Case Numbers: 3200639/2020
3201976/2020

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs D. Stripe**
Respondent:	**Clarion Housing Group**
Heard at:	**East London Tribunal (remotely, by CVP)**
On:	**18-20, 24-25 August 2021; and 26 August 2021 (in chambers)**
Before:	**Employment Judge Massarella**
Members:	**Mrs G. Forrest** **Mrs B. Saund**

Representation

Claimant:	In person
Respondent:	Ms T. Burton (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Tribunal lacks jurisdiction in respect of Issues 2.4.2(a) and 2.5.2(a) because the claims were brought outside the statutory time limit and it is not just and equitable to extend time;**

2. **the Claimant's remaining claims of failure to make reasonable adjustments, harassment related to disability and victimisation are not well-founded, and are dismissed;**

3. **the Claimant's claim of unfair (constructive) dismissal is not well-founded and is dismissed.**

REASONS

This has been a remote hearing by video (CVP), which has not been objected to by the parties. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. The Claimant issued her first case on 27 February 2020, after an ACAS early conciliation period between 8 and 27 January 2020 ('the first case'). At the time she was still in the Respondent's employment. She complained of disability discrimination (failure to make reasonable adjustments, harassment and victimisation). There was a preliminary hearing for case management on 20 July 2020 before EJ Burgher, at which the issues were clarified.

2. The Claimant issued a further case on 31 July 2020, after an ACAS early conciliation period between 2 and 17 July 2020 ('the second case'). A preliminary hearing took place on 14 December 2020 before EJ Tobin. A claim of failure to make reasonable adjustments in relation to sick pay was withdrawn; the Claimant confirmed that the second case related only to unfair (constructive) dismissal.

The hearing

3. At the beginning of the hearing, the Tribunal had a discussion with the parties about adjustments. I explained that I proposed to take breaks every hour; we would aim to finish each day at 4 p.m. I reassured the Claimant that, if she needed any additional breaks, she need only ask. If she needed to stand and stretch on any point, we would pause the hearing while she did so (off-camera, if she preferred). Both parties confirmed that no other adjustments were required.

4. We had a bundle of documents running to 543 pages, a supplementary bundle of nine pages, a chronology and a cast list. The parties had prepared an agreed list of issues. On the first day of hearing a single clarification was made and incorporated into the version which is appended to this judgment. The Claimant confirmed that, although the box for 'other payments' had been ticked on the first ET1, she had not intended to raise any freestanding wages claims.

5. The parties had agreed a proposed timetable for the hearing. After some discussion, it was agreed that the hearing would deal with liability only, although we would hear evidence and submissions on contribution. We spent the rest of the morning reading into the case.

6. We heard evidence from:

    6.1. the Claimant;

    6.2. Mrs Angie Keating (Customer Accounts Team Leader, the Claimant's line manager through most of the material time); and

    6.3. Ms Pratima Chauhan (Assistant Head of Customer Accounts);

    6.4. Ms Tanya Curran (Regional Customer Account Manager, grievance chair);

    6.5. Mr Steve Moody (Head of Customer Accounts, grievance appeal chair);

    6.6. Ms Abi Jones (at the time, Employee Relations Manager, ER support and notetaker at the grievance appeal meeting).

Findings of fact

7. The Respondent is a housing association, which maintains around 25,000 properties across England. It was formed in November 2016 after a merger between two other housing associations, Affinity Sutton and Circle Anglia Ltd.

8. The Claimant started her employment on 10 November 2014 for Circle Housing Group, as it then was, as a Money Adviser. She worked from the Vange office, near Basildon, which was a 5- to 10-minute drive from her home. She worked in the Customer Accounts team, which is responsible for collecting rent and dealing with tenants who are in arrears. Mrs Keating was Customer Accounts Team Leader; she managed a team based in Birmingham; part of the team was based in the Bishops Stortford office.

Contract of employment and place of work (Issues 2.3.3. and 3.1.1(a))

9. We were taken to a contract of employment dated 1 July 2016, when the Claimant's job title changed to Welfare Benefits Adviser ('WBA'). WBAs assist tenants who are in arrears to secure housing benefit or universal credit. Much of the Claimant's work consisted of contacting tenants by phone and setting up face-to-face meetings with them, usually at their home. There might be several face-to-face meetings in a day. The Claimant had a car and drove to the office and to her meetings.

10. The contract provided that her normal place of work was Bishops Stortford, but recorded that the company reserved the right reasonably to change this to another location as it may require, and the Claimant agreed to travel as may be required for the performance of her duties.

11. On 23 November 2016, the Respondent wrote to the Claimant, notifying her that her place of work would move from Charrington House in Bishops Stortford to Innovation House in Bishops Stortford:

> 'Although you now working in an agile way and can work from any Circle Housing location, it is important to specify a base location for contractual purposes. This relocation constitutes a permanent amendment your contract of employment and all other terms and conditions will remain the same.'

12. There was a further contractual variation in March 2018, to which the Claimant signed her agreement; the contractual position remained that her base location was Bishops Stortford.

13. The Claimant said that she challenged this at the time, indeed that she had queried the position when her employment started in 2014 and was told not to worry about it by her manager, and that her contractual base would be Vange. We do not accept that evidence. We think it unlikely that a promise was made to her that she would have a different contractual base from the one stated in the contract, without that agreement being reflected in writing at some point, which it was not. There was no record of the Claimant's challenging the subsequent iterations of the contract. We think it more likely that she raised the issue when she started in 2014 and that she was told that, because of the Respondent's practice of agile working, there would be no practical difficulty

with her working from Vange, but that her contractual base would be Bishops Stortford.

Ill-health in May 2019

14. The Claimant wrote to her manager at the time, Ms Emma Wotton, on 3 May 2018 to notify her that she had been suffering with severe lower back pain since January 2018. She had consulted her GP, who thought it might be sciatica.

15. On 5 June 2018, the Claimant wrote to Mr Jared Myers (Regional Manager), telling him that she was now in continual pain in her neck, upper arms, lower back and hips, and was taking daily painkillers. There was a possible diagnosis of spinal osteoarthritis. She asked for some adaptations to her workstation. On 5 June 2018, Ms Wotton wrote to Mr Andy Lyon (of the Respondent's health and safety team), asking for an assessment of the Claimant's workstation as soon as possible.

16. The Claimant was referred to Axa, the independent occupational health provider used by the Respondent, and a report was produced on 2 July 2018. They advised that the Claimant was currently fit for work. The report recommended a full ergonomic assessment, and suggested that she work from home more, because of her mobility difficulties. If she was going to be working from home, however, a DSE assessment would have to be carried out there as well. It was noted that the Claimant's symptoms were worse in the morning, and that management might consider adjusting her working hours. Consideration might also need to be given to reducing her working hours to 75%.

17. On 31 July 2018 a DSE assessment took place at the Vange office, and an adapted workstation was provided with a reasonable period thereafter. Soon after this, the Claimant received a formal diagnosis of fibromyalgia. The Claimant also suffered from Chronic Idiopathic Urticaria (CIU), which caused flareups of hives on the Claimant's skin.

The training issue (3.1.1(e))

18. On 29 June 2018 the Respondent's Learning and Development officer wrote to the Claimant and others, reminding them that they had not completed the mandatory training course 'Lone Working And Conflict De-Escalation Techniques'. In her role the Claimant spent a lot of time working on her own, whether visiting customers at their homes or in tribunal. The Claimant had had this training previously but needed a refresher. It was important training. It was due to be held in central London. The Claimant wrote to Ms Wotton on the same day, saying that she understood the need for a refresher course, but that she could not manage the journey to central London at the moment. Ms Wotton replied the same day, reassuring her that the training could be put on hold until she was feeling better. In a subsequent email she asked her to keep an eye out for another course. The Claimant accepted that at this stage there was no question of her being forced, or put under pressure, to attend training.

Meetings with Ms Wotton in July 2018

19. The Claimant had a single day of absence on 9 July 2018; the reason given was irritable bowel syndrome (IBS). She had a return to work interview with Mrs Keating, at which she confirmed that IBS was an ongoing issue, but no

adjustments were required in relation to it, indeed she confirmed that she never asked Mrs Keating for adjustments in relation to IBS. She maintained that this had been discussed with her very first line manager, Ms Eva McIlwaine, who agreed that she could work from home on days when her IBS was particularly bad. She did not mention this to Mrs Keating.

Line management and scrutiny of cases (Issue 3.1.1(e))

20. On 20 July 2018 the Claimant had a one-to-one meeting with Ms Wotton, at which objectives were set for 2018/19. The first of these was to contribute towards the overall income team reduction of arrears to 3.5% at the end of the financial year. At the meeting Ms Wotton discussed this with the Claimant and asked her about the number of cases she had on the books. They reviewed two cases in more detail, which had been their usual practice.

21. The Claimant agreed that a number of adjustments were in place, which were discussed with Ms Wotton at a one-to-one meeting on 20 July 2018:

> 'EW and DS have discussed DS working from home to make things more comfortable for the morning and to come in at least 2 or 3 times a week in the afternoons. If DS is not comfortable coming in then not to. DS is happy with the arrangement currently and will speak to AK if anything needs to be changed.'

22. The Claimant was managed by Ms Wotton until the end of July 2018, when Mrs Keating ('AK' in the note above) took over as the only team leader. Mrs Keating worked from the Bishops Stortford office. She described the Claimant as a very good WBA, who performed well and was very thorough.

23. It is right that, for a short period when Mrs Keating took over as the Claimant's line manager, she increased the level of scrutiny of the Claimant's cases.

24. On 15 November 2018, the Claimant had a one-to-one meeting with Mrs Keating. The same objectives were in place as had been discussed with Ms Wotton. Mrs Keating recorded that the Claimant was currently behind with her arrears' reduction target but the Claimant believed that she had pending financial gains. They then went through each of the Claimant's cases, and the Claimant updated Mrs Keating. This was different from what had happened before, when only two cases would be selected for review. Mrs Keating was herself under pressure to reduce the number of open cases and we accept her evidence that she did not single out the Claimant, but had a similar conversation with Mrs Elaine Obika, who was also a WBA, albeit somewhat later (in May 2019) when Mrs Obika returned from a period of sickness absence

25. They also discussed at this meeting the fact that the Claimant now had an adapted chair which she was happy with. The cost of the chair was £830. Together with the mouse, keyboard, document viewer and footrest, the overall cost was about £1000.

