EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107723/19 (V)

Held on 1, 2 and 3 February and 21, 22 and 23 April 2021

Employment Judge N M Hosie
Members K Pirie
A N Atkinson

A	**Claimant** **Represented by:** **Mr K McGuire, Advocate** **Instructed by:** **Mr F H Lefevre** **Solicitor**
B	**Respondent** **Represented by:** **Mr J Barron, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:-

(1) the respondent unlawfully discriminated against the claimant by failing to comply with its duty to make reasonable adjustments;

(2) the claimant was constructively and unfairly dismissed by the respondent; and

(3) a remedy hearing should be fixed.

REASONS

Introduction

1. The claimant, "A", brought complaints of and disability discrimination (a failure to make reasonable adjustments in terms of s.20 and 21 of the Equality Act 2010) and constructive unfair dismissal. The respondent accepted that the claimant was disabled in respect of her "bodily fluids phobia". Otherwise, the claim was denied in its entirety.

The evidence

2. We first heard evidence from the claimant. We then heard evidence on behalf of the respondent from:-

    - Mr M, Principal of Support for Learning at the School
    - Miss A, the Depute Head Teacher at the School
    - Mr C, Head of Resources and Performance
    - Mrs C, HR Adviser for the School and its "network"

    A Joint Bundle of documentary productions was also lodged by the parties ("P").

The facts

3. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following findings in fact. The claimant commenced her employment with the respondent at the School on 19 November 2014. She was employed as a Pupil Support Assistant ("PSA"), working 20 hours per week. Her Contract of Employment was one of the documentary productions (P35). The "Job Profile" for a PSA was also produced (P185). Her duties on a "day-to-day" basis, involved providing support to the class teacher, mainly with pupils aged 14 and over. The Job Profile contained "core responsibilities/duties" which included the following provisions:-

"

- *Encourage pupil and dependants, and with appropriate training, assist with personal care and support physical needs……*

The following duty is performed on a voluntary basis:

- *Attend to individual health care or medical needs, including the administration of "medicines.*"

Reporting structure

4. The claimant reported to Mr M, the Principal Teacher of Support for Learning. He in turn reported to the Depute Head Teacher, Miss A and she in turn reported to the Head Teacher, Mrs P. There were normally between 9 and 10 PSAs at the School.

Claimant's disability

5. The claimant suffers from a bodily fluids phobia. It was accepted by the respondent that this constituted a disability in terms of the Equality Act 2010 ("the 2010 Act").

6. We should record at this stage that the claimant gave her evidence in a measured, consistent and thoroughly convincing manner and presented as credible and reliable.

7. From the start of her employment at the School, the claimant made the respondent aware of her phobia. In the first week of her employment, when preparing the timetable for a male Child C who was disabled and around 13 years of age, Mr M asked her if she wanted to do "top or bottom". What this meant was that the claimant could either deal with "enteral tube feeding", which is administered orally, or changing incontinence pads. The claimant agreed, reluctantly, to carry out the enteral tube feeding. However, she advised Mr M that if she had been aware that she was required to do so she

would not have accepted the job. Mr M accepted that he had not advised her of this at interview. The claimant had a good job at the time. One of the reasons for her applying for the job at the School was that it was near her home. The claimant continued to carry out the enteral tube feeding of Child C for a number of years, but only did so with reluctance.

Child E

8. The situation changed, however, with the arrival of Child E at the School. Around March or April 2018 the claimant was informed that Child E, a female pupil aged 12/13 years, would be coming to the School from her primary school at the start of the 2018/2019 academic year. The claimant was informed that Child E had severe and complex disabilities and was incontinent. It was clear to the claimant that she would require "intimate care".

9. When the claimant expressed concern to Mr M about caring for Child E, due to her phobia of dealing with bodily fluids, he advised her, "*it's in your contract*" which she took to mean that she was obliged to do it.

10. By way of preparation for Child E moving to the School, other PSAs from the School had been to visit Child E at her primary school to assist with her transition.

11. The claimant became increasingly concerned with the impending arrival of Child E at the School as it was unclear whether or not she would be asked to provide intimate care for her. As the claimant put it, "*it was left in the air*".

12. The claimant raised her concerns with Mr M on a number of occasions. She wanted to remind him of what she could and couldn't do by way of care. She advised him on one occasion, "*I hope you remember I can't help with nappy changing and it is upsetting me*", or words to that effect; he replied, "*I hear*

you but I can't promise you anything as it's in your contract", or words to that effect.

13. Miss A, the Depute Head Teacher, also spoke to the claimant about Child E. She asked the claimant if she wanted to care for Child E and the claimant advised her that she did not.

14. On another occasion, in June 2018 around the last day of term, the claimant raised her concern again with Miss A. She told her that she didn't think her phobia was being taken seriously and that she was, *"so worried about it".* She said that she was worried she would be, *"forced to change a nappy".* In response, Miss A told her, "*I didn't say you'd be forced to change a nappy but it's in your contract.*", or words to that effect.

15. The claimant wasn't asked to provide care for Child E when she arrived at the School at first. The claimant sensed some resentment from the other PSAs that she hadn't been required to care for Child E. However, her position was that she had not refused to deal with Child E, at all, only that she wasn't prepared to change her "nappies".

Staff meeting on 3 September 2018

16. This proved to be the last day the claimant worked at the School. As she made her way into the School from the car park she was approached by one of her colleagues who questioned her, *"aggressively"* as to why she was not prepared to care for Child E.

17. Shortly after that there was a staff meeting chaired by Mr M. The care of Child E was discussed at the meeting. Mr M said that everyone would be caring for Child E, *"in precisely the same way".* The claimant felt that that comment was *"aimed at her"* and that she was being *"bullied"* by her

colleagues, one of whom, she alleged, *"sat pointing at Mr M's notepad telling him what to ask next".*

Claimant's meeting with Mr M on 3 September 2018

18. The claimant said she was distressed, "shell shocked", as she put it, by the events of that day and after the meeting she spoke to Mr M about her concerns. Mr M made a hand-written note of what was discussed (P.188/189). We were satisfied that the note was reasonably accurate. It was signed by both of them. The following are excerpts:-

"*A feels unable to change nappies – Child E or Child C. Has never made a secret of this and has managed to do "top" for Child C and avoid "bottom" altogether. A feels "personal care" is a vague meaningless term and had she realised it entailed bodily fluids would never have accepted the job……..*

A feels this issue is causing her to be ostracised and bullied by other members of the department……

A joining Unison today and has every intention of fixing this as far as she needs to."

19. The claimant became unwell that afternoon. She had panic attacks and was sick. She was signed off work due to ill health.

Claimant's e-mail on 4 September

20. On the following day, 4 September, the claimant sent a lengthy e-mail to Mr M setting out her concerns about her duties because of her *"severe phobia",* the detrimental effect it was having on her health and the divide that it had caused between her and her colleagues (P.190-193).The following are excerpts:-

"*Further to our discussion yesterday I am writing this e-mail because the pressure I have been under at work got to me at work last night at home. After discussing the day's events for 4 hrs with my fiancé I had a full blown*

anxiety attack which lasted over an hour. For the 2nd night in a row, I've had 3 hrs sleep and I'm sure you'll agree that's not a nice place to be……

So, as you can imagine, I was naturally horrified when you casually asked on week 1 if my preference was 'top or bottom' of Child C. I remember feeling severely duped. Panicking I wondered if I could get my old job back. I have a severe phobia of other people's bodily fluids. And I made this clear to you immediately. I was angry and I guess in shock. Reluctantly I agreed to 'top' rather than refuse entirely. I have done that, reluctantly and trembling and anxious ever since. I made it very clear to you then that I CANNOT change other people's children's nappies. Your words: 'it's fine, it's fine, it's fine. So long as you do top half you won't have to do the bottom half. Don't worry. Yeah, I'm sorry, I'm a bit crap at that, I need to learn how to tell people at interview'…….. .

So anyway, it appears that all of your PSA's except me are prepared to change Child E's nappies, wipe her drool, and feed her. I think you're incredibly fortunate it's only me. You've no idea how sorry I am that I can't 'just do it' as you put it but I can't. Last week you've made me feel totally inadequate when you questioned, 'how on earth I managed to change my own children's nappies'. I don't think that was fair."

21. Mr M forwarded the claimant's e-mail to Miss A, the Depute Head Teacher. She replied to the claimant by e-mail on 7 September 2018. She invited the claimant to a meeting (P.204).

Meeting on 13 September 2018

22. The claimant attended the meeting on 13 September. Also present were Miss A and Mr C and a representative from the respondent's HR Department.

23. Prior to the meeting, the claimant had contacted HR to clarify her position concerning a return to work. She was advised that she was entitled to a one-to-one meeting with someone from HR but that never happened.

24. She also made enquiries with regard to the respondent's Policies and the issue of whether she was obliged, in terms of her Contract, to deal with all of Child E's needs, including the need to change her incontinence pads.

25. Mrs C, HR Adviser, sent an e-mail to the claimant on 10 September 2018 at 12:07 in the following terms (P.205):-

"*I have attached your job profile* (P.185)*. The profile states - The following duty is performed on a voluntary basis:*

- *Attend to individual healthcare or medical needs, including the administration of medicines.*

From time to time there may be care needs for children that PSA's may feel uncomfortable with and we encourage that appropriate support and training is given to the PSA's to ensure that we can meet the needs for the young person in School.

In the first instance I would encourage you to speak with your line manager to discuss any concerns you have and what can be done.

I have also given the above advice to the DHT (Miss A) at the School."

