EMPLOYMENT TRIBUNALS

Claimant:	**Mrs J Davies**	
Respondent:	**The Regard Partnership Limited**	
Heard at:	**Cardiff (by CVP)**	**On: 15, 16, 17 and 18 November 2021**
Before:	**Employment Judge R Vernon** **Ms D Hebb** **Ms P Humphreys**	

Representation:
Claimant: Mr P Morris (Counsel)
Respondent: Ms S Garner (Counsel)

RESERVED JUDGMENT

JUDGMENT

The unanimous Judgment of the tribunal is as follows:

1. The claimant's complaint of constructive unfair dismissal contrary to section 94 and 98 of the Employment Rights Act 1996 is well-founded and succeeds.

2. The claimant's complaint of direct disability discrimination contrary to section 13 of the Equality Act 2010 fails and is dismissed.

3. The claimant's complaint of discrimination arising from disability contrary to section 15 of the Equality Act 2010 succeeds (in part).

4. The claimant's complaint of indirect disability discrimination contrary to section 19 of the Equality Act 2010 fails and is dismissed.

5. The claimant's complaint of a failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 fails and is dismissed.

6. The claimant's complaint of victimisation contrary to section 27 of the Equality Act 2010 fails and is dismissed.

REASONS

Introduction

1. By an ET 1 claim form presented to the Tribunal on 11 September 2019, the claimant makes complaints of constructive unfair dismissal and disability discrimination. In summary, the claimant asserts that the way in which she was treated by the respondent whilst absent from work on sick leave following a diagnosis of cancer amounted to unlawful discrimination in one or more forms and provided her with justification for resigning from her employment and treating herself as unfairly dismissed.

Procedural history

2. The respondent presented an ET3 response together with grounds of resistance on 25 October 2019. The respondent denies liability in respect of each of the claimant's complaints and asserts that the respondent did not discriminate against the claimant as alleged or at all and that the respondent did not act in a way so as to breach a fundamental term of the claimant's contract of employment and that, accordingly, the claimant's employment came to an end upon her resignation and not as a result of any dismissal constructive or otherwise.

3. A preliminary hearing took place on 19 November 2019 before Employment Judge Ryan. During the course of that preliminary hearing, the claimant clarified her case. In respect of the complaint of constructive unfair dismissal, the claimant confirmed that the term alleged to have been breached is the implied term of trust and confidence and the acts or omissions of the respondent relied upon to establish that breach were also clarified. As to the claim of disability discrimination, the claimant confirmed that she alleged direct discrimination, discrimination arising from disability, indirect discrimination, a failure to make reasonable adjustments and victimisation. The specific acts or omissions relied upon as the discrimination alleged were also clarified. Directions were given for the matter to be listed for a final hearing with a time estimate of 5 days. As a result of various delays, many of which were caused

by the Covid 19 pandemic, the final hearing could not take place until November 2021.

Hearing and evidence

4. The final hearing took place between 15 and 18 of November 2021. Although the final hearing had been listed originally with a 5-day time estimate, the time estimate was reduced administratively by the Tribunal (and not by the Tribunal panel actually hearing the final hearing) in the run-up to the final hearing due to judicial availability.

5. Both parties attended and were represented by counsel. The claimant attended and gave oral evidence. On behalf of the respondent oral evidence was given by Louise Ridger (Human Resources Manager), Moira Jevons-Hunt (Human Resources Integration Manager at the time of the events in question but no longer employed by the respondent), Michael Fullerton (Clinical Director) and Joanna Armitage (Data Protection Officer).

6. All of the witnesses who gave oral evidence had provided written witness statements which the Tribunal also considered. In addition to the witnesses above, the Tribunal was also provided with a witness statement from Kay Beacham, the claimant's former line manager. After allowing time for the claimant's counsel to take instructions, the claimant indicated that she did not seek to rely upon that statement. Ms Beacham did not attend the hearing to give evidence and the Tribunal has not considered the evidence set out in her statement.

7. After the tribunal spent the first morning of the hearing reading into the case, the evidence commenced on the afternoon of day one. The evidence of all witnesses was completed by lunchtime on day three and submissions were heard from the parties that afternoon. On behalf of the respondent, Miss Garner had prepared written submissions which she elaborated upon in oral submissions. Oral submissions only were received from Mr Morris on behalf of the claimant.

