blood pressure low to manage the risk of a bleed and to manage the coil in her head. However, we concluded that the respondent could not show that it was unreasonable for it to be expected to know that. We reached that conclusion for two reasons. Firstly, whilst the respondent may not have actually known the specifics as to *why* the claimant was particularly vulnerable to stress, Mr Smith was clearly aware in more general terms that stress was something she needed to avoid, hence his supportive text message on 9 September in which he said;

I am also very conscious that you are not to be under any stress and I want to support you in any way I can, paragraph 15.66.

He was on notice, therefore, that the claimant needed to avoid stress. Additionally, a simple question to the claimant about why she needed to avoid stress would have given the respondent the required knowledge, given that this was something about which the claimant herself was particularly concerned, paragraph 15.18.

53 As to the requirement to return to altered and increased duties caused the claimant a great deal of stress, that was self evident to all concerned. By day 2 of her return the claimant had told Mr Smith that she was struggling with the spreadsheets and did not understand what she was supposed to do and that she was finding it really hard, paragraph 15.54. Day 3 she told him she was struggling with the formulas, paragraph 15.55. By day 4 of her return the claimant was tearful and upset with Mr Smith and told him that she could not understand the role, paragraph 15.55. He knew that on day 5 she had left work early very upset, and he knew the level of difficulty she was having adapting to the changes, hence his text to her that day starting with the words;
"I am so sorry the return has been so uncomfortable," paragraph 15.66. He had actual knowledge, therefore, that the requirement to return to work to altered and increased duties was causing the claimant a great deal of stress.

54 In terms of knowledge that the claimant would feel unable to remain in her job and would decide that she had to resign, Mr Smith did not have actual knowledge of that (until the resignation happened, of course). However, we concluded that the respondent could not show that it was unreasonable for it to be expected to know that. We reached that conclusion for the following reasons.

55 As we have set out above, an employer must do all it can reasonably be expected to do to find out, not just if a worker has a disability, but also whether any arrangement of theirs is likely to place the worker at a substantial disadvantage. In this instance, given the length of the claimant's sickness absence and the severity of her illness, we concluded that it would have been reasonable for the respondent to make enquiries and obtain medical advice before the claimant returned to work. The respondent, after all, was attempting to rehabilitate back into the workplace an employee who had almost died. Had the respondent made enquiries they would very likely have been advised that, in order for the return to work to be successful, the claimant needed to keep her blood pressure low and needed to avoid stress. It would also have been reasonable for the respondent to ask for advice on what effect the changes to the claimant's role would have on her and, had they made this enquiry, the respondent would very likely have been advised that the claimant was unlikely to be able to cope with such changes.

56 Moreover, the vast majority, if not all, of this information could readily have been elicited by the respondent from the claimant herself. It would have been a simple (and eminently sensible) step to explain to the claimant what changes had been made to her role in her absence and to ask her opinion of how likely she was to be able to cope (or not) with those changes. These would have been reasonable enquiries to make. Had the respondent made these enquiries we have little doubt that the claimant would have told Mr Smith that she was unlikely to be able to cope with substantial changes to her role. Moreover, even if it could be said, contrary to our primary conclusion, that it was not reasonable for the respondent to make these enquiries of the claimant before she returned to work,

it clearly would have been reasonable to make these enquiries of her once she had returned. As set out above, by day 2 of the return the claimant had told Mr Smith that she was struggling with the spreadsheets and did not understand what she was supposed to do and that she was finding it really hard, and by day 4 she was visibly and openly distressed and had told him that she could not understand the role. Given that Mr Smith knew the claimant had managed perfectly well in the role for 12 years this should have alerted him to the possibility that the claimant was not able to cope with the changes he was requiring of her and it would have been reasonable for him to explore with her at this point whether she would be able to manage the changes and remain in role with them in place, which he did not do.