Proposal to increase the Claimant's work at the Bishops Stortford office (Issue 2.3.3)

26. On 6 December 2018 Mr Myers wrote to the Claimant and her colleagues in the team, setting out a number of changes and concerns: how entries were logged into the system; that the team as a whole was not hitting its rent reduction

targets; that the type of attendances they could make with customers would be reduced. He also wrote that, from the first week in January, he needed both the Claimant and Mrs Obika to be in the Bishops Stortford office a minimum of one day per week initially, to improve face-to-face visibility between the customer accounts team and WBAs.

27. Around this time, the Claimant was only spending two days a week in the office; the other three days were spent away from the office, visiting customers and attending tribunals. This involved significant travel: for example, she attended a tribunal in Ipswich, which was 54 miles from her home. She was travelling to Harwich first, which was 57 miles from her home. The Claimant ensured that she could stop every thirty minutes, to walk and stretch, and always travelled outside rush hour.

The meeting on 14 January 2019 with Mrs Keating

28. On 14 January 2019, and in the light of Mr Myers' request, Mrs Keating wrote to the Claimant, asking her if she was planning to work a regular day in Bishops Stortford. The Claimant replied the next day saying that she was doing her best, but that parking was an issue, as was the fact that her adapted chair was located in the Vange office. She suggested that one possibility might be for her to work 10.30 to 15.30 when she worked at Bishops Stortford.

29. The Claimant and Mrs Keating met to discuss the issue on 23 January 2019. The Claimant explained that the reason she had suggested working those hours was because she took her daughter to school in the morning, and could not leave Basildon until 08:50. If she left Bishops Stortford at 17.00, she would not arrive home until 18.30/19.00. She felt that she could manage one day per week without some of her specialised equipment, but that she would benefit from a footrest and an adapted chair. Mrs Keating emphasised that the Claimant should take sick leave when she was unwell.

30. Mrs Keating asked the Claimant to attend training in central London, but the Claimant declined, because she would be unable to use public transport. She agreed that, if there was a mandatory event requiring her to use public transport, she could travel after rush hour, to be guaranteed a seat, and could leave early. She would be willing to drive if parking was available, and she would accept a lift in a car share.

31. Mrs Keating also recorded a number of positive developments: the Claimant had closed down several cases since the previous meeting and had achieved financial gains and arrears reduction; she was still working towards closing down all cases where benefits had been finalised; and she had accepted six new referrals over the past few weeks.

32. On 30 January 2019, Mrs Keating wrote to the Claimant, having spoken to Mr Myers, who had suggested that nothing be formalised about the Claimant working at the Bishops Stortford office until they were sure that they could get an additional adapted chair for her: there would be no expectation that the Claimant increase her work there until the issue had been resolved. The Claimant replied the same day: 'that is great thank you'.

The meeting in February 2019 (Issue 3.1.1(e))

33. At a one-to-one meeting with Mrs Keating on 15 February 2019, it was confirmed that the Claimant's objectives remained the same. Mrs Keating recorded that the Claimant was still behind on her arrears' reduction target, but that there were encouraging signs of improvement. They discussed the Claimant's health; the Claimant confirmed that she did not require any further specialised equipment. There was still no requirement for her to attend Bishops Stortford, while Mr Myers looked into the additional adapted chair.

34. At the meeting, the Claimant again updated Mrs Keating on each of her cases, as she had done in the November 2018 meeting.

The April 2019 meeting

35. On 5 April 2019, the Claimant had a one-to-one meeting with Mrs Keating. There was more positive news about the Claimant's progress towards meeting targets.

36. Mrs Keating told the Claimant that she had hit the trigger under the sickness absence policy, as a result of several short periods of sickness absence. The Claimant described these in her statement as being unrelated to her disability:

    36.1. one day in January 2018 (cold/flu);

    36.2. two days in July 2018 (hospital operation/gastrointestinal disorder)

    36.3. one day in February 2019 (cold/flu).

37. They had a detailed discussion about the Claimant's well-being. The Claimant confirmed again that she had been provided with adapted equipment. It was still the case that she could work from the Vange office until an adapted chair had been sourced for Bishops Stortford. Once that had been done, they would then discuss phased working from that office. As at April 2019 therefore, there was still no requirement for the Claimant to work at Bishops Stortford.

38. In addition, it had been agreed that the Claimant could work from home (or start the day's work at home), if she suffered with extra pain on certain days, but she was required to liaise with Mrs Keating about this, so that homeworking could be monitored. The Claimant did not need any adjustments to her workload or her hours. They also discuss the Claimant's travelling: she had been travelling to the Stevenage office (55 miles and an hour's drive). The Claimant said that she thought anything more than this would be difficult for her. She again said that she could not use public transport during rush-hour.

39. On 8 April 2019, the Claimant went to her GP and raised concerns about travelling to Bishops Stortford. The GP wrote a letter recommending that she be permitted to park her car near to work premises and, on days when she had an acute flare-up of her CIU, she should be permitted to work from home/start work slightly later than usual.

The emails and meeting in May 2019

40. On 10 May 2019, Mrs Keating emailed the Claimant with a list of cases that looked to her like they could be closed; she asked the Claimant to comment on each one for her. She was not criticising the Claimant, nor suggesting that she

was underperforming; she did this to help the Claimant expedite the closure of cases.

41. On 13 May 2019 the Claimant wrote to Mrs Keating about what she considered to be excessive scrutiny of her work:

> 'I have been doing my role now for over four years and I am fully aware of when a case can be closed; when it can be referred on and what outcomes are likely.'

42. As a result of this email, Mrs Keating stop reviewing all the Claimant's cases at one-to-ones; they went back to discussing just two cases in detail. The Claimant accepted that Mrs Keating listened to her objections and changed her behaviour. She accepted that her description of Mrs Keating's behaviour earlier in these proceedings as a 'personal vendetta' against her was an overstatement; she withdrew it at the beginning of her cross examination of Mrs Keating.

43. At a one-to-one meeting on 20 May 2019, the Claimant said that the adapted chair and footstool were helping to relieve her pain, and the document viewer was helping with reducing neck pain. She had not taken advantage of working from home, in part because she had a school run to do. She also preferred to go into the Vange office because her equipment and textbooks were there. She said that working from home 'may be counter-productive'. She confirmed that she was happy to continue driving for her role and managed her journeys so as to allow her to take any necessary breaks. It was a ten-minute drive to the Vange office. She said that, if she had to attend Bishops Stortford, she would be travelling for a minimum of two hours and would certainly be more tired if she was asked to travel there daily.

44. Thus, it was still the position as at June 2019 that she was not being required to attend the Bishops Stortford office, other than to attend meetings, to which she did not object.

<u>The occupational health referral and report of June 2019 (Issues 2.4.2(a) and 2.5.2(a))</u>

45. In early June 2019 a referral was made to OH, asking about the Claimant's fitness for work, her capability to continue in her present post, and her absences from work. No concerns were raised about her performance. The Claimant saw the referral document when she received a copy of the report sometime in late June 2019. The evidence we heard suggested that the document was drafted by a member of the HR team. One of the questions asked was:

> 'further clarity is required on whether Deeanne is fit to drive? There have been occasions whereby a medical excuse has been given to not attend a meeting at the Bishops Stortford office'.

46. We note that, earlier in the same form, slightly different language was used ('medical reasons').

47. The report was provided on 27 June 2019. In the opening paragraph, it stated:

> 'Thank you for referring Mrs Deanne Stripe to Occupational Health. She was referred for guidance on her fitness for work, her capability to continue in her present post and due to several absences from work.'

48. Among other things, the report stated:

> 'Functionally, she is driving her car and can drive for up to one hour provided her pain is well controlled. She can walk up to 50m before experienced increased aching. She can stand for up to 5 minutes before she must shift her weight.
>
> Mrs Stripe is keen to remain at work. She advised of difficulties attending a course in central London due to having difficulty travelling by public transport. She advised she can travel to Bishops Stortford however she has not had a workstation assessment completed at this office.
>
> If operationally feasible it would be supportive to provide Mrs Stripe with a disabled parking space or a parking space close to her places of work to reduce the risk of increased pain and fatigue should she have to walk. Due to the long-term nature of her condition this is recommended on a permanent basis.
>
> In my opinion, she remains fit to attend Bishops Stortford as required provided her symptoms of pain are stable at that time.
>
> She remains fit to drive, however it is recommended that she conducts a personal risk assessment prior to driving to ensure she is fit to carry out the journey.'

<u>FF2: changes to ways of working at the end of July 2019</u>

49. In 2018 and 2019 there was a large-scale organisational change in progress within the organisation, called FF2. It was split into two phases: Phase 1a went live in 2018. It involved major changes to the Customer Services, Housing, Finance and Development/Asset teams, and the launch of the Respondent's intranet system. It focused on the Affinity side of the business, and it did not affect the Claimant. Phase 1b, which did affect the Claimant, covered the same changes being made to the former Circle side of business. That went live in November 2019. Preparations for Phase 1b had already begun by July 2019. The changes for Customer Accounts included managing customers' accounts in different ways; roles and responsibilities changed across key teams. A key principle was that all employees had responsibility for each other and each role was interconnected. A completely new system (ERP) was introduced. The Claimant and her colleagues in the WBA team were to work from the new system, as well as continuing with their existing case management system (Advice Pro).

50. On 23 July 2019, Ms Pratima Chauhan wrote to the team, explaining that there had been a review of practices across the group within customer accounts, as part of the reorganisation, including: moving away from WBAs working in 'patches' (i.e. specific geographical areas); attendance at Tribunal would have to be discussed and agreed by line managers; and attendance would only be authorised for housing benefit or universal credit, where there was a direct link to the Respondent achieving gains.

51. During the later grievance meeting on 15 December 2019, the Claimant said about these changes: 'the requirements of the job now are not the job she wanted as she always wanted to help people, but she needs a job.'