8. After hearing submissions, the tribunal indicated that it would need the whole of the next day to deliberate on the complaints made by the claimant and that it was therefore not possible for the Tribunal to deliver an oral judgment within the (reduced) hearing time. Accordingly, the parties were released from attendance at the hearing at the conclusion of day three and judgment was reserved.

Issues

9. A comprehensive summary of the issues for determination was recorded in the record of the preliminary hearing conducted by Employment Judge Ryan on 19 November 2019. Subject to one matter, the parties confirmed at the outset of the hearing that the list of issues set out in that document remained the list of issues for determination.

10. At the commencement of the hearing, Mr Morris indicated that one of the claimant's factual allegations (relevant to the complaints of unfair dismissal, direct discrimination and discrimination arising from disability) required amendment or clarification. The allegation as recorded in the list of issues, for example at paragraph 11 c) iv) was that the claimant did not receive a pay rise granted to her colleagues. Mr Morris accepted that the claimant had in fact received the same pay rise as her colleagues but that the claimant alleged that she had not been consulted by the respondent in respect of the pay rise unlike her other colleagues. No objection was taken by the respondent to that amendment/clarification.

11. Having considered the list of issues incorporating the amendment/clarification above, the Tribunal adopted the list of issues for the purposes of the final hearing.

12. The Tribunal observes that, during cross-examination of the respondent's witnesses a number of further issues were raised on behalf of the claimant and criticisms made of the approach taken by the respondent in respect of various events. To the extent that those matters are material background to the specific complaints made by the claimant the tribunal has considered them. However, the parties having agreed a list of issues in November 2019 and having confirmed that the list of issues remained valid at the commencement of the hearing, the Tribunal has not considered any additional complaints raised during the hearing by the claimant beyond those set out in the list of issues.

Facts

13. The respondent is a national provider of support to adults with learning disabilities, mental health needs and acquired brain injuries. It provides support through various services which operate in over 164 services nationwide, employing in excess of 2300 members of staff. The respondent is registered as a care provider with the Care Quality Commission.

14. The claimant was employed by the respondent from 8 January 2013 as a locality manager responsible for a number of services within the Welsh region. She remained employed by the respondent in that role until she resigned on 6 September 2019.

15. As a locality manager, the claimant was required to oversee a number of registered and supported living services within Wales. In fact, the claimant's area covered the majority of Wales, except Anglesey. The claimant was the direct line manager for eight service managers who, in turn, managed approximately 150 staff members between them. In summary, the claimant's role required her to visit and monitor the facilities where the respondent provided its services to ensure that those facilities met the required organisational and regulatory requirements.

16. In terms of the claimant's own line management, as locality manager she was directly responsible to the Regional Director of Wales. For the majority of the claimant's employment, the Regional Director of Wales was Kay Beacham. Although other regions employed Area Managers in addition to locality managers and Regional Directors, there was no intermediate level of manager between the claimant and the Regional Director in Wales. Therefore, the natural course of any promotion for the claimant during her employment would likely have been from locality manager to Regional Director. There was no dispute between the parties that, during the claimant's employment, she had covered Kay Beacham's role during periods in which Ms Beacham was absent.

17. The claimant was a hard worker. She was considered by all of her colleagues to be diligent and good at her job. No concerns were raised at any stage in relation to her work or her capabilities. In her witness statement, the claimant says that she was told by her line manager throughout her employment that she was consistently in the top three of the manager ratings throughout the whole company. The claimant was not challenged about that evidence and the tribunal therefore accepts it.

18. The events which are material to the claimant's claim took place between January 2019 and September 2019.

19. In early 2019, the respondent was involved in the process of merging with another care provider, namely CMG (an acronym for the Care Management Group). The respondent and CMG were both significant, large scale providers of care services throughout the United Kingdom. The merger was a significant event and resulted in decisions being taken as to the restructuring of the new post-merger organisation which became known as Achieve Together. The

merger and the processes surrounding it created a complex and often stressful situation for those employees involved.

20. In early January 2019 the claimant commenced a period of sickness absence, initially due to back pain. The claimant had initially started experiencing back pain in October 2018 but had continued to work until January 2019 when the pain became too bad for her to continue.

21. On 31 January 2019, the claimant sent an email to Louise Ridger, HR manager. In her email the claimant indicated that she had been contacted by one of the service managers for whom she had responsibility. The manager was querying information given to her about the person to whom she should report in the absence of the claimant and the claimant's line manager, Kay Beacham. The claimant was querying the change in reporting lines given that she was unaware of the absence of Kay Beacham. In the same email, the claimant also informed Ms Ridger that she had received news that a routine mammogram she had undertaken had produced an abnormal result and that she was now awaiting the results of a biopsy to see if there was any evidence of a cancerous growth.