26. The claimant replied as follows at 12:55 (P.205):-

"*Thank you so much for this. You have no idea how much of weight you have just lifted from my shoulders.*

I would like to send you a copy of the e-mail I sent my boss, Mr M, last Tuesday morning (P.190). This was the result of team pressure being put on me to change nappies and deal with a SEVERELY disabled child. The pressure became way too much for me and I had a anxiety attack which lasted 1hr.

I'm hyper aware that breaking any protocol considerably could jeopardise my position as PSA a job which I love so before forwarding you this for opinion and advice I want to ensure it is completely ok to do so."

27. She then sent another e-mail to Mrs C at 13:00 in the following terms (P.205):-

"*……..and (Mrs C) before I dance around the room in sheer happiness can I just clarify that changing nappies of disabled children would come under the banner of medical need?*"

28. Mrs C replied as follows on 12 September at 09:25 (P.205):-

"*I would say that this comes under individual health care.*

If there is a need to support this young person and PSA's have been asked to attend to personal care then we are required to ensure we have employees who are able to carry out this task. PSA's are on cluster contract and we may have to ask you to move to another School in order that we have PSA's who are able to do this task in School."

29. The claimant replied later that day at 11:46 as follows (P.206):-

"*I see. That is not what I would wish for. There are 8 PSA's in (the School) and as far as I'm aware all but me are currently willing and able to change nappies.*

Surely I have the right to remain at (the School) doing my other good work with pupils and not penalised and uprooted for one thing I have never been able to do."

30. The claimant had copies of some of the respondent's Policies with her at the meeting on 13 September and she maintained that were the respondent to require her to carry out changing Child E's incontinence pads it would be in breach of its own Policies. She produced the respondent's "Intimate Personal Care" Policy (P.59) and showed it to Miss A.

Intimate Personal Care Policy

31. The Policy contains the following provisions (P.62/63):-

"***Definition of Intimate Care***

Intimate Care is any care which involves washing, touching or carrying out an invasive procedure that most children/young people would carry out for themselves but which some are unable to do due to physical disability, additional support needs associated with learning difficulties, medical needs or needs arising from the child's development.

Intimate Care may involve help with drinking, eating, dressing and toileting. Help may also be needed with changing stoma bags, catheterisation and other such processes. It also includes the administration of invasive medication and some Therapy programmes.

Examples include:-

- *Washing*
- *Dressing and undressing (including swimming)*
- *Support eating (including tube feeding);*
- *Administering medication (e.g. rectal diazepam)*
- *Toileting and menstruation*
- *Therapy exercise programme/moving and handling*
- *Massage – intensive interaction*
- *Dental hygiene*
- *Care of tracheostomy*
- *Applying topical medicines e.g. sun creams, eczema creams*

In most cases Intimate Care will involve procedures to do with personal hygiene and the cleaning of equipment associated with the process. In the case of a specialised procedure only a person suitably trained by NHS Grampian staff and assessed as competent should carry out the procedure.

Staff providing Intimate Care must be aware of the need to adhere to good Child Protection practice in order to minimise the risk for both children/young people and staff. It is important that staff are supported and trained so that they feel confident in their practice."

32. The Policy then goes on to deal with "Roles and Responsibilities" (P.63) and "Management Responsibilities" (P.64).

33. The respondent also had with her another Policy entitled, "Supporting Children and Young People with Health Care Needs and Managing Medicines in Educational Establishments" (P.141). This contained the following provision at P.153:-

"*4.6. Intimate and Invasive Treatment*

Some School staff are understandably reluctant to volunteer to administer intimate or invasive treatment (e.g. administration of rectal Diazepam)

because of the nature of the treatment, or fears about allegations of abuse. ***Accordingly, Parents and Head Teachers must respect such concerns and should not put any pressure on staff to assist in treatment unless they are entirely willing***……..”

Minutes of the meeting on 13 September 2018 (P. 207/209)

34. Minutes of the meeting with the claimant’s comments in the margin were produced (P.209). The claimant wished to return to work and would have done so if she was not required to change incontinence pads. At the end of the meeting, Miss A advised the claimant that she would take advice from HR and get back to her.

Meeting on 2 October 2018

35. A “record” of this meeting was produced (P.226). The claimant had trade union representation at the meeting. The following is an excerpt from the “record”:-

“*Miss A shared again the options that are available to address the concerns around the feeding and changing of pupils, firstly the option of further training and secondly the option to explore with cluster colleagues whether we could make a move within the cluster to a school where the requirement for this role is not necessary.*”

36. The claimant was of the view that further “training” was not an answer to her bodily fluids phobia. So far as a change of school was concerned, the claimant had chosen the School to be nearer her home and most of the other schools in the “cluster” were primary schools where contact with children’s bodily fluids would be more likely. Also,her preference was to work in a secondary school.

37. At the end of the meeting, three "action points" were agreed:-

"*Miss A to continue dialogue with the authority and HR in relation to this situation.*

The claimant and IK (her union representative) to formalise in writing the concerns that the claimant has, including those where she feels we have failed in her duty of care towards her as a school and an authority.

Miss A will enquire again whether there is capacity for the claimant to return to work whilst this is being resolved."

Grievance

38. As the claimant was dissatisfied with the outcome of the meeting and as she had been advised that she could not return to work, she instructed her trade union to submit a grievance which they did on 10 October 2018 (P.237-239). The following are excerpts:-

"*The claimant at interview was never asked about the possibility of providing intimate personal care to any young person, this was not a question asked at all. It was only on her first week of employment that she was asked by Mr M if she wanted "top or bottom", the claimant was shocked and stunned and reluctantly agreed to but at that time did indicate that she had not been asked this at interview and had a phobia of such things. The claimant finds it extremely difficult, if not a phobia, to deal with bodily fluids of any kind.*
The claimant has done her utmost to deal with this and has taken steps that allows her to assist with dealing with 'the top half' when dealing with young people but finds the thought of dealing with continence issues horrifying and causing panic attacks and extreme anxiety.

Had the claimant known that this would be expected of her she would have declined the appointment.

Current situation

The school currently has 2 pupils requiring incontinence support. The school are stating that all PSAs should be able to address the need of the young people involved including continence care.

B is stating that the duties being required of the claimant and her colleagues are personal care and fall within the job description they are working from although personal care is not actually listed within the most recent document.

The claimant believes the duties required are defined as intimate personal care……...

Many other schools and academies have many more pupils and young people that require incontinence support and do not require every PSA to provide support to each of them……

Resolution sought

That the claimant be allowed to recover from her stress and anxiety caused by this situation and be supported to return to work to the post that she applied for and was appointed to at the school supporting young people to engage with education.

That if intimate personal care is now a requirement of the post that Job Profiles, and Job adverts and interviews clearly cover this issue and that the school especially pay cognisance to this in future adverts and interviews.

To recognise that every member of staff is different and has different skills to bring to the school and expecting everyone to do everything does nothing for the staff or the young people alike.

To recognise that the duties being required of the claimant do not fall within her copy of the job description or the current version on Arcadia and are indeed intimate personal care."

Respondent's response

39. Mr C replied on behalf of the respondent by letter of 31 October 2018 (P.255/256). The following are excerpts:-

"*I understand that the grievance is regarding the requirement to undertake certain aspects of personal care for an individual pupil at the start of this session at the school. You advised that the claimant has indicated that she does not feel that this is included in her role as PSA, and that she should not be required by management to undertake this particular aspect of the role.*

The job profile for a PSA includes the following:-

- *Encourage pupil independence, and with appropriate training, assist with personal care, and support physical needs.*

It also states that the following duty is performed on a voluntary basis:

- *Attend to individual health care or medical needs including the administration of medicines.*

I understand the claimant raised her concerns regarding undertaking the care aspect of the role and specifically, the care requirements of this particular child, with Miss A, DHT, and had sought advice from HR. I understand that Miss A advised her that this was a requirement of the post. HR colleagues provided details of the job profile, and advised that, if there was a specific need for care, that the claimant wasn't able to carry out, then a move to another school within the school cluster may be required. This would then enable the task to be undertaken by other PSA's based at the school……

Following these meetings, Miss A sought further advice from colleagues with regard to guidance on the personal care aspect of the PSA role. Further advice was also sought from HR and the QIM for the cluster. Colleagues confirmed that the tasks being asked of the claimant were personal care and appropriate for a PSA, and a fundamental part of the role of PSA. It is therefore, appropriate for management to ask the claimant to undertake these tasks. It is recognised that it is essential that all the PSA's have the appropriate training in order that they can meet the individual needs of the pupil. This advice was conveyed to the claimant by Miss A. I understand that, as the claimant has raised health concerns regarding her ability to perform these tasks, an OH referral will be discussed with her……..

The claimant has a contract of employment for the post of Pupil Support Assistant. I believe that the task being required of the claimant in her role as PSA is a fundamental part of her role and as are detailed in her job profile. It is reasonable, therefore, for management to require her to undertake these tasks. Given these circumstances, in my view, it would not be appropriate to carry out a further investigation i.e. it is clear that the claimant is being asked to undertake duties in accordance with the job profile…….

I understand that the claimant has been offered further training/support on the matters discussed and, as outlined above, due to her disclosure regarding severe phobia, extreme anxiety and panic attacks an OH referral will be made. Thereafter, a further meeting will be arranged with the claimant to discuss next steps."

40. The claimant denied that she had been "offered support" and questioned how "training" could assist with her phobia.

Second grievance

41. The claimant was dissatisfied with the response. She and her trade union representative were of the view that the respondent had not followed its

Grievance Procedure (P.45) as there had been no hearing in terms of the respondent's "Grievance Guidance" (P.48); no "stage 1 formal hearing" and no appeal (P.123/124).