Lone working training in August 2019 (Issue 3.1.1(e))

52. On 14 August 2019, the Claimant received an email again asking her to enrol to attend the 'Lone Working' training course in central London. Mrs Keating followed up with an email asking the Claimant to book on to one of the courses. The Claimant replied the same day, saying that she would do so, but that it would depend on how she was feeling on the day whether she attended. On 19 August 2019, Mrs Keating wrote to Ms Katy Brewis of HR, advising her of the Claimant's position. She asked Ms Brewis whether, if the Claimant did not attend the training, it would affect her ability to continue as a lone worker. That was a necessary point of clarification.

53. Ms Brewis replied that, if that situation occurred, but the Claimant was able to book on another course fairly quickly, she would be able to continue lone working. The courses took place regularly. If, on the other hand, it seemed likely she would not be able to attend the course for a significant period of time, there would need to be a further discussion. Both managers took a flexible and pragmatic approach. The Claimant was not put under pressure.

The one-to-one meeting in August 2019

54. The Claimant had a one-to-one meeting with Mrs Keating on 21 August 2019. Mrs Keating recorded that the Claimant had had one day's sickness absence, which was not related to her disability. The Claimant raised the 'medical excuse' comment in the OH report and told Mrs Keating how much it had upset her. Mrs Keating formally recorded in the notes that the comment was wrong, and that the Claimant did attend team meetings at Bishops Stortford.

55. She advised the Claimant that consideration was still being given to the need for her to be located in Bishops Stortford, but before this would happen the issues of parking and adapted equipment would need finally to be addressed. Consequently, there was still no requirement for the Claimant to attend Bishops Stortford on a regular basis in late August 2019.

The stress risk assessment (Issue 3.1.1(d))

56. Mrs Keating suggested to the Claimant that a stress risk assessment be conducted. She recorded in an email to the Claimant of 21 August 2019 that the Claimant felt that she was under additional pressure because of the new ways of working, and this had caused both her CIU and her fibromyalgia to worsen. On 23 August 2019, the Claimant wrote to Mrs Keating saying that she had not had a chance to complete the assessment and did not want to rush it. Mrs Keating reassured her that she could leave it until she got back from leave but mentioned that she was away on leave/training for most of September. The Claimant sent the completed assessment form to Mrs Keating on 10 September 2019.

The September complaint

57. On 3 September 2019 the Claimant raised an informal complaint to Employee Relations. She wrote:

> '… due to the current organisational changes and other ongoing issues related to my role, I have been placed under significant pressure to change my current office location and attend mandatory training courses of which both will require me to be travelling either by car or public transport for a substantial amount time. I believe that the requests are unreasonable due to my current health conditions and disabilities.'

58. The Claimant also raised the use of the phrase 'medical excuse' in the occupational health referral:

> 'An excuse is to 'invent a reason', 'create a way to defend one's behaviour' or simply as a means of 'neglecting responsibility'. I find this to be insensitive, unprofessional and discriminatory.'

59. We are satisfied that the complaint of 3 September 2019 contained a protected act, within the meaning of the victimisation legislation.

The meeting with Mr Morling on 26 September 2019 (Issue 2.3.3.)

60. On 26 September 2019 a meeting took place between the Claimant and Mr Roan Morling (Regional Customer Accounts Manager). Mr Morling had been seconded into this position after Mr Myers left. He no longer works for the Respondent. The first thing Mr Morling did at the meeting was to apologise to the Claimant for the poor wording in the OH referral; he repeated the apology at the end of the meeting and both apologies were formally recorded in the notes of the meeting.

61. He then told her that it had been confirmed two days earlier that the Claimant had been allocated a disabled parking bay at the Bishops Stortford office. As for working in Bishops Stortford, he said that, because it would take a number of weeks for the adapted equipment to arrive, he had agreed that the Claimant should continue to work from Vange for the next month. The note recorded:

> 'Once the equipment is installed DS has agreed to work from Vange for two days a week, and the rest of the week (if not on appointments) she will work from Stortford office. Appointments at, or in the surrounding area of, Vange must be booked on a Vange day. The said that sometimes her illness means she is unable to get work for 9.00 am, RMS said that as long as the CATL is aware then that is okay, and as DS has laptop to complete her role, she can WFH when she's feeling that she is unable to travel but able to work. She may also require an earlier finish which RM has agreed but the hours must be made up during the working week.'

62. Consequently, between 26 September and 26 October 2019, the Claimant would continue to work at Vange, with all her adapted equipment. As for the future plan, the Claimant accepted that she would still be working two days from Vange and at least one day a week on the road, dealing with appointments with customers. Thus, she would be working two out of five days from Bishops Stortford.

63. On 30 September 2019 Mr Morling wrote to the Claimant asking her to choose a desk for the Bishops Stortford office and complete the DSE assessment. On 28 October 2019 he chased her about this. The Claimant confirmed on 4 November 2019 that she had selected a desk but had still not met with Mr Lyons (health and safety officer) before she went on annual leave. She had emailed him that day to ask for a workstation similar to the one she had in Vange. In the meantime, she wrote that she would attend the Bishops Stortford office for one day each week until the workstation was in place. She asked Mr Morling if this was acceptable.

The October 2019 meeting: stress risk assessment (Issue 3.1.1(d))

64. A one-to-one meeting took place between the Claimant and Mrs Keating on 16 October 2019. Unfortunately, the notes of that discussion were not saved on the system and there is no written record of what was said. The Claimant accepted that there was a discussion of her general health and well-being, as there was at every meeting. There was also a brief discussion of the stress risk assessment form, but not a detailed discussion, because the meeting was held late in the day and they ran out of time. Whatever good intentions Mrs Keating may have had, no steps were then taken by her, Ms Norman or Ms Chauhan (both of whom were copied into the stress risk assessment) to make sure that it was followed up. In fact, nothing was done until it came up in the correspondence dealt with below. Equally, the Claimant did nothing to chase it.

The meeting on 20 November 2019 (Issue 2.3.4):

65. At a meeting on 20 November 2019, Mr Morling told the Claimant that the Respondent was not able to finance a second specialist chair for the Bishops Stortford office because of the cost. As a result, the Claimant would be required to work from Bishops Stortford five days a week, and arrangements would be made to move her adapted equipment from the Vange to the Bishops Stortford office. The Claimant was shocked by this news.

66. On 25 November 2019, Mr Morling wrote to the Claimant saying that a courier had been arranged to collect the equipment from Vange on 9 December 2019. In her ET1 the Claimant described this as 'the straw that broke the camel's back'.

The November grievance

67. On 26 November 2019, the Claimant raised a formal grievance about these latest developments. The issues raised included the requirement to work at the Bishops Stortford office, excessive scrutiny by Mrs Keating, the issue of homeworking and the use of the term 'medical excuse' in the OH referral. The grievance included explicit complaints of disability discrimination, which plainly amounted to a protected act.

68. The Claimant also sent an email to Ms Jade Norman of HR, emphasising her dissatisfaction with the way the Respondent had been dealing with her concerns. On 27 November 2019, the Claimant emailed Ms Katy Brewis (Employee Relations Adviser), asking if her adapted workstation could remain at the Vange office until a final outcome had been reached. On 28 November 2019, Ms Brewis wrote to the Claimant, agreeing to this as an interim adjustment.

69. In the event, the equipment was never collected, and the Claimant was never required to work in Vange without it.

Home working

70. On 6 December 2019 the Claimant notified Mrs Keating at the beginning of the day that she had an upset stomach and her hives had flared up badly. She said that she would do 'odd bits of case work as and when I can', although in the event she took it as a day of sick leave. Mrs Keating's response was to wish her well and to observe that she would be missed at a social event taking place that evening. A return to work meeting took place. It was recorded that there were no issues the Claimant wished to raise in relation to the recent absence, and she did not require further support or adjustments. The Claimant accepted in oral evidence that she hardly ever worked from home.

The December one-to-one

71. On 29 November 2019 Mrs Keating emailed the Claimant suggesting that she might want to update her stress risk assessment before the planned December one-to-one meeting. This was the first mention of the stress risk assessment since the October one-to-one. The Claimant replied the same day:

> 'I would rather just stick to doing the case reviews etc at the 121 as all the other stuff is just getting me down tbh. I feel totally demoralised by it all my enthusiasm & passion for my work is completely deflated. I will just be glad when it's all over – whatever the outcome.'

72. The Claimant accepted in cross-examination that by this she meant that she did not wish to discuss the stress risk assessment at the meeting. She thought that the issue would be dealt with in the course of the grievance process.

73. At the one-to-one on 2 December 2019, the Claimant told Mrs Keating that she was due to attend 'Lone Worker' training in central London that day but was unable to do so because of her disability. Mrs Keating suggested that the Claimant complete the e-learning and contact the training manager for an alternative date. The Claimant agreed. She confirmed in oral evidence that she never had to attend the training. Again, we find that Mrs Keating was approaching the issue reasonably and sensitively.

74. The Claimant complained about the fact that she 'kept getting told I was non-compliant'. There was little evidence of this, other than a reference by the Claimant herself in an email of 13 September 2019, when she says that 'I want to attend but physically struggle to do this and if I don't attend than I am told I am being non-compliant'. Even if it was the case, it was not an inappropriate observation to make: this was important training which might affect her ability to discharge the full range of her duties.

The conduct of the grievance process (Issues 2.3.5 and 2.5.2(b))

75. The Claimant's grievance was acknowledged on 27 November 2019. She was invited to attend a grievance meeting on 16 December 2019. In the invitation letter Ms Curran specifically said that it was unlikely that she would be able to give the Claimant an outcome on the day. The Claimant accepted that this was unsurprising.

76. At the beginning of the meeting on 16 December 2019, Ms Curran told the Claimant that a decision would probably be provided in early January 2020. She would keep her informed about timescales.

77. Asked what outcome she was seeking, the Claimant said that she wanted to be left alone to do her job from Vange. She also wanted compensation for how she had been made to feel. She warned that, if she did not get this, she would consider making an Employment Tribunal claim for discrimination and constructive dismissal. She said that she would be prepared to work one day a week in Bishops Stortford, although she did not see the point of doing so.