22. On 6 February 2019 the claimant sent an email to Graham Farrington-Horsfall and Ms Ridger. In it she requested that, due to her situation (by which she was referring to her illness and absence from work) she be granted full sick absence pay for the duration of her absence. She informed them that she had been diagnosed with stage 3 breast cancer and that she required an operation. She was unsure whether she would require chemotherapy but she had been told that she would definitely require a course of radiotherapy and, in order to allow her time to recover, she would likely be absent from work for a period of 3 to 4 months.

23. The following day, Sam Collier (the respondent Regional Director) sent an email to Mr Farrington-Horsfall and Matthew Butcher (a senior recruitment adviser employed by The Regard Group). In his email, Mr Collier asked them to prepare an advert for a locality manager in Wales to cover the claimant's sickness absence indicating that he would give the green light to send it live later that day. In the evening on 7 February 2019, Mr Collier sent a further email to both asking for the campaign to be launched at 2 PM the following day.

24. At around that time job advertisements were placed seeking to recruit a full-time role in Wales for a Regional Director. Those adverts appear at pages 100 and 103 of the bundle. Those job adverts were placed by the CMG side of the business.

25. Also, at around the same time the respondent authorised the claimant's request to receive sick pay for a period of 6 months. The claimant was informed of that by Graham Farrington-Horsfall by telephone.

26. On 8 February 2019 an email was sent to all members of staff (including locality managers) inviting them to a conference call on 11 February 2019 in order that they may be talked through the proposed operational structure for the new organisation. In the body of the email, Sam Collier said that "*to avoid an anxiety filled weekend please be assured, your jobs are safe*".

27. On 11 February 2019 Sam Collier sent an email to all locality managers following a conference telephone call with them in which they were informed of the proposed new organisation following the merger. Attached to the email was the headline organisational chart for the new organisation. The chart showed that, in Wales, it was planned for there to be an Area Director (a role which did not exist in name within The Regard Partnership prior to the merger but which was effectively a replacement for the Regional Director role) and three Regional Managers reporting to the Area Director. The email also enclosed a briefing slide providing an overview of the work done to date across all areas of the business. In his email, Sam Collier also indicated that he would be in touch again to confirm the Area Director level reporting lines.

28. On the same day, the claimant was sent a letter by Graham Farrington-Horsfall informing her that her full sick pay would continue until early July 2019.

29. On or around 14 February 2019, the respondent placed an advertisement with a view to recruiting an interim locality manager to cover the claimant's sick absence. The job was advertised internally and on the indeed website. A copy of the advert appears at page 182 of the bundle. The advert specifies the job title as locality manager (fixed term contract). The location was to cover services across Wales with a salary of £40,000-£42,000 plus company car or allowance and benefits. The advert also contained the following words:

    "*job type: fixed term contract – 4-6 months with the possibility of full-time*".

30. The advert did not provide any further explanation about what was meant by "*the possibility of full-time*".

31. On 15 February 2019 (at 17:04) Matthew Butcher sent an email to all employees of the respondent informing them that, due to operational changes within The Regard Group, there were some newly created internal positions for Area Directors. The email invited applications from any interested employees and provided links to the vacancy information. The three regions in

which Area Directors were being sought were a) Surrey and south London, b) Dorset and Hampshire and c) North West UK.

32. On 22 February 2019 Graham Farrington-Horsfall sent a text message to the claimant. He had tried to contact her by telephone to speak to her but the claimant was at hospital and unavailable to take his call. In his text message he informed the claimant that the respondent had identified a person to cover for the claimant whilst she was off work for the next 6 months starting in mid-March. The text also informed the claimant that a person called Mel would be starting towards the end of March as the new Area Director for Wales. Mr Farrington-Horsfall indicated that he had wanted to let the claimant know of that information before he spoke to the team and that he would keep in touch. He had wanted the claimant to know of those developments in order to prevent her from worrying about her team during her absence. Mr Farrington-Horsfall sent an email to all members of staff that afternoon informing them of the appointments of Mr Rogers and Ms Isherwood.