42. Accordingly, the claimant decided to submit a further grievance and elaborate on what she had maintained previously. The second grievance was submitted on 14 November 2018 (P.271).

43. Mr C replied by e-mail on 27 November (P.295). He advised that he had already responded to the first grievance, "*and concluded that the claimant is being asked to carry out duties as required of the role of PSA and this role is not being reviewed at this time.*" However, he did undertake to include "*the additional information*" for discussion at a subsequent meeting.

Occupational Health referral

44. Although the claimant was signed off work on 3 September 2018 and it was accepted that B should have been aware that the claimant was disabled from 4 September, she was only assessed by Occupational Health ("OH") by telephone on 11 December 2018. The reason for this was that the first referral form to OH, dated 30 October 2018 (P. 245-252), had given the wrong telephone number for the claimant and also had not included the claimant's e-mail address which, it is understood, is OH's preferred method of communication. Also, the original referral had not disclosed that the claimant has, *"a severe phobia, anxiety and panic attack re performing the personal care aspects of the role"* and no advice had been sought in that regard. This was a matter which was raised by Mrs C in an e-mail which she sent to Miss A on 5 November 2018 (P.262). Accordingly, Miss A included this information in a further referral to OH on 9 November 2018 (P.264-268).

45. Another reason for the delay was that appointments were made for the claimant by OH but as they had the wrong telephone number she was not

aware of these. When the claimant was advised by Miss A that three appointments had been made for her, she sent an e-mail to Occupational Health on 6 December to clarify the position (P.305).

Occupational Health report

46. The following are excerpts from the OH report which is dated 21 January 2019 (P.315/316):-

"*She reports to me she has been experiencing significant mental symptoms, and mainly disturbed sleep patterns, tiredness and anxiety, which interferes significantly with her daily living activities. She reports that her symptoms have been triggered and maintained, in her view, by work-related stress, and especially on-going bullying, lack of suitable support, and unreasonable work demands.*

She reports that she perceived that the main stressor at work, is related to some unreasonable work task, which require close contact with bodily fluids of her pupils, and which, in her view, were imposed by her manager, although they were not included in her job description and existing policy.

The claimant reports she is particularly concerned about the above-mentioned type of tasks, as she suffers from bodily fluids phobia. She reports she made her line manager aware about her phobia immediately after she was required to carry out such tasks, in the first week of her employment. She reports that in her view, she was further misled by her manager that the tasks of concern were mandatory for her job role, although it transpired later, that they were not being requested to choose and carry out some of them.

She reports that she reluctantly carried out only enteral feeding, struggling with this task since the beginning of her employment……..

In my opinion, the Disability Discrimination Provision of Equality Act 2010, is likely to apply in this case. However, it is not a medical decision but a legal one.

I am reasonably expecting the claimant to be able to resume her duties in short to medium term if work-related stressor, as they are perceived, and mainly those of tasks of concern, which require contact with bodily fluid, would be addressed and solved properly. Therefore, I recommend that the claimant avoid totally and permanently those tasks, which require contact with bodily fluids."

47. The claimant next heard from the respondent on 26 March 2019 when she received a letter from the respondent's Quality Improvement Manager ("QIM") inviting her to a meeting on 28 March (P.361).

48. The claimant was unable to attend the meeting. She sent an e-mail to the respondent on 26 March to advise them of this, to express her concern at the delay; to advise she was "*severely anxious, stressed, and mentally and physically ill*"; and to assert that the respondent was likely to be in breach of the Equality Act 2010 (P.346).

Subject access request

49. On 10 December 2018, the claimant included a Subject Access Request ("SAR") in an e-mail to Miss A (P. 301-302 at P.302).

50. The claimant received the documentation she had requested, in March 2019, comprising some 500 pages. The following are excerpts from an e-mail, which Miss A sent to Mrs C on 18 September 2018, which the claimant received as part of her SAR (P.196):-

"*The claimant has made it very clear she is not prepared to undergo any training in this area and will under no circumstances perform these duties.*

My understanding is that the changing of a pupil would be considered Personal Care as outlined in the PSA job description. The claimant feels this should be classed as intimate care and states this does not feature in the job description. My concern here is that this is an issue over terminology as changing pupils is now common place across many……..schools and is referred to as personal care……..

Can we seek clarification as to which category the tasks outlined above would come into and whether we are within our rights as a school to suggest the move within the CSN to support us to meet the needs of our pupils. Would she have any case that this move would be discriminatory? The claimant feels as others are prepared to do it, it should not matter if she doesn't. However, we have real concerns about floodgates and with such a high level of need that we need everyone to be able to carry out the tasks out if circumstances meant it was necessary."

51. Mrs C replied later that day (P.196). The following are excerpts from her e-mail:-

"*I feel there is a crossover between what can be categorised as personal/intimate care and attending to an individual health care needs. The profile does not help us with this but it is what we have and what they have been graded against under Job Evaluation. There is an individual healthcare plan some of which may be classed as personal care some more intimate care.*

If she continues to be unwilling to carry out the tasks listed then we will require to move her to ensure that the PSA's in school are trained and able to carry out these tasks for this child.

Please be clear to her on this as you have been and she should return to work with restrictions in place until we are able to move her within the cluster. We are not discriminating against her. We have a service requirement which requires to be fulfilled. She is on a cluster contract and will have to move PSA's according to the service need.

As you state we have to think of the needs of the pupil and the principles the schools worked to in relation to the inclusion and GIRFEC. If she does not understand this and/or is making inappropriate comments about this then she needs further training/support in this area. The profile is clear that encouraging an inclusive environment etc. is also a core part of the role which she requires to understand."

52. The claimant also recovered as part of her SAR a copy of an e-mail from the Head Teacher at the School dated 16 November 2018 (P.277). The following are excerpts:-

"*I have a PSA who is currently contesting the role she has in school. It is with HR and various procedures are in place with regard to this. She took out a grievance against a member of staff (DHT) that was not upheld. My DHT has spoken with me today regarding this PSA. The DHT has maintained contact as requested by HR during the absence of this colleague. Today in conversation my DHT was concerned to note the following:*

PSA has taken out another grievance. Not sure who it is against.
PSA continues to threaten that the school is not meeting legislation to support this ASN pupil in school. To the best of our knowledge we are. We have asked a number of the ASN team to look over our practice to ensure this is all ok. This is scheduled to happen on 3 Dec. PSA quotes documents but we are unsure what documents. PSA threatening the name of the school/authority. PSA threatening the position of HT and process/reference to not doing job etc. PSA threatening to go to the press.

53. The claimant also recovered an e-mail, dated 27 November 2018, from Mrs C to Mr C (P.296). The following is an excerpt from that e-mail:-

"*If we are unable to find an appropriate resolution following this meeting this may lead us to either our decision as to her capability on health grounds for her to continue in her employment as PSA or disciplinary for refusing to carry out her role, following reasonable management instruction etc.*"

54. The claimant was upset when she read this correspondence, particularly the reference to "capability" and as she had not heard from the respondent for some considerable time. She said in evidence that when she read the documentation which had been recovered, this "*was a game changer; I knew I couldn't win; against an organisation which was sticking to its guns.*"

Resignation

55. On 18 April 2019, the claimant submitted a letter of resignation to the respondent's Head of Education (P.362-364). The following are excerpts from her letter:-

"*I am writing to inform you that I am resigning from my position of PSA at the school with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract. I feel that I am left with no choice but to resign in light of my dreadful experiences and lack of support since 2014, and since September of 2018, a succession of fundamental breaches of contract, gross negligence and duty of care to me as an employee, plus written GDPR evidence of misconduct and incompetence by DH and HT at the school, plus Mrs C (HR).*"

56. On 22 April 2019, the respondent's Head of Education wrote to the claimant to advise her that her resignation had been accepted (P.365).

Claimant's submissions

57. The claimant's Counsel spoke to written submissions which are referred to for their terms.

Breach of duty to make reasonable adjustments

58. Counsel submitted, with reference to s.s.20 and 21 of the 2010 Act, that the respondent was in breach of its duty to make reasonable adjustments.

59. He also referred to Schedule 8, paragraph 20 of the 2010 Act.

60. In support of his submissions, in this regard, he referred to the following cases:-

Environment Agency v. Rowan [2008] IRLR 20;
Newham Sixth Form College v. Sanders [2014] EWCA Civ734;
The Department of Work & Pensions v. Miss V Hall UKEAT/0012/05/DA;
Lamb v. The Garrard Academy UKEAT/0042/18

61. At the start of his submissions Counsel sought clarification from the respondent's solicitor as to whether, "*the respondent now accepts that it knew or should have known that the claimant was disabled from 4 September 2018*." The respondent's solicitor confirmed that that was the respondent's position and that the duty to make reasonable adjustments arose then.

The PCP

62. The respondent's "Provision, Criterion or Practice" ("the PCP") relied upon was, *"the requirement for PSAs to carry out duties (or to be able to carry out duties) which may expose them or bring them in to contact with bodily fluids of other persons".*

63. Counsel submitted that: "*There can be no doubt that this PCP put the claimant (or would put the claimant) at a substantial disadvantage compared to non-disabled PSAs. By virtue of her disability, the claimant is unable to carry out these activities. Because of this, the claimant risked being transferred to another school or facing disciplinary action on capability grounds.*"

64. Counsel submitted that as the respondent's knew of the claimant's disability on 4 September 2018 they should, "*reasonably have arranged for an Occupational Health Report to be produced at that time, that is in September 2018 (or at the latest in early October 2018). Indeed, Miss A says on 4 September 2018, 'I'm doing a OH referral for her'* (P.201/202). *There is no good reason why an OHR was not instructed in the middle/towards the end of September 2018. The respondent had by that stage fairly detailed information about the claimant's phobia and the effect it had on her. Indeed, as early as 8 October 2018 (already a delay of several weeks from mid-September), Mrs C advises there should be an OH referral to Iqarus* (P.229) *and on the same date the claimant is informed that this will happen* (P.231)."