The adjustment contended for

57 We found it convenient to consider the last adjustment contended for by the claimant first of all - which was that the new duties should have been removed from the role when she returned to work. We concluded that this was a reasonable adjustment for the respondent to make. It would have been effective at removing the substantial disadvantage because, if the new duties had been removed, and the claimant had returned to a role with which she was comfortable and very familiar, she would not have developed the stress caused by the requirement to return to altered and increased duties. As it was her concern about these stress levels which caused the resignation it follows from this that she would not have decided that she needed to resign to avoid this particular source of stress. It was, moreover, an entirely practical step for the respondent to take. Sage was already in place and available to be used immediately and the job had been carried out successfully using Sage for 12 years. In fact, of course, the person now carrying out the claimant's role has also reverted to using Sage, paragraph 15.78 above. There were no costs associated with making the adjustment and no evidence was led to suggest that it would have caused any disruption to the respondent's business. It is also notable that the respondent did not seek, before us, to argue that this was not a reasonable adjustment for it to make. Accordingly, this claim succeeds.

58 The other adjustments contended for by the claimant were (i) that the respondent should have allowed her to work one day a week and (ii) permitted her to undertake duties limited to HR and payroll. In fact, the second adjustment incorporated the first in that it was the claimant's case that she could have come in to work one day a week to carry out some HR duties and then an additional two days at the end of each month to help with payroll. Accordingly, it was only necessary for us to consider the second of these adjustments.

59 We concluded that the respondent has shown that this was not a reasonable adjustment for it to make. Firstly, it would not have been effective at removing the substantial disadvantage. As set out above the substantial disadvantage was stress caused by being required to return to increased and

altered duties and an inability to cope with that stress leading the claimant to resign. Given that Mr Ball had introduced an Excel workbook for the payroll work the claimant would still have been required to return to altered duties (the Excel spreadsheets) to carry out payroll, and it was not part of this complaint that the respondent should *both* have allowed the claimant to come in to do payroll work *and* allowed her to revert back to the old way of working. Moreover, and significantly, this adjustment would have required the respondent to create a role for the claimant and we accept that it was not practicable for them to do so, or at least it was not practicable until they had advertised for, and filled, the claimant's role. It would have been necessary to see what skills the new recruit brought with them to the role in order to establish whether it was necessary for the respondent to create an additional post to cover HR and payroll, paragraph 15.70. Accordingly this part of the claim fails.

Section 15: discrimination arising from disability

60 We have already set out our conclusions on knowledge for the purposes of the reasonable adjustments claim and we do not repeat those conclusions here. Suffice to say that on our conclusions the respondent had the required knowledge of the claimant's disability for the purposes of this claim.

61 The claimant conceded at the start of this hearing that the first four of her complaints were not in fact complaints of unfavourable treatment because of something arising in consequence of disability, and accordingly these complaints are dismissed.

The respondent failed to consider the claimant's request to return part-time one day a week carrying out HR work

62 The relevant decision maker is Mr Smith. This complaint fails on the facts. Mr Smith did consider the claimant's request to return one day a week but decided that it would not be possible to pursue this until he had recruited to fill the claimant's role, paragraph 15.70.

The respondent did not allow the claimant to work flexible hours

63 The claimant led no evidence at all on this issue. There was simply no suggestion that there had been a request to work flexible hours which the respondent had turned down. Accordingly, this complaint fails on the facts.

The claimant's constructive dismissal

64 As set out above, it was agreed that for the purposes of analysing this complaint we would need to identify the conduct, if any, which we had concluded amounted to a fundamental breach of contract and then consider the respondent's reasons for those acts, and whether those reasons were because

of something that arose in consequence of the claimant's disability. Accordingly, this complaint was best analysed once we had reached our conclusions on the constructive dismissal claim.

Constructive unfair dismissal

65 The claimant had identified six matters which, she said, taken together cumulatively breached the implied term of trust and confidence. As set out above, these were:

1 No risk assessment was carried out on the claimant's return to work.
2 No occupational health report was commissioned.
3 No return to work strategy was in place.
4 The claimant's duties had been increased and changed when she returned to work.
5 The respondent failed to appreciate the difficulties with the new job that the claimant described during various meetings.
6 The respondent failed to confirm to the claimant the changes in her terms and conditions of employment in breach of section 4 of the ERA.