78. The Claimant emailed some further points about her grievance to Ms Curran on 18 December 2020. Ms Curran replied, telling her that she would take the into account. She also told her that she could not meet with all the relevant individuals until the week commencing 6 January 2021, and so would not be able to provide an outcome until mid-January 2020. The Claimant replied on 20 December 2020, saying that she wanted the matter sorted out as soon as possible, as she was finding the situation 'emotionally exhausting'. However, if that was the earliest that an outcome could be given, 'then so be it', provided she was left to work in Vange during the interim period. She also mentioned that she had contacted ACAS.

79. On 31 December 2019, the Claimant provided proposed amendments to the hearing notes. On 8 January 2020, she contacted ACAS to begin early conciliation. Ms Curran spoke to Mrs Keating and Mr Morling on 9 January 2020.

80. On 13 January 2020 she emailed the Group Safety Officer to seek funding for a second adapted workstation for the Claimant to use in the Bishops Stortford office. She was told that a second workstation would need to be funded by operations. Ms Curran spoke to Ms Chauhan about funding the second workstation, which Ms Chauhan agreed to look into it. On the same day Ms Curran informed the Claimant that she had concluded her investigation and would send the outcome to her by the end of the week.

81. On 16 January 2020, the grievance outcome letter was sent to the Claimant. Ms Curran recommended as a reasonable adjustment that the Claimant work four days a week from the Vange office, and one day a week from the Bishops Stortford office. The Respondent would provide a permanent parking bay at the Bishops Stortford office. She suggested that the Claimant work at Bishops Stortford on Friday, so that she could recover from the drive the following day. She did not uphold the grievance in relation to excessive scrutiny by Mrs Keating. She did not agree that homeworking should be permitted; she concluded that, if the Claimant was unwell and not fit to attend the office, the day should be taken as sick leave. She upheld the grievance in relation to the use of the term 'medical excuse' in the OH report; she considered it a poor choice of words and formally apologised again for it. She did not find that the Claimant had been discriminated against.

82. On 17 January 2020 the Claimant went on long-term sick leave; she remained off work until 1 June 2020, a period of around five and a half months.

83. On 23 January 2020 the Claimant appealed the grievance outcome.

Mr Moody's conduct of the grievance appeal meeting (Issues 2.4.2(b) and 2.5.2(c))

84. The grievance appeal meeting took place on 10 February 2020 and was conducted by Mr Moody. Ms Jones attended to provide support and take notes, which were later amended to include the Claimant's comments. The Claimant alleged in her witness statement that Mr Moody conducted the meeting:

> 'in a manner that was patronising, condoning [*sic*], arrogant and condescending. This angered and upset me to the point that I needed to request a break so that I could calm down and gather my thoughts and dignity.'

85. The Claimant was accompanied at the meeting by Mr Brett. Neither he nor the Claimant raised any concerns at the meeting about the way in which it was being conducted. There was no evidence in the notes of the meeting, which the Claimant had reviewed, and to which she had proposed amendments, of Mr Moody saying anything inappropriate at this meeting. The Claimant did not put anything specific to him about what he said in cross-examination. The high point of her case in respect of this meeting was in relation to a break in the middle of the meeting. The Claimant stated in her oral evidence (but not in her witness statement) that Mr Moody's manner changed when she returned after the break, and she inferred from this that Ms Jones must have spoken to him about his manner.

86. Mr Moody, in his statement, denied the allegations. In her witness statement (para 18) Ms Jones, who was present at the meeting, stated that 'Steve conducted the hearing entirely appropriately and professionally'. We accept that evidence: we are not satisfied that Mr Moody behaved in any way inappropriately at this meeting.

87. On 12 February 2020, the Claimant wrote to Mr Moody [412], setting out her desired outcome which was: that she work at the Vange office five days a week; that there be no expectation that she attend any training in person; and that she be given financial compensation equivalent to one year's salary.

The grievance appeal outcome

88. On 19 February 2020, the grievance appeal outcome was sent to the Claimant. Mr Moody concluded that the Claimant should work from Bishops Stortford one day a week, but that it could be any day. He took a different view on homeworking, stating that it should continue to be allowed as and when needed, on the basis that the Claimant make the request to her manager 'where possible at least one day before the requirement'. We find that this was a sensible step, which ensured that the line manager could be satisfied that the Claimant was not working when she was not well enough to work; it explicitly left open the possibility that it might not always be possible for the communication to take place the day before the requirement.

89. As for training, the requirement to complete mandatory training remained but the arrangements for providing that training should be adjusted where possible to support the Claimant's needs, and in line with OH advice. Mr Moody confirmed that 'Lone Working' training would be provided either at Vange or Bishops Stortford, or by an appropriate desk-based solution. The Claimant confirmed that she was never required to attend training in central London.

90. The request for financial compensation was declined. On 27 February 2020, the Claimant issued the first case.

Contact from Mrs Keating during sickness absence (Issue 3.1.1(g))

91. Mrs Keating contacted the Claimant on 20 February 2020 and 4 April 2020. She also emailed the Claimant on 25 and 26 March 2020. These were standard calls, in which Mrs Keating touched base with the Claimant and asked for an update on her progress. Not only was this in line with the Respondent's absence management procedure, it was good practice. Had she not maintained this contact, the Claimant might reasonably have complained that she had been neglected during her absence.

92. On 25 March 2020, the Claimant was signed off for a further three months for 'work-related stress which has made her fibromyalgia and mental health much worse'. She had had to increase her medication.

93. One of the subjects Mrs Keating raised when she contacted the Claimant was the arrangements for the adapted equipment in Bishops Stortford. On 3 March 2020, the Claimant advised Mrs Keating to 'hang fire' with this, as she did not yet know when she would be back from sick leave. It was suggested to the Claimant in cross examination that she did not want Mrs Keating to incur the cost, because she knew that she would not be remaining with the Respondent.

94. Towards the end of March 2020, the first Covid-19 lockdown began. On 9 April 2020 the Respondent presented its ET3 response to the first case. On or around 19 April 2020, Mrs Keating arranged for flowers to be sent to the Claimant at her home, for which the Claimant expressed gratitude in an email.

The issue of sick pay and attendance management (Issue 3.1.1(f) and (g))

95. After three months of long-term sickness absence, the Claimant's pay reduced to 75% from 15 April 2020, in line with the Respondent's policy. On 27 April 2020 the Claimant wrote to Ms Jones, asking that a reasonable adjustment be made so that her salary was not reduced to 75%, but instead her absence be recorded as disability leave. Ms Jones refused the request on 30 April 2020.

96. On 30 April 2020, Ms Jones invited the Claimant to attend a first stage attendance at work meeting, to get an update on her condition. This was also in line with the Respondent's policy. Mr Brett from the Ability Network accompanied the Claimant to the meeting. All agreed that it was a very positive meeting. At the end of the meeting Ms Jones stated:

> 'AJ outlines that whilst meeting has been extremely positive and it sounds likely that Dee will be able to RTW before the end of her existing fit note, she does need to remind her that if she does not return to work by 1st June – further to another review, a decision may be made to proceed to 2nd stage of the formal LTS procedure. Does not want to dampen the positive actions from meeting, but outlines the present levels of absence concern, and you need to see an imminent RTW.'

97. The Claimant perceived this as a threat. It was not. When going through a procedure of this sort, it is vital that HR be transparent about possible consequences. If Ms Jones had not warned the Claimant, and the

consequences had occurred, the Claimant would have been entitled to criticise her.

98. On 7 May 2020, Mrs Keating conducted a Stage 1 formal sickness meeting with the Claimant, who was accompanied by Mr Brett. Ms Jones attended to take notes. Mrs Keating confirmed that, because of the pandemic, there was no restriction on working from home and observed that this might help the Claimant get back to work.

99. On 1 June 2020, the Claimant returned to work on a four-week phased return, working from home. Mrs Keating conducted a return to work interview with her. She told the Claimant to work whatever hours suited her and to take as many breaks as she needed. She asked her to go through emails and any e-learning. She encouraged her to complete the homeworking DSE report, which the Claimant did on 5 June 2020.

New employment with Citizens Advice

100. The Claimant had been working as a volunteer with the CAB since 2012. On 6 June 2020 the Claimant was contacted by Citizens Advice about the possibility of her taking up a paid position with them. The Claimant accepted a contract to begin working for the CAB on 15 June 2020, working two hours a day, going up to full-time on 1 July 2020. We find on the balance of probabilities that the Claimant had already decided to resign from the Respondent's employment by 15 June 2020 at the latest.

101. On 12 June 2020, an OH report was prepared, which recommended that the stress risk assessment be updated. It also suggested mediation, which the Claimant declined at a meeting on 23 June 2020, saying that:

> 'Dee does not want to access mediation. Dee feels she has a good working relationship with her direct line management, team members and other teams. Dee did not appreciate how she was communicated with by senior management but believes on a day-to-day basis she would not be contacting these individuals.'

102. We infer that the Claimant rejected mediation, in part at least, because she had already decided to resign, and knew that it would be pointless. The OH report confirmed that a DSE had been completed and that the Claimant had all the equipment she required.

103. On 26 June 2020, the Claimant received a copy of the Respondent's ET3 in the first case.

104. In the Claimant's witness statement (at paragraph 63) she wrote:

> 'Despite having loved my job and having such passion for the work I did in supporting our vulnerable tenants I could not stop the negative thoughts of what Clarion had done and felt such an immense feeling of fear and panic inside that the treatment would continue it made me physically sick. I had so much to lose by walking away from Clarion but the damage done I realised was now irreparable. I was looking to serve my notice from the 29th June 2020 however this changed when I received the ET3 on the Friday (26th). Upon reading through the things said about me by Clarion

> my mind was flying between anger and emotion. I didn't want to rush any decision but once I received the ET3 I knew I would never go back.'

105. The Claimant was taken to this passage in cross-examination; she agreed that it confirmed that she had already decided to resign before she saw the ET3.

The Claimant's resignation (Issues 3.1.1(h) and 3.2)

106. On 29 June 2020 the Claimant submitted her resignation to Ms Jones. In the latter she referred to having received, and being upset by, 'a copy of Clarion's response to my appeal'. She confirmed in Tribunal that by this she meant the ET3. She wrote:

> 'The detrimental and false allegations made by Clarion I perceive to be the 'last straw doctrine'. The statements made by Clarion within the response had a severe emotional and devastating psychological impact upon my well-being and has consequently caused an irretrievable breakdown in our working relationship. I believe this now constitutes a fundamental breach of all trust and confidence to the point that I believe resignation to be my only choice'.