65. Counsel then went on in his submissions to say this:-

"So, by its own admission, the respondent accepts on 8 October that an OH referral should be done. Mrs C's evidence was to the effect that there is usually a small timescale between a referral being made and an appointment taking place. If an OH referral had been made on 8 October 2018 (a Monday) it is not unreasonable to conclude that a report would have been produced within 2 weeks – 22 October. It is further not unreasonable to conclude that that report would have been in similar terms to the report which was finally produced dated 21/1/2019 (P.315-316)……..

What is remarkable, however, in the present case, is that an OH referral was not made until (at the earliest) 30 October 2018 (P.251-252). This is over 3 weeks after Mrs C advised that a referral should be made. No good reason has been advanced to explain this lengthy delay. If the OHR had been produced within a reasonable time the respondent would have been aware of the claimant's disability when it was produced. This would have been in September or October 2018."

66. Counsel submitted that the respondent had to accept responsibility for the incorrect details for the claimant being provided to OH. However: -

"*it is not clear what action, if any, the respondent took after the referral was made to check on the progress of the situation.*

The respondent was clearly aware that the PCP put or would put the claimant at a substantial disadvantage compared to non-disabled PSAs. The claimant had informed the respondent that she could not carry out certain tasks associated with the care of Child E. The claimant was unable to attend work because of being required to carry out these tasks.

It would have been a reasonable adjustment to allow the claimant to return to work and not require her to carry out tasks associated with the care of Child E that meant she would be exposed or come into contact with bodily fluids. The claimant could have returned to work and carried out other roles in her job as a PSA. This is not a matter that appears to have been considered by the respondent. The respondent's position – as set out in the evidence of Mrs C – was that the school/respondent had decided that all PSAs had to carry out tasks such as changing nappies of Child E if so required. The respondent was of the view that this was part of the contractual obligations of PCPs (sic – presumably PSAs*) It is submitted that this is not the case (or at least the position is not clear). Mrs C advised the claimant that those tasks are "individual healthcare tasks" and would therefore be performed on a voluntary basis* (P.205-206 and P.185)*. The policies at* (P.59-66 and P.62) *and* (P.142-183, at P.153) *support this view. Even if the respondent is correct that, for example, the requirement to change nappies of children is a contractual requirement, that does not alter the fact that the respondent was under a duty to make reasonable adjustments to remove the substantial disadvantage caused to the claimant in terms of s.20 and 21 EQA. This does not appear even to have been considered by the respondent. Mr M accepted that a PSA could work at the School and not carry out 'intimate care' duties. There is evidence that there is a PSA currently at the School who falls into this position. The PSA who replaced the claimant was male and Child E's parents did not think it was appropriate for males to provide intimate care to her.*"

Constructive unfair dismissal complaint

67. In support of his submissions in this regard, Counsel referred to the following cases:-

Western Excavating (ECC) Ltd v. Sharp [1978] IRLR 27;
Malik v. BCCI [1997] IRLR 462.

68. Counsel submitted, with reference to para. 36 of the amended particulars of claim (P.18/19), that there was a breach of the implied duty of trust and confidence which entitled the claimant to resign.

69. Counsel said that he could not understand why the respondent had failed to arrange a grievance hearing as it was required to do in terms of its Guidance and its Policy. Indeed, Mrs C accepted in cross-examination that a hearing should have been held. Counsel submitted that in itself was a fundamental breach and, if not, it contributed to one.

70. Counsel also highlighted the manner in which the OH Report had been obtained. The intention was to obtain an OH Report on or about 4 September. The claimant was advised in early October that an OH Report was being obtained but it was not instructed until 30 October, almost two months later. It was then amended and then there was a further referral on 10 November.

71. Counsel submitted that that in itself also amounted to a breach of the implied term of trust and confidence.

72. Further, so far as the SAR was concerned, this was also not acted upon immediately in December 2018 and the claimant did not receive the documents until 24 March 2019. Counsel described this as an *"unconscionable delay".*

73. There was little contact between the respondent and the claimant from 24 January, when the OH Report was received, until 26 March 2018 when the claimant received an undated letter inviting her to a meeting (P.361). However, there was nothing in that letter about reasonable adjustments, nothing about disability.

74. Counsel submitted that that letter put the situation in to *"last straw territory".* He referred to the claimant's evidence about her emotional reaction to that letter and to seeing the content of the e-mails she received following her SAR.

He submitted that the SAR e-mails and the letter which he received on 26 March (P.361) "*tipped her over the edge and she decided she had to resign.*"

75. In his written submissions, Counsel also submitted that the following evidence should be noted as it demonstrated that the claimant resigned in response to the respondent's breach of contract:-

> "(i) *The respondent at all material times did not adhere to its own policies on intimate care. The claimant on several occasions informed the respondent in clear terms that she was unable to be in contact with or exposed to other people's bodily fluids. She was met with the response from the respondent that she had to do this as 'part of her contract'. This was not the case as set out above.*
>
> *(ii) The claimant believed that the respondent had divulged confidential information about her disability (her phobia to other people's bodily fluids) to a colleague.*
>
> *(iii) The claimant felt intimidated and bullied by the behaviour of Mr M in the meeting of 13 September 2018 when she was singled out for having to participate in the care of Child E.*
> *(iv) When the claimant was unable to attend work, the claimant failed to provide her with HR support or contact.*
>
> *(v) The respondent failed to make reasonable adjustments that would have permitted the claimant to return to work.*
>
> *(vi) The respondent did not act reasonably in delaying the production of an OH Report. It was evident from a very early stage that an OH Report would be helpful. An OH Report was not produced until shortly before the claimant's dismissal.*
>
> *(vii) The claimant raised two grievances, neither of which were dealt with by the respondent following its own procedures. It appears that the respondent did not consider that the claimant's grievance was competent, at least in so far as it related to a dispute concerning an interpretation of her terms and conditions of employment. The respondent's Grievance Procedure, however, gives as an example of issues that may cause grievances "Interpretation of Terms and Conditions of Employment" (P.120-125, at P.121).*
>
> *(viii) The respondent did not hold a grievance meeting for the claimant. Again, this stance is not supported by the Grievance Procedure: 'the person to whom the Formal Written Statement of Grievance has been addressed will convene a formal grievance within 14 calendar days from receipt of the letter'. This could not be clearer, but a hearing was not convened. The respondent did not even inform the claimant that there*

would not have been a grievance hearing prior to the response to her grievance being produced.

(ix) Likewise the respondent failed to deal reasonably or timeously with the claimant's subject access request (SAR). A SAR was first made on or around 10 December 2018 (P.301/302). This is an unexplained delay in responding to the SAR (P.327 and 329).

(x) The claimant received an undated recorded delivery letter on 26 March 2019 inviting her to a meeting in Aberdeen on 28 March (P.361). The claimant replied to this letter immediately (P.346-348). The response notes that the claimant had received little support from HR during her period of absence.

(xi) The letter received on 26 March makes reference to the respondent's Absence Management Policy (P.127-140). That policy refers to the importance of contact being maintained when an employee is absent from work (which did not happen in the present case) and 'supportive measures' such as reasonable adjustments being put in place to remove disadvantages created by an employee's disability. No supportive measures or reasonable adjustments were put in place for the claimant.

(xii) The claimant received a number of documents in response to her SAR on or about the middle of March 2019. The content of some of these documents together with a letter received on 26 March referring to the respondent's absence management policy was the 'last straw' which resulted in the claimant's resignation. The claimant referred to a number of documents in evidence. In particular the claimant was shocked by the tone and content of an e-mail exchange between Mrs C and Mr C on 27 November 2018 (P.296). In the e-mail Mrs C raises the possibility of disciplinary action being taken against the claimant.

(xiii) The claimant also referred to other documents received following her SAR that had a similar effect on her: (P.196-198) suggesting that the claimant was 'unwilling' to carry out intimate care duties. No recognition of claimant's phobia preventing her from doing so; (P.277) reference to the claimant raising a grievance against Miss A (the DHT). This is incorrect; the claimant did not raise a grievance against another member of staff; (P.297-298) suggesting that OH was only offered as a means of support and was not event required."

Respondent's submissions

76. The respondent's solicitor also spoke to written "Skeleton Submissions" which are referred to for their terms.

77. In support of his submissions he also referred to ***Malik*** and ***Western Excavating***.

Reasonable adjustments

78. The respondent's solicitor confirmed that he accepted the claimant was disabled in terms of the 2010 Act. However, he maintained that the respondent did not know or could not have been reasonably expected to know that the claimant was disabled, *"until at earliest 4 September 2018"* (this was not disputed).

The PCP/Substantial disadvantage

79. The respondent's solicitor further advised that he accepted that the PCP, *"was the requirement to undertake any duties that would mean the claimant coming into contact with bodily fluids"* and that, "*the substantial disadvantage that she suffered was her absence from work, resulting from an inability to carry out the duties in question*".