66 Of these, complaints 3 and 6, we conclude, essentially fail on the facts. The respondent did have a return to work strategy in place, namely the phased return to work and the agreement that Mr Ball would remain in post during the phased return to assist the claimant. Likewise, there was no failure to confirm to the claimant a change to her terms and conditions in breach of section 4 the ERA. This complaint related to the claimant's contention that the respondent had changed her job from Financial Accountant to that of Management Accountant. We have found as a fact that this was not the case. The role remained that of Company Accountant and, in fact, the principal duties of the role remained as set out in the claimant's job description, paragraph 15.32.

67 Item 5 was difficult to understand as it was originally drafted on the list of issues because it described behaviour on the part of the claimant, not the respondent. As originally drafted it was: "the claimant says that at several meetings she explained that she was not able to get to grips with the new job and on 9 September at a meeting with James Ball who was covering the claimant's absences she gave verbal reasons why she was not able to do different tasks allocated and she resigned verbally on 10 September." We therefore asked the claimant for clarification of this complaint. The claimant told us that it was about how the respondent had responded to her during the meetings, they did not appreciate the difficulties she was describing to them. The claimant was not able to provide any more clarification than this. This did not appear to us to be a complaint that the respondent had failed to make reasonable adjustments, it appeared to be a more general complaint about how the respondent had reacted

in the meetings when the claimant had raised her concerns. The evidence as to what was said and done at these meetings was a bit limited. We have found as a fact that the respondent offered the claimant internal or external training on Excel, and that there was a suggestion made that Mr Ball could write a user manual for the claimant, paragraph 15.56. That is not conduct, we conclude, that, judged objectively, can be said to be conduct that contributed to a breach of the implied term. These were offers of help designed to assist the claimant.

68 However, as we have already set out at paragraph 56 above, we have concluded that the claimant's words and conduct during these meetings should have alerted Mr Smith to the possibility that the claimant was not able to cope with the changes he was requiring of her and it would have been reasonable for him to explore with her at this point whether she would be able to manage the changes and remain in role with them in place, which he did not do. In this sense, therefore, on our findings the respondent did not appreciate the difficulties the claimant was describing during the meetings and in this sense this is a factually accurate complaint. We concluded that, judged objectively, this was conduct which could properly be said to contribute to a breach of the implied term.

69 We reached this conclusion for the following reasons. In three of the meetings the claimant clearly and explicitly communicated to the respondent that she was in difficulty. By day 2 she had told Mr Smith that she was struggling with the spreadsheets and did not understand what she was supposed to do and that she was finding it really hard, paragraph 15.54. Day 3 she told him she was struggling with the formulas, paragraph 15.55. By day 4 of her return the claimant was tearful and upset with Mr Smith and told him that she could not understand the role, paragraph 15.55. The claimant had told Mr Smith by day 4 of her return, therefore, that she was now unable to understand her role in circumstances where he knew that she had worked successfully in that role for many years prior to this. Whilst some offers of assistance were made, see above, the respondent did not properly engage with the issues that the claimant was raising and left the claimant to continue to try to master Excel. Moreover, this was done, as we have already stated above, when it was self-evident that the claimant's levels of stress and distress were rapidly becoming worse. That was a very serious matter when set against the context of the claimant returning to work after a very lengthy period of sickness absence and an extremely serious illness. Employers have a significant duty of care towards all employees but great care was needed in relation to the claimant's return to work, given her particular circumstances. In this context the failure to appreciate the difficulties that she was describing was a serious failure.

70 Accordingly, we then had to consider whether the respondent had reasonable and proper cause for this omission. We concluded that the claimant had proved an absence of reasonable cause. We do so for the reasons that we set out at paragraph 56 above.