107. Ms Jones replied, asking if she wished to reconsider. On 1 July 2020 the Claimant wrote to Ms Jones, confirming her resignation. The Claimant's last day of employment with the Respondent was 2 July 2020. She commenced ACAS early conciliation in the second case on 2 July 2020. She lodged it with the Tribunal on 31 July 2020.

108. In October 2020 the decision to close the Bishops Stortford office was taken. Staff were consulted about the proposal in May 2021. At the time of the hearing, the process of transferring staff to Stevenage was underway.

Time limits

109. The Claimant is currently working as a general adviser and advice line coordinator for Citizens Advice. While working for the Respondent she had been working as a volunteer with the CAB since 2012. She confirmed that, in 2018 and 2019, she knew about the existence of Employment Tribunals, and had access to information about Tribunals through the CAB. She had known about the three-month time limit since she joined the CAB because it was covered in the training she received. She also had access to the CAB website, which contained the relevant information.

110. She had a thirty-minute advice session about her employment difficulties shortly after 3 September 2019. She confirmed she had not sought advice earlier.

111. She believed that, if discrimination was ongoing, it could be a continuing act. She also relied on the fact that she was going through an internal process.

The law: disability discrimination

Time limits

112. S.123(1)(a) EqA provides that a claim of disability discrimination must be brought within three months, starting with the date of the act to which the complaint relates.

113. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

114. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

115. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which will usually include: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

<u>The burden of proof</u>

116. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

117. Their effect was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the**

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
>
> **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

118. In *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279, Sedley LJ observed at [19]:

> **'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'**

119. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

<u>The definition of disability</u>

120. S.6(1) EqA provides:

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

121. 'Substantial' is defined in s.212(1) EqA as 'more than minor or trivial' and is a low threshold.

122. The 'long-term' requirement is developed in para 2, Sch.1 to the EqA, which provides, so far as relevant:

> **(1) The effect of an impairment is long-term if –**
>
> **(a) it has lasted for at least 12 months,**
>
> **(b) it is likely to last for at least 12 months, or**
>
> **(c) it is likely to last for the rest of the life of the person affected.**
>
> **(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.**

123. 'Likely', in this context and elsewhere in the provisions defining disability, means 'could well happen', rather than 'more likely than not to happen' (*Boyle v SCA Packaging Ltd* [2009] ICR 1056, HL).

124. Sch.1, para 5(1) EqA provides (the doctrine of deduced effects):

> **(3) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:**
>
> **(a) measures are being taken to correct it, and**
>
> **(b) but for that, it would be likely to have that effect.**
>
> **(4) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.**

125. The Guidance gives non-exhaustive examples of day to day activities:

> **'[D2] In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.'**

126. The Tribunal's focus should be on what the employee cannot do (or what they can do with difficulty) rather than on what they can do. The EqA does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial. Unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial (*Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591 EAT at [14-15]).

127. In *Ministry of Defence v Hay* [2008] 1247 EAT, the EAT held that an impairment could be an illness or the result of an illness and it was not necessary to determine the precise medical cause. In that case there were a "constellation of symptoms" that lasted more than a year, even though they were not all medically attributable to the employee's tuberculosis. The EAT concluded that someone who suffered from a combination of impairments with different effects, to different extents, over periods of time which overlapped, could be regarded as disabled. This view is supported by the *Guidance* at B6, which states that, although a person may have more than one impairment (any one of which alone would not have a substantial adverse effect), account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities.

<u>Knowledge of disability</u>

128. Knowledge of disability is relevant to the claims under ss.15 and 20 EqA. The burden is on the Respondent to show that it did not know that the Claimant was disabled (actual knowledge), or that it ought not reasonably to have known that he was disabled (constructive knowledge).

129. There is a further requirement in a reasonable adjustments claim: that the employer knew, or ought reasonably to have known, that the disability was likely to ('could well') put the Claimant at a substantial (more than minor or trivial) disadvantage in comparison with non-disabled persons.

130. For these purposes the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day activities. Provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person'. The responsible employer must make his own factual judgment as to whether the employee is or is not disabled. In doing so, the employer will rightly want guidance from occupational health. When seeking outside advice from clinicians, the employer must not simply ask in general terms whether the employee is a disabled person within the meaning of the legislation, but pose specific *practical* questions directed to the particular circumstances of the putative disability. The answers to such questions will then provide real assistance to the employer in forming his/her judgment as to whether the criteria for disability are satisfied. (*Gallop v Newport City Council (No.1)* [2014] IRLR 211 at [36-44]).

Failure to make reasonable adjustments: s.20-21 EqA

131. S.20 EqA provides as relevant:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**

132. S.21 EqA provides as relevant:

> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
>
> **[…]**

133. In relation to "practice", it has been held that there must be some degree of repetition. For example, in *Nottingham City Transport Ltd v Harvey* UKEAT/0032/12 a one-off, flawed disciplinary process was not a 'provision' or 'criterion' nor a 'practice' with the latter requiring some element of repetition. The one-off act of dismissal has been held not to be capable of amounting to a PCP: *Fox v British Airways Plc* EAT 0315/14.2

134. In *Gan Menachem Hendon Ltd v De Groen* [2019] ICR 1023 the EAT held that for a PCP to exist from a single occasion:

> **'there must either be direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred'.**

135. *De Groen* was not cited to the Court of Appeal in *Ishola v Transport for London* [2020] ICR 1204 CA but the outcome is consistent. The Court of Appeal rejected the Claimant's submission that *Harvey* was wrongly decide. The court accepted that the words 'provision, criterion or practice' were not to be narrowly construed or unjustifiably limited in their application, the court concluded that it was significant that Parliament had chosen these words instead of 'act' or 'decision'.

> **'To test whether the PCP is discriminatory or not it must be capable of being applied to others. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words 'provision, criterion or practice' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Although a one-off decision or act can be a practice, it is not necessarily one.'**

136. In *Rider v Leeds City Council* EAT 0243/11, the EAT held that the act of informing an employee that he or she must return to a particular post in due course may be sufficient to amount to the application of a PCP, even if the return to work is never effected because of the employee's objections.

137. In the same case the EAT also held that the carrying out of an assessment as to what reasonable adjustments might be made in respect of a disabled employee was not, of itself, capable of amounting to a reasonable adjustment. In *Smith v Salford NHS Primary Care Trust* UKEAT/0507/10, the Employment Appeal Tribunal held that:

> '**Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage … within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify.'**

138. In *NCH Scotland v McHugh* EATS 0010/06 the EAT concluded that the duty to make reasonable adjustments is not triggered until the Claimant indicates that he or she was intending or wishing to return to work. His Honour Judge McMullen stated:

> **'We agree that a managed programme of rehabilitation depends on all the circumstances of the case, but it does include a return to work date. And certainly, if additional management and supervision is to be required, they must be arranged in advance and not in a vacuum. Similarly, if additional costs were to be incurred by (not this case) the purchase of new equipment to counteract the effect of the**

[2] In the sphere of indirect discrimination, a one-off decision has been held to amount to a provision: *British Airways Plc v Starmer* [2005] IRLR 862 EAT.

> **environment on the disabled person, there would be no need to spend that money in advance of a clear indication that the Claimant was returning. In our judgment, applying the trigger approach… it was not reasonable for the Respondent to pursue the possibilities which the Tribunal noted until there was some sign on the horizon that the Claimant would be returning.'**

139. This approach was approved by Lady Stacey in *Doran v Department for Work and Pensions* EAT 0017/14, although a different approach was taken in *London Underground Ltd v Vuoto* EAT 0123.09.

140. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal (*Morse v Wiltshire County Council* [1998] IRLR 352).

141. The Code provides:

> **17.21 Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so.**
>
> **17.22 However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make.**

<u>Harassment related to disability</u>

142. Harassment related to disability is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
> **…**
> **race**
> **…**

143. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

144. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at para 47) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

145. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ (at para 12), referring to the above, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

Unfair (constructive) dismissal

146. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

147. S.95(1) ERA provides that he is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct ('a constructive dismissal').

148. The employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard himself as discharged from his obligations under the contract.

149. Examples of breaches of contract upon which a complaint of constructive dismissal might be founded include a reduction in pay (*Industrial Rubber Products v Gillon* [1977] IRLR 389); and a complete change in the nature of the job (*Land Securities Trillium Ltd v Thornley* [2005] IRLR 765).

150. An employee may also rely on a breach of the implied term of trust and confidence. The applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at [14] onwards):

> **14. 'The following basic propositions of law can be derived from the authorities:**
>
> **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**
>
> **2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**
>
> **3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in**

> ***Woods v WM Car Services (Peterborough) Ltd*** **[1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).**
>
> **4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).**
>
> **5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:**
>
> > **"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."**
>
> **15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:**
>
> > **"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."**
>
> **16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.**'

151. The Court of Appeal gave further guidance in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (at [55]):

> '**(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*) of a course of conduct comprising several acts and 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 previous 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?'

152. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at [29]).

153. It is important to apply both limbs of the test. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract if there is 'reasonable and proper cause' for it: *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727 (at [22- 23]).

154. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Meikle* (at [29]).

155. The employee must not delay his resignation too long or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 (at 828-829). What matters is whether, in all the circumstances, the employee's conduct shows an intention to continue in employment, generally by continuing to work: *Chindove v William Morrison Supermarket plc*, UKEAT/0201/13 at [25-26].

Submissions

156. Both the Claimant and Ms Burton provided written documents containing their closing submissions which the Tribunal has taken into consideration. These are a matter of record we do not summarise them here in what is already a long judgment.

157. Ms Burton made brief oral submissions, mainly updating her submissions by reference to the evidence that had been heard on the morning of the fifth day and making observations on the points made by the Claimant in her written document.

158. The Claimant explained in a letter to the Tribunal accompanying her submissions that she preferred not to make oral submissions, as she would find this too emotional an experience. I reassured her that she could change her mind if she wished to do so, after we had heard from Ms Burton. In the event, she chose to make some further points orally in response.