80. The respondent's solicitor submitted that after 4 September 2018 the respondent, "*did attempt to make reasonable adjustments, namely a move of schools and additional training, but both were unreasonably refused by the claimant.*" He also submitted that, "*the failed adjustment alleged by the claimant, namely the complete removal of all tasks pertaining to bodily fluids, is not 'reasonable' for the purposes of the 2010 Act.*" He submitted, therefore, that, *"there is no proper basis upon which the respondent can be said to have failed in its duty to make a reasonable adjustment.*"

"Attempted Duties – Move Between Schools"

81. After detailing the "key facts" in his written submissions, the respondent's solicitor set out the relevant law and then addressed the issue of relocation with the possibility of a "move between schools". He submitted that before 4 September 2018 the respondent had allowed the claimant to undertake *"lighter duties with respect to tasks involving bodily fluids"* and she was not required to, *"undertake nappy changes notwithstanding that that was still considered part of her role"*. However, that was no longer feasible, with the arrival of Child E at the School. There were a limited number of PSAs, many of whom worked part-time and, "*it needed flexibility across its pool of PSAs and in order to adequately discharge its duty of care to Children E and C, the school required all of it's PSAs to be able to undertake duties involving bodily fluids.*"

82. The respondent's solicitor referred to the, *"mobility clause in the claimant's contract of employment"* (P.35) which states that she was employed to work in a "cluster of schools" and not just the School alone. She was employed, *"to work at various locations within (the respondent's local authority area). Your work location will vary dependant on the exigencies of the service". Accordingly, the respondent, held the contractual ability to move the claimant to a different school".*

83. He submitted that:-

> *"The exigencies of the service required all PSAs at the School to be able to undertake tasks relating to bodily fluids, and that should the claimant not be able to, as is her position, the respondent is reasonably entitled to move her to a different place of work. The respondent made multiple attempts to progress this with the claimant, but the claimant unreasonably refused to discuss that as an option."*

84. He said that the reason that a "concrete proposal" was not put to the claimant was that she "flatly rejected a move". Miss A, in particular, said that the claimant made it clear that she wasn't prepared to transfer.

85. In support of his submission that the claimant had made it "very clear" that she was not prepared to move schools, he referred to a number of e-mails: P.205, 206, 221, 223 and 197. He submitted that a move between schools was a reasonable adjustment and that it was *"entirely unreasonable"*, for the claimant to reject such a suggestion. The respondent tried to explore this with the claimant but she had made her position clear.

"Attempted adjustment – Additional Training"

86. While accepting that this may not have resolved matters completely, the respondent was not allowed to explore this possibility as the claimant "*rejected any suggestion of training.*" He further submitted that the nature of the claimant's disability was not clear. The respondent was not given the opportunity of investigating this further.

"Failed" Adjustment not Reasonable"

87. The respondent's solicitor submitted that simply removing the claimant's duties so that she would not have any contact with childrens' bodily fluids at the School would not have been a reasonable adjustment as the respondent needed the PSAs at the School to be required to undertake all the tasks in question. The fact that the parents of Child E only wanted female PSAs to carry out "intimate care" reduced the availability of PSAs. Account also had to be taken of absences. The respondent's solicitor submitted that:-

"*The respondent's position is that by removing those duties from her, its ability to discharge it's duty of care towards Children E and C would have suffered. That duty of care is of the utmost importance, and accordingly that adjustment is 'reasonable' for the purposes of the 2010 Act.*

Furthermore, my submission is that there is significant doubt as to whether the adjustment alleged would have actually overcome the significant disadvantage experienced. Even having removed the specific body fluid related tasks from the claimant, she may well have encountered Children E and C with other tasks not directly involving bodily fluids. Witnesses for the

respondent spoke to difficulties that Children E and C had in controlling their saliva. Any involvement with the children may have caused the claimant to encounter bodily fluids too and thereby exacerbate the associates symptoms of her phobia."

88. He referred to the respondent's evidence that the School only had limited resources. He submitted that the respondent was entitled to allocate its resources as it saw fit.

89. Although the claimant's Counsel submitted that the claimant's replacement was male and therefore could not care for Child E, the respondent's solicitor submitted that the replacement would have other duties other than nappy changing and would be able to deal with all bodily fluids. Further, Child C also needed nappy changing.

"Wording of the Job Description"

90. The respondent's solicitor said this about the relevance of the job description in his written submissions:-

"*The Tribunal has heard at length about whether or not the tasks pertaining to bodily fluids were contained within her job description (P.185). It is my submission that a job description is a summary of a role, and that the respondent is not required to list every single task of every role it employs. The nuanced wording of the job description is not entirely relevant to the claims to be determined by this Tribunal. It does not directly affect the duty to make reasonable adjustments. Accordingly, the issue is a red herring, and should be disregarded by the Tribunal. In any event, the respondent considers that the wording of the job description does still give some indication that bodily fluids may be encountered in the role, particularly for an individual who may be more alert to the possibility, such as the claimant.*"

91. He also said that the job description is a "standardised one" for a number of schools. However, schools are not standardised. This particular School had the additional responsibilities of caring for Children C and E and whether that

was “personal care”, “intimate care” or “health care” did not alter the fact that it had to be done.

92. The claimant was advised of this requirement when she started to work at the School and was told that “nappy changing” was part of her job. However, she was able to undertake other roles.

93. Also, the front cover of the Guidance for PSAs shows a PSA spoon feeding a disabled child (P.87).

94. The respondent’s solicitor also challenged the contention that other PSAs had been allowed to not do these tasks. His recollection of the evidence was that a PSA at the School was exempted from lifting but that was the only exemption which had been allowed.

Conclusion

95. The respondent’s solicitor made the following submissions, by way of conclusion:-

“*The respondent denies that the duty to make reasonable adjustments arose at any time before 4 September 2018, on account of it not having sufficient knowledge of the claimant’s disability. Thereafter, the respondent assessed that it required all of its PSA staff to be able to undertake the tasks in question. The claimant was unable to, so the respondent explored the possibilities of giving her additional training and of moving her to a different school, where the requirements to directly encounter bodily fluids would not have been present. In both instances, the claimant unreasonably rejected those attempted adjustments. Accordingly I invite the Tribunal, in light of the evidence and submission heard, to make a finding that the respondent did not fail in its duty to make reasonable adjustments.*”

Constructive unfair dismissal

96. In his written submissions, the respondent's solicitor first set out the relevant law with reference to ***Western Excavating*** and ***Malik***.

97. He then went on in his submissions to address the matters relied upon by the claimant as establishing a breach of the implied duty of trust and confidence, some of which are narrated at para.16 in the amended particulars of claim (P.18/19).

"Making the claimant undertake tasks not part of her role/failing to make reasonable adjustments"

98. The respondent's solicitor submitted that "*it is clear that duties including bodily fluids were obviously part of her role.*" He referred to his submissions in relation to the job description (P.185) and submitted that, "*the expectations of her role were made clear from an early stage which is not changed by subtle and nuanced wording of the job description.*

99. From the first week of her employment, it was made clear to the claimant that she was expected to undertake these type of tasks and she did undertake some bodily fluids tasks which included the feeding of Child C. She accepted, therefore, that tasks involving bodily fluids formed part of her job from the start of her employment. *"Accordingly, there cannot be a fundamental breach in contract when that requirement is maintained following the arrival of Child E."*

"Alleged Breach of Confidentiality"

100. This related to the "confrontation" between the claimant and one of her PSA colleagues on or around 3 September 2018. The claimant alleged that this

was as a result of a breach in confidentiality of the claimant's phobia by her line manager, Mr M.

101. The respondent's solicitor submitted that there was, "*no reliable evidence provided by the claimant to establish this allegation.*" In support of his submission, he referred to the note of the meeting which the claimant had with Mr M on 3 September (P.188) which was signed by her as a "*fair and accurate record*". He submitted she was not keeping her position "*a secret*" and, "*more significantly that the claimant's position would have been plain for her colleagues to see.*" That was because she hadn't been "*changing nappies*" for some 4 years since she started to work at the School.

"Targeted by Mr M on 3 September 2018"

102. This related to the meeting which Mr M convened for the PSAs on 3 September 2018. This was the day before the claimant's e-mail to Mr M in which she makes reference to her "*phobia*" (P.190). It was submitted that Mr M regularly held such meetings. His clear evidence was that the meeting was not targeted towards the claimant. It was submitted that, "*he was delivering reasonable management instructions and that it was simply not carried out in a targeted manner described by the claimant.*"

"Minutes of meetings"

103. The claimant alleged that she was not allowed to contribute to minutes of the meetings that took place on 13 September and 2 October. However, it was submitted that the documentary evidence (P.222, P. 226 and P. 231) along with the oral evidence of Miss A did not support her assertions in this regard.

"Occupational health referral process"

104. It was submitted that the issues which led to the delays, "*were caused by simple human error, compounded by the Occupational Health provider which was outside the control of the respondent*" and that any error, "*was unintentional and minor*". Further, the claimant spent some time reviewing the report before it was issued to the respondent.

105. It was submitted, therefore, that, "*the respondent's actions in making the referral to occupational health should not be considered in the Tribunal's assessment on whether or not a constructive unfair dismissal has occurred. They are not actions sufficiently serious to cause her to resign in the manner that she did.*"

106. So far as the claimant's contention that there was a failure to implement the OH advice, was concerned, the respondent's solicitor drew the Tribunal's attention to the fact that the OH report confirmed that the claimant was unfit for any work and unfit to attend any meetings. The respondent wished to allow her time to recuperate on sick leave and that was why she was not invited to attend any meetings until several weeks later. However, when the respondent invited the claimant to a meeting, the claimant chose to resign beforehand. The respondent's solicitor submitted that, "*the permanent adjustments advised namely the complete removal of all tasks relating to bodily fluids, was at best not reasonable whilst the claimant remained at the School and at worst, impossible. The alternative of moving the claimant to another school, where the recommended adjustments were more feasible, was unreasonably refused by the claimant.*"

"The Claimant's Grievance"

107. The claimant's trade union representative submitted a grievance on or about 10 October 2018 (P.237). It was submitted that, "*Mr C on receipt of the grievance, considered it to be raising issues that were already subject to*

discussion at an informal stage with the claimant's line management. Accordingly, he rejected it as being without sufficient basis."