The claimant's duties had been increased and changed when she returned to work

71 This is factually accurate, on our findings of fact. Of course, it is not necessary to show that the respondent intended any repudiation of the contract. The tribunal's function is to look at the respondent's conduct as a whole and determine sensibly, reasonably and objectively whether it was such that it would entitle the employee to leave. Whilst it is always necessary to consider whether the act was a breach objectively viewed, this is an assessment that should be made in light of all the known facts.

72 We concluded that, judged objectively, increasing and changing the claimant's duties was conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence. We concluded this for following reasons. Firstly, the changes made were very significant. Whilst we have accepted the respondent's evidence that the overall deliverables of the role remained the same, day to day the claimant's job looked very different indeed. She was required to produce the management accounts and a suite of additional management information using Excel with which she had virtually no familiarity at all. She was required to learn an entirely new skill set in order to produce information which it was important was accurate. She was no longer required to use, or was not required to use regularly, the software, Sage, that had been at the core of her job for many years, paragraphs 15.33, 15.34 and 15.35. This change was, moreover, presented to her without warning as a fait accompli on her first day back at work, paragraphs 15.47 and 15.49, and the context in which this was done was significant. This is a claimant who was returning to work after a 5 month absence having nearly died and having suffered a serious brain injury. These were wholesale changes made immediately upon the claimant's return, and whilst she was on a phased return to work.

73 Accordingly, we then had to consider whether the respondent had reasonable and proper cause for changing and increasing the claimant's duties in this way. The respondent did not put forward a positively asserted case on why a decision was made that the claimant should continue with Mr Ball's methods of working, although there were hints within the documents that Mr Smith liked the new method of presentation of information. But in the absence of evidence from the respondent on this issue we concluded that the claimant had proved an absence of reasonable and proper cause. We say this for the following reasons. The job had seemingly been done well by the claimant for the last 12 years using Sage. Additionally, Mr Ball himself told us in evidence that the Excel reports were not essential because the information they contained could be produced via Sage, paragraph 15.47, and it was also not disputed that the person now doing the role has reverted to using Sage, paragraph 15.78. In such circumstances it is difficult to see on what basis there could be said to be reasonable and proper cause for making wholesale changes which were neither necessary nor maintained by the respondent, and to do so without warning when the claimant

was on a phased return to work after 5 months sickness absence following an exceptionally serious illness. It was not reasonable, in this context, to make changes that were neither essential nor necessary immediately upon the claimant's return to work.

Failure to carry out a risk assessment/ obtain OH advice

74 On balance, we do not conclude that the failure to carry out a risk assessment was something which, objectively judged, could be said to contribute to a breach of the implied term. Risk assessments are normally used to identify hazards within the workplace; they are not generally deployed when a person is returning to work from sick leave. In contrast it is, of course, fairly standard practice to obtain occupational health advice when an employee is returning from a period of sickness absence, and it was not disputed that the respondent did not obtain such a report.

75 We conclude that this can properly be said to be something that contributes to a breach of the implied term, given the circumstances of this case, in particular the very serious nature of the illness that the claimant had suffered. It is one thing, perhaps, for an employer to fail to take steps to inform itself of what help or assistance an employee might need if they are returning from a mild or moderate illness but another thing entirely to fail to take such steps when an employee is returning to work having suffered a cataclysmic event in which they nearly lost their life and which had left them with brain damage.

76 No explanation was advanced by the respondent as to why no occupational health report was obtained. In fact, as we set out above, it appeared to be something to which no one addressed their minds. Whilst the respondent is a relatively small company, which did not have the benefit of an in house HR specialist, it did have access to HR advice via Citation, and obtaining such a report would have been a perfectly straightforward, reasonably inexpensive, step to take. In the circumstances we conclude that the claimant has proved an absence of reasonable and proper cause for this omission.