159. We are grateful both to the Claimant and to Ms Burton for their thoughtful and measured approach to the hearing.

Conclusions: disability

160. The Claimant raised the issue of IBS, CIU and stress/anxiety and depression for the first time in the second claim, presented in July 2020. In the first claim,

and at the PH before EJ Burgher, the Claimant relied only on fibromyalgia. The Claimant explained that she wanted it to be known that part of the reason why she needed to work at home was because she did not want to be seen (because of her CIU) or needed to be near a toilet (because of her IBS). The Claimant confirmed at the hearing before us that she was not relying on IBS and CIU as separate disabilities, but as symptoms of fibromyalgia, brought on by stress. She maintains that IBS is a recognised condition within fibromyalgia.

161. We accept that, as well as fibromyalgia, the Claimant suffered from IBS, CIU and stress, anxiety and depression. Whether these symptoms were related to, or aggravated by, or aggravated her fibromyalgia, does not make a great deal of difference. The Respondent conceded that the Claimant met the test for disability by reason of fibromyalgia alone. To the extent that these other conditions were relevant to the issues before us, we did not treat them as disabilities in their own right, but acknowledged that they formed part of a 'constellation of symptoms' (to use the language of *Ministry of Defence v Hay* (above at para 127) which, taken together with fibromyalgia, had a substantial and long-term adverse effect on the Claimant's day-to-day activities. We understood that to be consistent with the way that the Claimant approached the issues. The Respondent accepts that it had knowledge of the disability of fibromyalgia at the material time.

Conclusion: failure to make reasonable adjustments

Issue 2.3.3: The Claimant contends that the requirement for her to work at the Bishops Stortford office as a PCP that put her at a substantial disadvantage because of her disability. This was indicated from 6 December 2018 and underlined on 26 September 2019.

162. In view of our findings of fact above, we have concluded that the requirement to work in Bishops Stortford was proposed but never imposed in practice.

162.1. In December 2018 Mr Myers proposed that the Claimant work from Bishops Stortford a minimum of one day a week. Although the issue was discussed at the meeting with Mrs Keating on 23 January 2019 (para 29), it was agreed by 30 January 2019 that the plan would not be implemented until an adapted chair had been provided in the Bishops Stortford office (para 32).

162.2. The position remained the same at the meeting on 5 April 2019 (para 37), 20 May 2019 (para 43-44) and 21 August 2019 (para 55).

162.3. The new arrangement discussed at the meeting on 26 September 2019 (paras 60-62) was agreed by the Claimant. However, it was made clear that it would not actually be applied to her until the necessary adjustments were in place to eliminate any disadvantage which she anticipated might occur. The PCP was, therefore, not applied at this stage either.

162.4. As for Mr Morling's proposal at the meeting on 20 November 2019 that the Claimant work in Bishops Stortford five days a week, we accept Ms Burton's submission that this too was a proposal to implement a PCP, which was never actually implemented. The difference between this and the two previous occasions is that the

proposal had none of the hallmarks of good sense in the approach which the Respondent showed earlier in the chronology. The Respondent later resiled from it in the grievance outcome (para 81), and then to an even greater extent in the grievance appeal outcome (para 88).

163. In addressing us on these claims, Ms Burton very fairly referred us to the case of *Rider* (para 136). We have considered that case carefully and we do not think it is on all fours with this case. *Rider* was a case, in which the EAT expressly found (at [70]) that the employer persisted in imposing a requirement on the employee to return to a particular post, without considering any alternatives or adjustments. That was not the position in this case. Up to the meeting on 20 November 2019, the requirement to work in Bishops Stortford would only have been applied to the Claimant when the adjustments which were anticipated were in place. In fact, this was a good example of a Respondent anticipating a disadvantage and seeking to eliminate it before it arose. What it was effectively doing was anticipating potential difficulties and seeking to eliminate them, before applying the requirement to the individual who might be disadvantaged by it. In our judgment that showed a degree of foresight which is not always evident among employers. In our view, it would be contrary to the underlying purpose of the Equality Act 2010, if an employer could not take this approach.

164. Although Mr Morling did not show such foresight in his approach at the meeting on 20 November 2019, the Respondent, as an organisation, again prevented the actual disadvantage from occurring on 28 November 2019, by suspending the proposal until the Claimant's objections, as raised in her grievance, had been properly investigated. In due course, they were upheld.

165. Consequently, the Claimant was never required to work in Bishops Stortford for five days a week. The final position was that she was required to work there was one day a week, a proposal to which she agreed (paras 63 and 77). Even that PCP was never applied in practice, because Covid-19 restricted the Claimant and her colleagues to working from home. Because the PCP was never actually applied, the claim cannot succeed.

166. Even if the requirement to work one-day a week in Bishops Stortford had taken effect, we have concluded that, insofar as the Claimant now says that this would have placed her at a substantial disadvantage, because she could not cope with the travel, we are not satisfied that it would; she was able to travel similar distances to clients and to tribunals by carefully managing her journey. If we are wrong about that, and the requirement to work one day in Bishops Stortford would have put the Claimant at a substantial disadvantage, the Respondent did not have actual or constructive knowledge of any disadvantage: the Claimant had consistently agreed (and told Ms Curran in the course of the grievance) that she could manage one day a week; the OH advice was that she was able to work in Bishops Stortford (para 48). If we are wrong about that, by that point, the necessary reasonable adjustments had been put in place to remove any disadvantage: a permanent parking space, agreement for the Bishops Stortford day to be any day of the week, flexibility in start and finish times, the installation of a second set of adapted equipment and homeworking when necessary. We have concluded that exempting her from the requirement altogether would not have been a reasonable adjustment: the Respondent reasonably needed some regular attendance by her in Bishops Stortford to enable face-to-face contact

and foster cooperation and the sharing of knowledge/information within and between teams (paras 26 and 49-51). We accept that that was especially important to the Respondent at a time of major organisational change.

Issue 2.3.4: The Claimant contends that, from 20 November 2019, she was required to work at the Vange office without the equipment to accommodate her disability amounted to a PCP that put her at a substantial disadvantage because of her disability. The equipment was to be moved to the Bishops Stortford office and the Claimant was asked to contact Access to Work for funding for equipment at the Vange office. The Claimant did not contact Access to Work.

167. The Claimant was never required to work from the Vange office without her adapted equipment; her adapted equipment was not moved to the Bishops Stortford office. Although both things were suggested as a possibility at one point, neither actually happened (paras 65-69); the PCP relied on was not applied.

168. If we are wrong about that, the Claimant's claim must fail because the Respondent made the adjustments contended for within a reasonable period and so there was no breach of the duty: they confirmed that she could continue working from the Vange office; that office continued to have all the necessary equipment to accommodate her disability; and when necessary, she was permitted to work from home.

Issue 2.3.5: The Claimant contends that the speed in which her grievance was held amounted to a PCP that put her at a substantial disadvantage because of her disability. It caused her additional stress compounding her condition.

169. This claim of failure to make reasonable adjustments fails because we have concluded that the Respondent did not have a practice of conducting grievance processes with undue delay; this was an exceptional instance of a process taking longer than it would normally have taken. The Claimant's own evidence was that she thought it was normal practice for the process to be quicker. She agreed that there was no practice of the Respondent to delay a long time in providing outcomes. That is consistent with the fact that Mr Moody's appeal process only took nine days. Consequently, no such PCP was applied and the claim must fail at that stage.

170. For the avoidance of doubt, we do not find that the timescale for dealing with the grievance was unreasonable in the circumstances, especially as it was being conducted over the Christmas period. Ms Curren kept the Claimant informed at all times.

Conclusion: harassment related to disability

Issue 2.4.2(a) The terms of the referral to occupational health in June/July 2019 in particular disability "being used as an excuse" and there were false allegations relating to "several absences incurred as a result".

171. At the hearing the Claimant withdrew her allegation of harassment relating to disability that the referral contained 'false allegations relating to "several absences incurred as a result"'; accordingly, it is dismissed. She confirmed that it was solely the use of the phrase 'a medical excuse has been used' which upset her, and which she pursued as an act of disability-related harassment.

172. We accept Ms Burton's submission that it is long out of time: is a discrete act; there is no connection between it and the conduct of Mr Moody at the meeting on 10 February 2020 (the next allegation of disability-related harassment). Six and a half months passed between the two events: it was not 'conduct extending over a period'. Nor do we consider it just and equitable to extend time: the Claimant was aware of her rights, and of the relevant time limits when the act occurred; no satisfactory explanation was advanced as to why she delayed as long as she did in bringing the claim. We do not consider that the fact that she pursued a grievance provided good grounds for the delay; nor was the Claimant so incapacitated by health difficulties that she was not capable of issuing a claim in time. In our judgment, the prejudice to the Respondent of defending a historic allegation outweighs the prejudice to the Claimant in not being allowed to pursue it. She has numerous other claims, which are in time, and in respect of which she can seek a remedy.

173. Had we had jurisdiction to deal with this claim, and insofar as we need to deal with it by way of background to the other discrimination claims, we would have found that, although it was unwanted conduct related to the Claimant's disability, and the Claimant's subjective perception was that it was deeply offensive, it was not reasonable for it to have that effect. In our judgment it did not begin to approach the high threshold of harassment: it was a single instance of inappropriate language, which viewed objectively, cannot reasonably be regarded as having violated the Claimant's dignity or created a hostile, intimidating, offensive or degrading environment for her.

Issue 2.4.2(b): Steve Moody's approach to the Claimant's grievance appeal meeting on 10 February 2020.

174. We have already found that the alleged conduct did not occur; the claim of harassment fails for that reason. Moreover, the Claimant accepted in oral evidence that she was not saying that there was anything in Mr Moody's manner which was linked to her disability, nor that he acted in the way he did because of her disability. Given that, a claim of harassment related to disability was bound to fail.

Conclusion: victimisation

175. We have found that the grievances of 3 September and 26 November 2019 both contained protected acts (paras 59 and 67).

176. However, the Claimant said in oral evidence that it was not her case that she was subjected to detriment because she had complained about discrimination. She did not pursue this claim in cross-examination of the Respondent's witnesses, or in her closing submissions.