108. Thereafter, the claimant resubmitted her grievance with additional, but unspecified, allegations of bullying. In light of these new points and the claimant's continuing absence, it was decided to obtain an OH report. Ultimately, that report confirmed that the claimant was unfit to attend any meetings.

109. The respondent's solicitor submitted that, "*in these circumstances it would have been inappropriate to progress the claimant's grievance without first obtaining Occupational Health input. Whilst the respondent's communications with the claimant could have been improved, those issues were not so extreme so as to meet the test of a fundamental breach in contract giving rise to constructive dismissal.*"

"DSAR"

110. The respondent's solicitor denied that the respondent had failed to deal with the DSAR adequately and that this contributed to a fundamental breach of trust and confidence. He submitted that, "*the claimant's request was made via a single line at the end of a lengthy and confrontational e-mail (P.302). The line was simply missed by Miss A, the recipient. The e-mail was not submitted using the processes that the respondent had established when dealing with such a request. Again, simple error or oversight does not reach the severity of behaviour required for a constructive dismissal.*"

111. The respondent did comply with the request but it took time to compile the response which comprised over 500 pages of documents.

112. Further, the DSAR response was "*heavily redacted*, *to the extent that the claimant made an application for them to be produced in their original form,*

as they could not otherwise be easily understood. The Tribunal granted the appropriate order. The documents included in the bundle are not the same documents viewed by the claimant that she claims led to her dismissal. They are not contemporaneous, and are viewed with the benefit of hindsight. The claimant's contentions in this regard are therefore unreliable, and should be disregarded by the Tribunal."

"Claimant's delay in resigning"

113. The respondent's solicitor made the following submissions in this regard:-

"*The claimant states that on 26 March 2019 she received a letter (P.361) from the respondent inviting her to an absence management meeting. She confirmed in evidence that she then chose to resign that same night.*

However, the claimant delayed in resigning for almost 3½ weeks, eventually tendering her resignation on 18 April 2019 (P.362). It is submitted that a delay to this extent is unreasonable, and that accordingly, the claimant has failed to meet the third essential requirement for a constructive dismissal claim set out in ***Western Excavating***."

Conclusion

114. The respondent's solicitor said this by way of conclusion:-

"*The claimant relies on numerous allegations that she says gave rise to a claim for constructive dismissal. The respondent submits that these allegations, if shown by the evidence and as laid out in these submissions, are ill-founded and have fair and reasonable explanations provided by the respondent. As a result, the allegations and the circumstances of this case, cannot be said to clear the bar of constructive dismissal. That is because they do not give rise to a fundamental breach in contract, namely the implied term of trust and confidence, nor do they exhibit behaviour that is calculated or likely (without reasonable and proper cause) to destroy the relationship of trust and confidence between the parties. On that basis, and in accordance with the authorities of* ***Western Excavating*** and ***Malik***, the claim for constructive dismissal must fail".

Discussion and Decision

Reasonable adjustments

Relevant law

115. The statutory provisions, relevant to the issues with which the Tribunal was concerned, are to be found in sections 20 and 21 of the Equality Act 2010 ("the 2010 Act"). These are as follows:-

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

Disability status/knowledge

116. As recorded above, the respondent's solicitor accepted that the claimant was disabled in terms of s.6 of the 2010 Act. He also accepted, with reference to Schedule 8, at paragraph 20 of the 2010 Act, that the respondent knew or could reasonably be expected to know that the claimant was disabled from 4 September 2018 when she sent an e-mail to Mr M in which she informed him, amongst other things, that she had "*a severe phobia of other people's bodily fluids.*" (P.190-193 at p.191). This was significant so far as the Tribunal's

deliberations were concerned, as thereafter the respondent was under a duty to make reasonable adjustments. Also, the claimant was placed at a substantial disadvantage by the application of the PCP which is referred to below, as she was unable to return to work at the School, at risk of being transferred to another school and faced disciplinary action on capability grounds.

117. In considering this issue, the Tribunal was also mindful of the case of ***Environment Agency***, which was referred to by the claimant's Counsel in his submissions. In that case, Langstaff LJ said that an Employment Tribunal when considering a reasonable adjustment claim must identify:

> "
> *(i) The provision, criterion or practice ("the PCP") applied by or on behalf of an employer, or the relevant physical feature of premises.*
> *(ii) The identity of non-disabled comparators, where appropriate.*
> *(iii) The nature and extent of the substantial disadvantage suffered by the claimant, in comparison to the non-disabled comparators.*"

118. The first situation in which the duty to make reasonable adjustment arises is where a PCP of the employer puts the disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. In the present case, it was agreed that the PCP was the respondent's requirement that PSAs carry out duties (or to be able to carry out duties) which may expose them or bring them into contact with bodily fluids of other persons.

119. The respondent accepted that this PCP put the claimant at a substantial disadvantage compared to non-disabled PSAs as by virtue of her disability, as we recorded above, the claimant was unable to return to the School and carry out her duties as a PSA; and ran the risk of being transferred to another School and of facing disciplinary action on capability grounds.

120. The issue for the Tribunal, therefore, was the reasonableness of adjustments as the duty to make adjustments only arises in respect of those steps that it

is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person.

121. The test of reasonableness is objective (***Smith v. Churchill's Stairlifts Plc*** [2006] ICR 524). Further, in ***Royal Bank of Scotland v. Ashton*** [2011] ICR 632. The Employment Appeal Tribunal emphasised that, when addressing the issue of reasonableness of any proposed adjustment, the focus has to be on the practical result of the measures that can be taken.

,

EHRC Employment Code

122. When considering this issue we were also mindful of the guidance in the EHRC Code of Practice on Employment (2011) ("the EHRC Code"). At para. 6.28, the following are listed as "*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.*

6.29 *Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.*"

Present case

123. What then of the present case? It was accepted by the respondent that the duty to make reasonable adjustments arose on 4 September 2018.

124. The EHRC Code makes it clear that it is important for an employer to address the issue of reasonable adjustments as soon as possible:-

"***5.20*** *Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments.*

6.32 *It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made.*"

125. The EHRC Code also gives as an example of, *"Reasonable Adjustments in Practice", "Allocating some of the disabled person's duties to another worker"* (Para 6.33).

Occupational Health Report

126. We heard evidence that once an Occupational Health ("OH") Report is instructed the Report will normally be issued within a few weeks. However, although in the present case Miss A said on 4 September 2018 that she was doing an OH referral for the claimant (P.201), she did not make the referral until 30 October (P.252), some 8 weeks later; some 3 weeks after Mrs C, HR Adviser, advised her that an OH referral should be made (P.235); and, as it transpired, the OH Report was not produced until 21 January 2019 (P.315), some 20 weeks after the duty arose.

127. While there was some delay when the Report was sent to the claimant for approval, in all the circumstances and bearing in mind the importance of taking "prompt action" and the fact that the claimant was unable to return to work, these delays were unconscionable and inexplicable.

128. Although we were not persuaded the delays were deliberate, the referral could best be described as "half hearted". It certainly was not given priority or submitted with reasonable care, as it should have been. One of the reasons for the delay was that the wrong contact telephone number for the claimant had been given in the referral and her e-mail address had been omitted. Also, the first OH referral (P.251) did not include any reference to the claimant's disclosure that she has a "*severe phobia of other people's bodily fluids*" (P.191) and that was why she could not care for Child E. We found that omission incomprehensible, as that was the material issue between the parties and OH could not possibly give meaningful advice about the extent, if any, to which the claimant could provide intimate care to children at the School and Child E, in particular, unless they had that information.

129. That was why subsequently, by e-mail on 5 November 2018 (P.262), Mrs C, the HR Adviser, advised Miss A, the Deputy Head Teacher, that the referral should include, "*her disclosure that she has a severe phobia, anxiety and panic attack re performing the personal care aspects of the role and we would like advice on this as this is fundamental part of the role.*" That was why, albeit some weeks later, Miss A submitted a further OH referral (P.264-268) which included this information (P.267).

130. Some insight was provided into the respondent's attitude towards obtaining an OH Report for the claimant from the e-mail of 30 November 2018 from the Head Teacher to Mrs C, Miss A and another (P.297/298). She said this: "*Firstly we only offered OH as by means of support the whole argument currently is tied up in something that was only offered and not even required!*" That comment did not suggest to us that those in senior positions at the School, at least, were aware that the claimant was disabled and of the duty to make reasonable adjustments, *"in a timely fashion".*

131. The respondent's solicitor submitted that the respondent was prepared to offer training and a move to another school by way of "reasonable adjustments". But, these matters were raised by the respondent long before

the OH Report had been obtained. In any event, we are unclear what sort of training was envisaged. We are not persuaded how this would have assisted the claimant having regard to the nature of her disability. The suggestion that training might assist in getting the claimant back to work suggested a misunderstanding of the claimant's condition. The claimant did make it clear that she was not prepared to move to another school. However, there was never any meaningful discussion about the options and no specifics were ever provided to the claimant.

132. We are bound to say that we were extremely surprised that there was no reference to the fact that the claimant was, or even might be disabled, and the obligation to make reasonable adjustments in the documents the claimant recovered following her SAR. Nor did there appear to be any suggestion that the issue should be considered once the OH Report had been obtained. The onus was on the respondent to make reasonable adjustments and that could only be done, reasonably and sensibly, with the benefit of advice from OH.