77 Accordingly, the claimant has proved a fundamental breach of contract. The change to the claimant's duties was, on our conclusions, serious enough by itself to breach the implied term of trust and confidence, and the failure on the respondent's part to appreciate the difficulties that the claimant was describing to them during the meetings and the failure to obtain an occupational health report contributed further to that breach. We have found as a fact that the claimant resigned because of the changes that had been made to her role, because of the respondent's failure to appreciate the difficulties that she had described to them and because of the impact that those changes had on her (stress) and the risks that caused to her health, paragraph 15.67. Accordingly, the claimant has proved that, in part, the fundamental breach caused her to resign.

78 We do not, for the sake of completeness, find that the claimant resigned in part because of the failure to obtain an occupational health report. The claimant led no evidence on this herself and there was no hint within her resignation letter that it was one of the reasons for her resignation.

79 Whilst affirmation was identified as an issue on the list of issues this was not pursued in any way by the respondent before us, nor dealt with in submissions. For the avoidance of doubt we did not consider that the claimant could be said to have affirmed the contract. She resigned very speedily after the breach and there was simply no conduct on the part of the claimant from which affirmation could be inferred.

80 Likewise, it was said on the list of issues that it was the respondent's case that if we were to find that the claimant had been dismissed then there was a potentially fair reason for the dismissal. As we set out above, when considering whether or not a dismissal is fair, a tribunal is required to apply the familiar tests set out in section 98 but with the necessary modification that, since there has been no actual dismissal, the "reason" that has to be identified for the purposes of sub section (1) is the employer's reason for the conduct which has been held to be a repudiatory breach (and which caused the resignation) – i.e. in this case the respondent's reasons for changing the claimant's duties and for failing to appreciate the difficulties that she described in the meetings.

81 In relation to the reason for the changes to the role the respondent led no evidence on this, as we have already commented. It seemed, from the documents, that Mr Smith liked the new method of presentation of information but that by and of itself would not be sufficient to prove that some other substantial reason was the reason for dismissal. A preference for information in a certain format (particularly when that information was neither necessary nor essential) cannot possibly amount to a substantial reason. There was no reason advanced by the respondent for the failure to appreciate the difficulties that the claimant described, as we have already stated. It is for the respondent to prove a potentially fair reason for dismissal and in the absence of any positively asserted case on the respondent's part we do not find that the respondent has established a potentially fair reason for the dismissal. Accordingly, the unfair dismissal complaint succeeds.

Section 15 constructive dismissal

82 For the purposes of this complaint it is necessary to have in mind the matters that we have concluded caused a breach of the implied term, and in response to which the claimant resigned, namely the respondent's decision to require the claimant to take on changed and increased duties and the failure to appreciate the difficulties she described.

83 We are firstly required to consider the reason why this happened and we found it convenient to consider the change and increase in duties first of all. It was Mr Smith's decision that the claimant should adopt Mr Ball's methods of working. As we have already commented, this decision appeared to be made by Mr Smith because he preferred the format in which the management information was being produced, which was more detailed and analytical, and accordingly we find that this was the reason for the treatment complained of. We next had to consider whether his preference for information in that format arose in consequence of the claimant's disability and we concluded that it did not do so. We were mindful that there can be more than one link in the chain when considering whether the causative factor for the treatment complained of arises in consequence of disability. But, it seemed to us, Mr Smith likely acted as he did because he preferred information in that format and he likely preferred information in that format because it was more useful for the respondent, neither of which could be said to be something arising in consequence of the claimant's disability.

84 As to the reason why the respondent failed to appreciate the difficulties that the claimant described to them during the meetings with her, there was no evidence led at all as to why this occurred and neither was this an issue raised in cross examination with the respondent's witnesses. There was nothing within the documentation to help us with this issue either. It was not the case, for instance, that it could be said that the respondent had failed to appreciate the difficulties that the claimant described because she had struggled to articulate those difficulties and that this struggle to communicate arose in consequence of disability. To the contrary the claimant was very clear during the meetings as to what her issues were. Doing the best that we could with this aspect of this claim we concluded that there were no facts from which we could conclude that this omission arose because of something arising in consequence of the claimant's disability. Accordingly, this claim fails.

Employment Judge Harding
Dated: 11 May 2021