177. For the avoidance of doubt, the first alleged detriment (Issue 2.5.2(a): the terms of the OH referral) is out of time for the reasons already given in relation to the equivalent harassment claim (Issue 2.4.2(a)). Moreover, it cannot have been an act of victimisation because it predated the first protected act; in our judgment, there is an adequate, non-discriminatory explanation for Ms Curran's delay in completing the grievance (Issue 2.4.2(b)); and we have already found that there was no evidence that Mr Moody acted as alleged at the meeting on 10 February 2020 (Issue 2.4.2(c)).

178. The claims were not well-founded, and the Claimant was right not to pursue them. For all these reasons, the claims of victimisation are dismissed.

Conclusion: constructive dismissal

Did the Respondent breach an express term of the Claimant's contract? If so, was it a fundamental breach of contract?

179. In the light of our finding that the Claimant's contractual base was Bishops Stortford (paras 9-13), the later attempts to require her to work from Bishops Stortford more than she had previously been doing did not amount to a breach of an express term of the contract.

Which, if any, of the acts, which C alleges amounted to a breach of the implied term, did not occur as alleged?

180. We have found that the following acts did not occur:

180.1. Issue 3.1.1(e): '[…] putting her under pressure in relation to attending training'. It is right that attempts were made to ensure that the Claimant completed 'Lone Worker' training. We have concluded that the attempts were always done in an appropriate way; pragmatic suggestions were made to facilitate her attendance. When she raised concerns about her ability to attend in person, her managers sought alternatives. At no point was the Claimant put under pressure to do something which she could not do. The conduct did not occur as alleged. If we are wrong about that, the Respondent had reasonable and proper cause for acting as it did: training was a necessary part of her job, and it was important that the Claimant stay up to date.

180.2. Dealing with Issue 3.1.1(b) (failure to make reasonable adjustments), we have already found that there was no such failure, either because the PCPs were not applied, alternatively because the steps contended for as adjustments (Issue 2.3.6) were taken: the Claimant was allowed to continue working from Vange and her adapted equipment was never removed from Vange; and the grievance was dealt with as quickly as it reasonably could be. As for home working, Ms Burton reminded us that there was no failure to make reasonable adjustments claim in relation to home working (the Claimant did not construct a PCP in relation to a requirement to work in the office, rather than at home). In any event, we are satisfied that the Claimant could work from home when she needed to, but rarely did so (before the pandemic, at least) because she preferred to work in the office. We note that in her grievance dated 16 November 2019 the Claimant wrote:

> 'the option of homeworking when needed was offered by you but to date I have not use this option, preferring to come into the office where I feel I can be more productive.'

The only period when homeworking was not permitted was between 17 January 2020 on 19 February 2020 (between the grievance outcome and the appeal outcome), but the Claimant was signed off sick in any event and was not fit to work either at home or in the office. Insofar as Mr Moody's appeal outcome required that the Claimant communicate

with her line manager when she wished to work from home, that was only required 'where possible', and so did not limit the Claimant's options in practical terms. It was, in our view, a sensible requirement because it allowed the Claimant's line manager to be apprised of the position and to step in, if necessary, if she felt that the Claimant was proposing to work from home when really she was too unwell to work at all at all. In short, there was no failure to make reasonable adjustments in this respect.

180.3. The alleged harassment by Mr Moody at the grievance appeal meeting did not occur (Issue 3.1.1(c)).

180.4. As for Issue 3.1.1(g) ('continually contacting the Claimant while she was signed off work, demanding a date for return'), the Claimant withdrew this aspect of her complaint in the course of the hearing. For the avoidance of doubt, we are satisfied that Mrs Keating's contact with the Claimant was sensitive and appropriate.

180.5. Finally, dealing with Issue 3.1.1(h), we have concluded that the contents of the ET3 cannot have played any part in the Claimant's decision to resign because that decision had already been taken before she saw it (paras 100 and 105). In any event, we are not satisfied that, merely by setting out its pleaded case, the Respondent did anything blameworthy which could contribute to a breach of the implied term. The Claimant appears to have been particularly upset by the fact that the Respondent did not concede that she was a disabled person. There was no obligation on it to do so. Although it had treated her as a disabled person during her employment, it is not uncommon for an employer to take a more cautious approach in the context of Tribunal litigation, and to require more formal proof of status. Consequently, even if the Claimant had not already decided to resign, the ET3 would not have provided her with the last straw, nor would it have contributed in any way to a breach of the implied term.

Having regard to the acts which did occur, was there reasonable and proper cause for them?

181. We have found that the following acts did occur, although we have concluded that they did not amount to unlawful discrimination. We were clear at the outset of the hearing that we would consider the underlying factual matters in the discrimination claims (where relied on under Issue 3) as potential elements of a breach of the implied term, whether or not they were discriminatory. We now go on to consider whether the Respondent had reasonable and proper cause for them.

181.1. Issue 3.1.1(e): 'Scrutinising the Claimant's cases […]' We have found that, for a short period when Mrs Keating took over as the Claimant's line manager, she increased the level of scrutiny of the Claimant's cases. She did so because there was an increased emphasis on efficiency at the time and Mrs Keating was herself being encouraged to reduce the number of open cases and wanted to get a handle on the Claimant's cases (paras 24 and 26). She raised it with the Claimant in an appropriate way; she did not put pressure on the her, she was simply line managing her professionally. When the Claimant raised an

objection, Mrs Keating stopped doing it (para 42). In our judgment, she had reasonable and proper cause for acting as she did.

181.2. Issue 3.1.1(d): 'Ignoring the stress risk assessment'. It was Mrs Keating's suggestion that the Claimant complete a stress risk assessment, which the Claimant did reasonably promptly. While we accept the explanation given for why the stress risk assessment was not discussed at the October one-to-one, no adequate explanation was given as to why it was not picked up in the following six weeks. To the extent that there was that period of delay in dealing with the stress risk assessment, we are not satisfied that the Respondent has shown that there was reasonable and proper cause for it; it appears simply to have been overlooked. By the time Mrs Keating returned to the subject on 29 November 2019, the Claimant had lodged a grievance and preferred that everything be dealt with together.

181.3. As for Issue 3.1.1(a) ('placing excessive demands upon the Claimant in relation to her hours and location in relation to working from Bishops Stortford') we are satisfied that the Respondent did not place excessive demands on the Claimant in terms of hours; it was consistently flexible and accommodating. As for location, it was reasonable for the Respondent to require the Claimant to increase the amount of time she spent in Bishops Stortford, because it was important that she have more face-to-face contact with her colleagues. We find that the Respondent had reasonable and proper cause for the approach taken by managers before 20 November 2019: the proposals to increase the Claimant's work in Bishops Stortford had been carefully negotiated with her, and the necessary adjustments had been agreed, as had the fact that any change would not be implemented until they were in place. However, we have concluded that there is one matter which potentially engages the implied term of trust and confidence: Mr Morling's proposal at the meeting of 20 November 2019 that the Claimant work five days a week in Bishops Stortford. Mr Morling's approach showed no sensitivity. It ought to have been apparent to him that requiring the Claimant to travel to and from Bishops Stortford five days a week was not a reasonable expectation. By proposing it, he undid a lot of the good which had previously been achieved; he was effectively raising the possibility of existing adjustments being removed. We do not consider that the cost of providing two sets of equipment, one in Vange and one in Bishops Stortford, was unreasonable. Although not-for-profit, the Respondent is a large organisation which, in our judgment, could easily have absorbed the cost, if it meant retaining a valued and long-serving employee. We have concluded that there was no reasonable and proper cause for making this proposal. The Respondent plainly reached the same conclusion when it later reversed Mr Morling's decisions by the decisions of Ms Curran and Mr Moody.

181.4. Dealing with Issue 3.1.1(c), although we have found that the use of the term 'medical excuse' was out of time for the purposes of the harassment Claimant, and was not sufficiently serious to amount to harassment, nonetheless it did occur and there was no reasonable and

proper cause for it: HR officers should be careful to avoid language which is likely to upset colleagues.

181.5. There is the then the issue of sick pay (Issue 3.1.1(f)). Ms Jones refused the request to maintain full pay on 30 April 2020. The Claimant suggested that one of the reasons why full pay ought to be maintained was because she was waiting for reasonable adjustments to enable her to return to work. That was not the case. The only pending adjustment was the adapted workstation for Bishops Stortford. The Claimant had specifically asked Mrs Keating to 'hang fire' before ordering it. The Claimant agreed that it was not a fundamental breach of contract to pay her in accordance with the Respondent's own contractual sick pay policy. Further, we accept Ms Burton's submission that there was no breach of an express term of the contract in not converting sick leave into disability leave, because there was no requirement under the contract for the Respondent to do so. However, that does not answer the question of whether this could amount to a breach, or an element of a breach, of the implied term of trust and confidence. We consider that it does not. We agree with Ms Burton's submission that the Respondent's sick pay provisions were generous, and that, in circumstances where the Claimant's inability to return to work was not caused by a failure by the Respondent to make reasonable adjustments, the Respondent had reasonable and proper cause for refusing the request: the Claimant had been off work for a very long time; the Respondent had done all it could to facilitate her return to work; in our judgment, had the Respondent maintained full pay, there would have been even less incentive for her to return.

181.6. As for the allegation that the instigation of the attendance management was in any way 'threatening' or otherwise inappropriate (Issue 3.1.1(g)), we reject that contention. Given the length of the Claimant's absence, there can be no doubt that the Respondent had reasonable and proper cause for acting as it did.

<u>In relation to the matters for which there was not reasonable and proper cause, did the Respondent behave in a way that, viewed objectively, was likely to destroy, or seriously damage, the relationship of trust and confidence between the Claimant and the Respondent?</u>

182. There are only three matters which we have found occurred - and in respect of which the Respondent did not have reasonable and proper cause - which could, singly or cumulatively, amount to a breach of the implied term: the use of the term 'medical excuse' in the OH referral; the failure to progress the stress risk assessment; and the approach taken by Mr Morling at the meeting of 20 November 2019, when he told the Claimant that the Respondent could not finance a second chair for Bishops Stortford and, because of this, she would be required to work at the Bishops Stortford office five days a week.