133. Mr M's response on 31 October 2018 (P. 255/256) to the claimant's grievance (P. 237-239) also makes no reference to the claimant being disabled and the duty to make reasonable adjustments, despite the fact that the duty arose on 4 September, almost two months before. He said in his letter that there was a contractual requirement to do intimate personal care which included changing incontinence products and the claimant had to do it. However, it was far from, *"clear that the claimant is being asked to undertake duties in accordance with the job profile",* as he asserted. He also failed to convene a meeting as he was required to do under the respondent's Grievance Procedure (P. 120-126). He claimed her grievance was not competent as it related to the interpretation of her contract, when clearly it was: it related to "Interpretation of Terms and Conditions of employment" (P. 121).

134. The delay in obtaining the OH Report was significant. For a number of months the claimant was left at home, in limbo, wondering what was happening, only to receive the letter of 26 March 2019 (P.361) from the respondent's Quality

Improvement Manager ("the QIM") inviting her to attend a meeting. There was no reference in that letter to the claimant's disability; no suggestion that there would be any discussion about making adjustments which would allow the claimant to return to work. The QIM also said that he wished to discuss the claimant's "reasons for absence", but the respondent already knew what these were.

135. Also, shortly before she received the QIM's letter, the claimant had received the documentation in response to her SAR, which, understandably in our opinion, upset her greatly, particularly when , far from being supportive, she learned the respondent was even considering dismissal on the ground of capability. It was in the light of the terms of the SAR documentation and the QIM's letter of 26 March, that the claimant decided that she had no option other than to resign. That was the "last straw".

136. We found it extremely surprising, particularly having regard to the terms of the claimant's e-mail of 4 September 2018 (P.190), that the possibility that the claimant might be disabled and that there would be a duty to make reasonable adjustments was not addressed in any meaningful way even after the respondent received the OH Report, dated 21 January 2019 (P.315-316) which contained the following (P.316):-

"*In my opinion, the Disability Discrimination Provision of Equality at 2010, is likely to apply in this case. However, it is not a medical decision but a legal one.*

I am reasonably expecting the claimant be able (sic) *to resume her duties in short to medium term if work-related stressor, as they are perceived, and mainly those of tasks of concern, which require contact with bodily fluid, would be addressed and solved properly. Therefore I recommend that the claimant avoid totally and permanently those tasks, which require contact with bodily fluids.*"

137. The Report could not have been clearer, but even then the respondent delayed. The claimant did not hear from the respondent until 26 March when she received the letter from the QIM.

138. Further, despite a number of Policies, whether or not the claimant was required, contractually, to carry out the intimate care of Child E, change incontinent pads and the like, was not clear. However, those at the School believed that she was so required but the claimant was not advised that she would have to do these tasks at her interview or at any time before she started to work at the School, otherwise she would not have accepted the job. This lack of clarity was further evidenced by the advice given initially by Mrs C, the respondent's HR Adviser, to the claimant that there was no contractual obligation to carry out these duties. Mrs C advised the claimant that those tasks were "individual healthcare tasks" and could therefore be performed on a voluntary basis (P.205/206 and P.185). However, subsequently, she changed her mind. It also emerged at the Tribunal Hearing that Mrs C was not aware of the respondent's "Intimate Personal Care Guidance" (P59-86).

139. It seemed to us that whether "personal care", involving changing incontinence products, was compulsory or voluntary was a matter of opinion, rather than fact.

140. In any event, whether or not the claimant was contractually required to carry out these tasks is nothing to the point as the claimant was disabled as defined by the 2010 Act and the respondent had a duty to carry out reasonable adjustments whether or not there was any such contractual obligation.

141. We were unanimously of the view that, in all the circumstances, the submission by the claimant's Counsel that, "*it would have been a reasonable adjustment to allow the claimant to return to work and not require her to carry out tasks associated with the care of Child E that meant that she would be exposed or come into contact with bodily fluids*", when viewed objectively, was well-founded.

142. It was clear that such a "step" would be entirely effective in preventing the substantial disadvantage caused to the claimant. It would have enabled her to return to the School and to work in the same way as she had been doing for the previous four years.

143. We were also satisfied that such an adjustment would not only be effective but would also be practicable.

144. There was clearly a degree of flexibility so far as the duties of the several PSAs at the School were concerned. At the relevant time there were 9 PSAs, 7 of whom were women. The claimant had been able to assist with Child C's healthcare needs for over four years without having to change incontinence pads; another PSA at the School was not required to do any lifting; the School was able to accommodate a request by Child E's parents that she would only be cared for by female PSAs and despite this, the respondent appointed a male PSA to replace the claimant.

145. Further, two PSAs had to be present when care for a child was "intimate" and the claimant offered to be present in the room at that time, provided she was not required to have contact with the child's bodily fluids.

146. In arriving at our view, we were also mindful of the respondent's significant financial and other resources, being one of the largest employers in the area.

147. We were also mindful, leaving aside the duty to make reasonable adjustments, with reference to the respondent's Policy on "Supporting Children and Young People with Health Care Needs and Managing Medicines in Educational Establishments", that ***" parents and Head Teachers must respect such concerns*** (about intimate or invasive treatment) ***and should not put any pressure on staff to assist in treatment unless they are entirely willing"*** (P.153).

148. The difficulty for the respondent was that they had not dealt promptly and properly in addressing the issue of reasonable adjustments. Those in senior teaching positions at the School were charged with the task of making such decisions but clearly they were not made aware of the full extent of the legal duty, let alone that the duty had arisen on 4 September 2018. They did not even believe it was necessary to obtain an OH Report. They also believed that the claimant was required, contractually, to carry out the same duties as all the other PSAs unaware, it would appear of the duty to make reasonable adjustments and lack of clarity of the contractual position. As a consequence, they ,were not favourably disposed towards the claimant and this was compounded by the claimant communicating at great length with Miss A, in particular, and threatening that she "would go to the press". This stressed Miss A to such an extent that she no longer felt able to deal with the claimant.

149. As a consequence, there was no consideration whatsoever of allowing the claimant to return to work at the School and not being required to have contact with Child E that meant she would not be exposed to contact with bodily fluids, even on a trial basis. Even as late as 27 November, almost three months after the duty to make reasonable adjustments had arisen, Mr M was advising that the claimant's PSA role was, *"not being reviewed at this time"* (P. 295).

150. Their minds were closed to making the adjustment which we considered to be reasonable.

151. As we recorded above, we were not persuaded how "training" would have assisted, given the nature of the claimant's disability. In any event, no specific proposals were ever put to the claimant, no specific proposals were ever put to her either about a move to another school which would have ensured that she would not have contact with any child's bodily fluids.

152. We were satisfied, therefore, unanimously, that by and large the submissions by the claimant's Counsel were well-founded; the respondent was in breach

of its duty to make reasonable adjustments and this complaint was well-founded.

Constructive unfair dismissal

Relevant law

153. Having resigned, it was for the claimant to establish that she had been constructively dismissed. This meant that, under the terms of s.95(1)(c) of the Employment Rights Act 1996 ("the 1996"), she had to show that she terminated her Contract of Employment (with or without notice) in circumstances such that she was entitled to do so without notice by reason of her employer's conduct. It is well established that that means that the employee is required to show that the employer is guilty of conduct which is a fundamental breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitled him or her to leave at once.

154. The correct approach to determining whether or not there has been a constructive dismissal was discussed in ***Western Excavating***, the well-known Court of Appeal case to which we were referred by both parties. According to Lord Denning, in order for an employee to be able to establish constructive dismissal, four conditions must be met:-

"*(1) there must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;*
(2) that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous interpretation of the contract by an employer will not be capable of constituting a repudiation in law;
(3) he must leave in response to the breach and not for some other unconnected reason; and

(4) he must not delay too long in terminating the contract in response to the employer's breach, otherwise he will be deemed to have waived the breach and agreed to vary the contract."

155. Accordingly, whether an employee is "entitled" to terminate his contract of employment "*without notice by reason of the employer's conduct*" and claim constructive dismissal, it is not enough to establish that an employer acted unreasonably. The reasonableness, or otherwise, of the employer's conduct is relevant but the extent of any unreasonableness has to be weighed and assessed and a Tribunal must bear in mind that the test is whether the employer is guilty of a breach which goes to the root of the contract or shows that the employer no longer intends to be bound by one or more of its essential terms.

Present case

156. So far as the present case was concerned, we were mindful that there is implied into all contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in ***Woods v. WM Car Services (Peterborough) Ltd*** [1982] IRLR described how a breach of this implied term might arise:

"*To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's effect, judged reasonably and sensibly, is such that the employee cannot be put up with it.*"

157. In ***Malik***, to which we were also referred, Lord Steyn stated that, in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, it is the impact of the employer's behaviour on the employee that is significant – not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively.

158. When we considered the authorities, we recognised that a wide range of behaviour by employers can give rise to a fundamental breach of the implied term of mutual trust and confidence.

159. In his submissions, the claimant's Counsel detailed a number of factors which he submitted, when considered individually, in some respects, and cumulatively, established a breach of the implied term of trust and confidence. We deal with each in turn.

"The respondent at all material times did not adhere to its own policies on intimate care. The claimant on several occasions informed the respondent in clear terms that she was unable to be in contact with or exposed to other people's bodily fluids. She was met with the response from the respondent that she had to do this as 'part of her contract'. This was not the case as set out above."

160. Although the position was not entirely clear, in our unanimous view, the claimant was not required, contractually, to be in contact with or exposed to other people's bodily fluids. Of course, the claimant had been advised initially by Mrs C that there was no such contractual obligation only for Mrs C to change her mind. At the very least, it was unreasonable, given the lack of clarity, for the respondent to advise the claimant repeatedly that it was "part of her contract".