183. Dealing first with the use of the term 'medical excuse', we find that this was an inappropriate term to use in the circumstances, which caused the Claimant some upset. However, viewed objectively, we consider that it was not in itself sufficiently serious to be likely seriously to damage or to destroy the relationship of trust and confidence

184. With regard to the stress risk assessment, while we consider that the Respondent was at fault in not pursuing the matter more promptly, in all the circumstances we do not consider that it was sufficiently serious to amount to a breach of the implied term: the Claimant agreed with Mrs Keating that it should not be discussed further at the October one-to-one; she herself took no steps to chase it; and, when Mrs Keating chased it with her, she asked not to progress it for the time being because she had lodged a grievance. At that point, the Respondent cannot be criticised for complying with her wishes. Moreover, the issues which would have been raised in the stress risk assessment were, to a very great extent, addressed in the grievance and the grievance appeal.

185. In our judgment, the position is different when it comes to Mr Morling's actions on 20 November 2019. What he was proposing was, in our view, impractical. The Respondent knew that requiring the Claimant to work five days a week from Bishops Stortford would be difficult for her. It was also contrary to the undertakings which she had previously been given. We consider that Mr Morling's approach on that occasion was sufficiently ill-advised that, viewed objectively, it was likely seriously to damage the relationship of trust and confidence between the Claimant and the Respondent. It amounted to a breach of the implied term of trust and confidence, and had the Claimant accepted that breach and resigned shortly thereafter, her claim of constructive dismissal might have succeeded.

Did the Claimant resign in response to the breach of contract?

186. However, she did not. She first went down the route of raising a grievance and appealing the outcome of the grievance. Those were sensible steps. As a result, the arrangements which Mr Morling had proposed were revoked by 19 February 2020. The Claimant then remained on long-term sick leave (and full pay) for a further three months. She then returned to work on 1 June 2020. She did not resign until the end of month. We have concluded that the sole reason why she did so was because, she had been offered, and had accepted, new employment with Citizens Advice, which was more suited to the kind of work that she wished to do than the work she was now doing for the Respondent within the new organisational culture, which she did not find congenial. Her reliance in these proceedings on the contents of the Respondents ET3 was a contrivance, which she hoped would provide her with a 'last straw'. For the reasons we have already given, it did not.

If so, did the Claimant affirm the contract before resigning?

187. If we are wrong about that, the Claimant remained in the Respondent's employment for over seven months after Mr Morling's proposal was made, and over four months after it was revoked, by which time she was on long-term sickness absence. She then returned to work throughout the month of June. She did not state that she was working under protest. In these circumstances we are satisfied that, by delaying for so long after the index event, and then returning to work for a month before resigning, the Claimant waived the breach and affirmed the contract.

188. For the reasons already given, there was no final straw which could revive the breach which she had waived. Accordingly, the claim of unfair (constructive) dismissal fails.

Conclusion

189. For the reasons set out above, we have concluded that the Claimant's claims are not well-founded, and they are dismissed. We apologise to the parties for the delay in sending out this judgment; this was caused by a lack of judicial resources and the demands of other cases.

Employment Judge Massarella
Date: 30 November 2021

APPENDIX: AGREED LIST OF ISSUES

1 **Jurisdiction**

1.1 Are all of the Claimant's complaints of discrimination in time?

1.2 Do the Claimant's complaints form part of a continuing act or continuing discriminatory state of affairs, the last of which is in time?

1.2.1 The Claimant submits that her complaints of discrimination do form part of a continuing act or continuing discriminatory statement of affairs.

1.3 If not, would it be just and equitable for the Tribunal to extend time?

2 **Disability**

2.1 Was the Claimant disabled at the relevant time? The Claimant contends that she suffers from fibromyalgia.

2.1.1 The Respondent accepts that the Claimant's fibromyalgia constituted a disability at the relevant time.

2.2 The Claimant also contends that she suffers from IBS, chronic idiopathic urticarial (CIU) and stress/ anxiety/depression.

2.2.1 The Respondent does not accept that these conditions made the Claimant disabled at the relevant time, being from 6 December 2018 to 10 February 2020. The Respondent does not admit that it knew or could reasonably have been expected to know that the Claimant was disabled at the relevant time for the purposes of her claim and does not admit that it knew or could reasonably have been expected to know that the Claimant was likely to be placed at a substantial

disadvantage by the PCPs pleaded by the Claimant compared to persons who are not disabled at the relevant time in relation to these conditions.

2.3 **Failure to make reasonable adjustments (s.20 Equality Act 2010)**

2.3.1 Was the Respondent under any duty to make reasonable adjustments for the Claimant?

2.3.2 Did the Respondent impose a provision, criterion or practice (**PCP**) which put the Claimant at a substantial disadvantage because of her alleged disability compared to those who are not disabled?

2.3.3 The Claimant contends that the requirement for her to work at the Bishops Stortford office as a PCP that put her at a substantial disadvantage because of her disability. This was indicated from 6 December 2018 and underlined on 26 September 2019.

2.3.4 The Claimant contends that, from 20 November 2019, she was required to work at the Vange office without the equipment to accommodate her disability amounted to a PCP that put her at a substantial disadvantage because of her disability. The equipment was to be moved to the Bishops Stortford office and the Claimant was asked to contact *Access to Work* for funding for equipment at the Vange office. The Claimant did not contact *Access to Work***.**

2.3.5 The Claimant contends that the speed in which her grievance was held amounted to a PCP that put her at a substantial disadvantage because of her disability. It caused her additional stress compounding her condition.

2.3.6 The Claimant contends that the following would have been reasonable adjustments that the Respondent should have made?

(a) Being allowed to continue working at the Vange office.

(b) When necessary, being allowed to work from home

(c) Ensuring that the Vange office had the necessary equipment to accommodate her disability.

(d) Dealing with her grievance quicker.

2.3.7 Did the Respondent know that the Claimant was disabled, or could reasonably have been expected to know that the Claimant was disabled, and the Claimant was likely to be at a substantial disadvantage compared with persons who are not disabled?

2.3.8 If the duty to make reasonable adjustments arose, are those adjustments specified by the Claimant reasonable adjustments and/or would they have alleviated the disadvantage suffered by the Claimant? Did the Respondent fail to make any such reasonable adjustments?

2.4 **Harassment– s.26 Equality Act 2010**

2.4.1 Did the Respondent harass the Claimant related to her disability?

2.4.2 The Claimant relies on the following acts of harassment:

(a) The terms of the referral to occupational health in June/July 2019 in particular disability "*being used as an excuse*" and there were false allegations relating to "*several absences incurred as a result*".

(b) Steve Moody's approach to the Claimant's grievance appeal meeting on 10 February 2020.

2.4.3 Insofar as any of the acts at paragraph 1.4.2. are found to have taken place:

(a) did the relevant act amount to unwanted conduct?

(b) was it related to the Claimant's disability?

(c) did it have the purpose or effect of violating Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Claimant?

(d) was it reasonable in all the circumstances for it to have that effect?

2.5 **Victimisation - S.27 Equality Act 2010**

2.5.1 The Claimant contends that she made protected acts in

(a) ~~her 1-2-1's from May 2019;~~

(b) her grievance dated 3 September 2019; and

(c) her grievance of 26 November 2019.

2.5.2 Was the Claimant subject to any detriment because of any protected act? The Claimant alleges that the acts of detriment are:

(a) The terms of the referral to occupational health in June/July 2019.

(b) The delay in concluding her grievance by Tanya Curran on 16 January 2020.

(c) Steve Moody's approach to the Claimant's grievance appeal meeting on 10 February 2020.

3 **Constructive unfair dismissal**

3.1 So far as the Claimant's constructive dismissal complaint, pursuant to section 95(1)(c) Employment Rights Act 1996, the issues to be determined are as follows:

3.1.1 Did the Respondent do the following things, which the Claimant contends amounted to individually or collectively as a fundamental breach of contract. The Claimant alleges they are:

(a) Placing excessive demands upon the Claimant in relation to her hours and location in relation to working from Bishops Stortford which the Claimant submits was an unreasonable change to how she worked and created an unsafe working environment and caused her work-related stress and reversed changes made in 2018 after Occupational Health recommendations;

(b) Failing to make the reasonable adjustments set out at paragraph 1.3.6 above;

(c) The alleged acts of harassment set out at paragraph 1.4.2 above;

(d) Ignoring the Claimant's stress assessment;

(e) Scrutinising the Claimant's cases and putting her under pressure in relation to attending training;

(f) Not recording the Claimant's sick leave as disability leave instead, and as a result this affected the Claimant's pay;

(g) Starting stage 1 sickness absence action due to time off the Claimant had taken for "work related stress" and continually contacting the Claimant whilst signed off work, demanding a date for return and making threats of taking the Claimant to stage 2 of the sickness absence procedure if she did not return on a certain date;

(h) The content of the Respondent's ET3 response to the Claimant's first claim in that the Claimant said the Respondent denied the Claimant's disability, told lies about the Claimant's disability, and called the Claimant's conduct into question. The Claimant alleges this was the final straw which prompted her resignation.

3.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

(a) whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

(b) whether it had reasonable and proper cause for doing so.

3.2 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

3.3 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

3.4 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that she chose to keep the contract alive even after the breach.

3.5 If the Claimant was dismissed, what was the reason or principal reason for dismissal? Was it a potentially fair reason?

3.6 Does the Claimant wish to be reinstated to their previous employment or re-engaged to comparable employment? If so, should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.7 Should the Tribunal order re-engagement?

4 **Remedy**

In respect of remedy:

4.1 Does the Claimant wish to be reinstated to their previous employment or re-engaged to comparable employment? If so, should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

4.2 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and appropriate.

4.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

4.3.1 What financial losses has the dismissal caused the Claimant?

4.3.2 Has the Claimant taken reasonable steps to replace her lost earnings, for example by taking another job?

4.3.3 What period of loss should the Claimant be compensated?

4.3.4 Does the statutory cap of 52 weeks' pay apply?

4.4 What basic award is payable to the Claimant, if any?

4.5 Is an injury to feelings award applicable in respect of the first claim?