"The claimant believed that the respondent had divulged confidential information about her disability (her phobia to other people's bodily fluids) to a colleague."

161. On the evidence we were not persuaded that this was so. It is more likely, in our view, that the claimant's colleague was aware from her own observations of day-to-day activities at the School and discussions with her colleagues, no doubt, that the claimant was not caring for Child E in the same manner as

most of the other PSAs and, as we recorded above, this gave rise to some resentment on the part of her colleagues.

"The claimant felt intimated and bullied by the behaviour of Mr M in the meeting of 13 September 2018 when she was singled out for having to participate in the care of Child E."

162. The meeting which Mr M convened on 13 September was a meeting he normally arranged for the PSAs. The claimant may have had the impression that she was "singled out". In our view, on the evidence, that was not so.

"When the claimant was unable to attend work, the respondent failed to provide her with HR support or contact."

163. In our view this submission was well-founded. The claimant was left at home "in limbo" for long periods of time without any contact from the respondent. In particular, there was the period from around 21 January 2019 when the respondent received the OH Report until 26 March 2019 when she received the letter from the QIM (P.361), when there was no contact whatsoever. When the claimant responded by e-mail on 26 March to that letter (P.346-348) she said this (P.347):-

"*The irony is not lost in me that the Employee Assistance Programme is called "Time for Talking". Perhaps you don't know, but you are the first person from (the respondent) to 'talk' to me in 105 days. HR have refused to assist me for 204 days.*"

"The respondent failed to make reasonable adjustments that would have permitted the claimant to return to work."

164. We decided, unanimously, that the respondent had failed to make reasonable adjustments. If they had, the claimant would have been able to return to work at the School.

"The respondent did not act reasonably in delaying the production of an OH Report. It was evident from a very early stage an OH Report would be helpful. An OH Report was not produced until shortly before the claimant's dismissal."

165. We were satisfied for the reasons detailed above that this submission was well-founded. As we recorded, in all the circumstances, the delay in obtaining the OH Report was "*unconscionable and inexplicable.*"

"The claimant raised two grievances, neither of which were dealt with by the respondent following its own procedures. It appears that the respondent did not consider that the claimant's grievance was competent, at least in so far as it related to a dispute concerning the interpretation of her terms and conditions of employment. The respondent's Grievance Procedure, however, gives as an example of issues that may cause grievances "Interpretation of Terms and Conditions of Employment" (P.120-125 at P.121).

166. We were satisfied that this submission was well-founded. As we recorded above, we sensed that many at the School were not favourably disposed to the claimant.

"The respondent did not hold a grievance meeting for the claimant. Again, this stance is not supported by the Grievance Procedure: 'the person to whom the Formal Written Statement of Grievance has been addressed within 14 calendar days from receipt of the letter." "This could not be clearer, but a hearing was not convened. The respondent did not even inform the claimant that there would not have been a grievance hearing prior to the response to her grievance being produced."

167. We were also satisfied that this submission was well-founded. The Grievance Procedure was one of the respondent's "Policies" and as such was part of the claimant's Contract of Employment (P. 35).

"Likewise the respondent failed to deal reasonably or timeously with the claimant's subject access request (SAR). A SAR was first made on or around 10 December 2018 (P.301/302). This is an unexplained delay in responding to the SAR (P.327 and P.329)."

168. We were satisfied that this submission was well-founded. While the request was not perhaps as clear as it might have been comprising only a short paragraph in the claimant's e-mail of 10 December (P.302) and while some 500 documents required to be produced, we were satisfied that the respondent had not dealt with the request "reasonably or timeously".

"The claimant received an undated recorded delivery letter on 26 March 2019 inviting her to a meeting in Aberdeen on 28 March (P.361). The claimant replied to this letter immediately (P.346-348). The response notes that the claimant had received little support from HR during her period of absence."

169. We have already expressed the view that this submission was well-founded.

"The letter received makes reference to the respondent's Absence Management Policy (P.127-140). That Policy refers to the importance of contact being maintained when an employee is absent from work (which did not happen in the present case) and "supportive measures" such as reasonable adjustments being put in place to remove disadvantages created by an employee's disability. No supportive measures or reasonable adjustments were put in place for the claimant."

170. We were satisfied that this submission was well-founded. These failures on the part of the respondent were pivotal so far as both complaints were concerned.

"The claimant received a number of documents in response to her SAR on or about the middle of March 2019. The content of some of these documents together with a letter received on 26 March referring to the respondent's

Absence Management Policy was the "last straw" which resulted in the claimant's resignation. The claimant referred to a number of the documents in evidence. In particular the claimant was shocked by the tone and content of an e-mail exchange between Mrs C and Mr C on 27 November 2018 (P.296). In the e-mail Mrs C raises the possibility of disciplinary action being taken against the claimant."

171. We were satisfied that this submission was well-founded. While the respondent's solicitor drew to our attention in his submissions that the documents which the claimant received following her SAR were "heavily redacted", the claimant presented as credible and reliable and we accepted her evidence that the terms of the documents which she received and the respondent's letter of 26 March 2019 (P.361) were the "last straw" for her.

"The claimant also referred to other documents received following her SAR that had a similar effect on her (P.196-198) suggesting that the claimant was "unwilling" to carry out intimate care duties. No recognition of the claimant's phobia preventing her from doing so; (P.277) referencing the claimant raising a grievance against Ms A (the DHT). This is incorrect; the claimant did not raise a grievance against another member of staff; (P.297-298) suggestion that OH was only offered as a means of support and was not event required."

172. We were also satisfied that this submission was well-founded.

The "last straw""

173. In ***Kaur v. Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 the Court reviewed cases on the 'last straw'. While in that case there was no "last straw" as the employer's disciplinary process was perfectly proper, which meant that the Tribunal was entitled to dismiss the case, the Court formulated an approach to 'last straw' cases, as follows, referring to the implied term of trust and confidence as "the ***Malik*** term":

"*In a normal case where an employee claims to have been constructively dismissed it is sufficient for a Tribunal to ask itself the following questions:*

(1) What was the most recent act or (omission) on the part of the employer which the employee says caused or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in ***Omilaju v Waltham Forest London Borough Council*** [2005] ICR 481) *of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the* ***Malik*** *term? (If it was, there is no need for any separate consideration of a possible affirmation, for the reason given at the end of para. 45 above)'*

(5) Did the employee resign in response (or partly in response) to that breach?

174. We deal with each of these questions in turn: -

(1) The recent act (or omission) on the part of the respondent in the present case was the terms of the documentation which the claimant received in mid-March 2019 following her SAR, along with the terms of the letter of 26 March 2019 (P.361) which she received from the respondent's QIM.

(2) The respondent's solicitor submitted that the claimant had affirmed the contract as she did not resign until 18 April, having decided to resign on 26 March when she received the QIM's letter. However, we were not persuaded that that submission was well-founded. There was a delay of a few weeks but that was understandable given the magnitude of the decision for the claimant and the fact that she had been employed by the respondent for over 4 years enjoyed her job, did not have another job to go to and faced a period of unemployment. It was clear, that it was only with considerable reluctance that the claimant decided that she had no option other than to resign. In any event, the authorities make it clear that

when considering the issue of affirmation time is not the only factor. Conduct has also to be considered and in the period from the "last straw" until the claimant resigned there was nothing in her conduct consistent with her affirming the contract.

(3) We were satisfied that what was revealed in the documents which the claimant recovered following her SAR and the respondent's letter of 26 March comprised a repudiatory breach of contract on the part of the respondent.

(4) Even if these last "acts" did not constitute a repudiatory breach of contract it was clear that there was a course of conduct on the part of the respondent comprising several acts and omissions, detailed above, which, cumulatively, amounted to a repudiatory breach of the "***Malik term".***

(5) There was no doubt that the claimant resigned in response to that breach.

175. We arrived at the unanimous view, therefore, that the respondent was in breach of the implied term of trust and confidence. Any breach of this term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. Accordingly, the claimant was constructively dismissed.

176. We were also satisfied, with reference to s.98(4) of the Employment Rights ACT 1996, that the dismissal was unfair.

Remedy

177. Parties are directed to liaise with a view to agreeing, extra-judicially, an appropriate award of compensation, failing which the case will proceed to a Remedy Hearing.

Comment

178. Finally, we think it is at least worthy of comment, that while we have found in favour of the claimant and identified a number of failings on the part of the respondent, we were sympathetic to the position in which Miss A, the Depute Head Teacher, in particular, and the Head Teacher found themselves. Although they sought advice from HR, they were left to make the OH referral and to make decisions concerning the claimant's possible return to the School but they were not made aware that the claimant was disabled in terms of the 2010 Act and of the implications of the legal requirement to make reasonable adjustments until they received the OH Report some months after the duty arose. They were also of the view, mistaken in our opinion, or at the very least not as certain as they believed, that the claimant was required, in terms of her Contract, to deal with the intimate care of children at the School, in the same way as most of the other PSAs. These are legal issues, and challenging ones at that. Further, we also recognised that Miss A was pressurised by a constant and relentless stream of communications from the claimant some of which contained threats to "go to the press" (P. 297/298, for example). While the claimant was understandably aggrieved at the way she was being treated and the respondent's, *"say very little approach"* (P.298), communications from her to that degree, and in that manner, which caused Miss A understandable stress to an extent that she felt unable to deal further with the claimant, was both excessive and unnecessary.

NM Hosie

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Employment Judge

14th of June 2021

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Dated

14th of June 2021

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Date sent to parties