33. That text message reflected the fact that the respondent had offered employment to Simon Rogers (as a temporary replacement for the claimant during her sick leave) and Melanie Isherwood as the new Area Director for Wales. Mr Rogers had been offered the position of Regional Manager on a 6 months fixed term contract by email on 15 February 2019. Although the email offering him the position indicated it was a fixed term position, an email sent by Sam Collier to Georgina Mears on 15 February 2019 (at page 128 of the bundle) shows that Mr Rogers was aware that the position could "*later become permanent*".

34. Melanie Isherwood was offered the role of Area Director for Wales on or around 18 February 2019. At page 132 of the bundle is the text of an offer to be sent to her. The position was to attract a salary of £65,000 with the possibility of a car allowance in addition. The circumstances in which Melanie Isherwood came to be offered that role can be summarised as follows. She was put forward to the respondent by a recruitment consultant by email on 13 February 2019. The email appears at page 190 of the bundle. The email indicates that she was currently employed as a regional manager for another organisation and was looking for a new role as a result of her post being made redundant by her current employer. She had a salary expectation of £65,000. Melanie Isherwood was then invited for interview by the respondent. Although not entirely clear from the email correspondence in the bundle, it can be inferred from that correspondence that she was to be interviewed for one of the new regional manager positions within the new merged organisation. If there was any doubt about that, in her oral evidence, Louise Ridger accepted that Melanie Isherwood was initially to be interviewed for the role of regional

manager and not the new role of Area Director. An email sent by Sam Collier to Holly Davies at 13:20 on 15 February 2019 (which appears at page 189 of the bundle) shows that the decision had been taken that day to offer the post of Area Director for Wales to Melanie Isherwood. Having clarified her salary expectations with the recruitment agency, the Area Director position was then offered to Melanie Isherwood. She accepted the offer.

35. The role of Area Director for Wales was not advertised internally by the respondent. There is no dispute between the parties about that. There is also no dispute between the parties that the normal process adopted by the respondent when advertising roles was to advertise them both internally and externally. That was the evidence provided to the Tribunal by a number of the respondent's witnesses. In paragraph 14 of her witness statement, the claimant also confirms that it was not normal company process for a position to only be advertised externally.

36. As a result of the position of Area Director for Wales being advertised externally only, the claimant was unaware of the vacancy and of any opportunity she may have had to apply for it. The first she knew of the vacancy was when Mr Farrington-Horsfall informed her that the position had been offered to Melanie Isherwood.

37. The claimant sent an email to Louise Ridger on 28 February 2019 entitled formal grievance. The email asked the respondent to accept the email as a formal grievance. The claimant stated that she believed she had been discriminated against under the Disability Discrimination Act 1995 and the Equality Act 2010. The email set out three ways in which that discrimination had occurred. First, the claimant complained that she had been denied the opportunity to apply for the new Area Director post for Wales (erroneously described in the email as the regional directors post for Wales) and that the position had not been advertised internally. Secondly, that the advertisement for the interim locality manager position to cover her sickness absence stated that the role was a fixed term role with the possibility of full-time. The claimant complained that the advertisement implied that, following her diagnosis with breast cancer, she may not return to work. The claimant stated that the advertisement was at best insensitive and implied that she would not recover from her disability. Finally, the claimant observed that the first two concerns expressed when combined with the fact that Kay Beacham and other established employees were leaving, caused her concern as to whether there were plans for her to be dismissed from her role. The claimant concluded her email by saying that she was not at that time physically or emotionally able to deal with the grievance but wished to have the grievance logged to be dealt with at a time when she felt able to address it.

38. Louise Ridger responded to the claimant by email the following day. She acknowledged receipt of the claimant's email and indicated that it had been accepted as a grievance pursuant to the respondent's policies. Further, she confirmed that the grievance would remain open until the claimant felt able to go through a formal grievance process. In addition, Ms Ridger also sought to provide some assurances to the claimant in respect of the points she had raised. Ms Ridger responded to each of the points set out in the claimant's email as follows:

    38.1 in response to point 1, Ms Ridger said that during the operational consultation process locality manager teams were advised of vacant Area Director posts and welcomed expressions of interest;

    38.2 in response to point 2, she said that Simon Rogers had been appointed as an interim locality manager on a temporary basis only until the claimant's return. In addition, she said that there were in fact two posts for locality managers available across Wales including fixed term cover for the claimant's post but also the need to increase staffing levels to manage operational pressures with a view to that post becoming permanent; and

    38.3 in respect of point 3, Ms Ridger accepted that the restructuring was causing staff to feel unsettled but went on to say that the claimant was a highly valued member of the team and that the respondent was looking forward to being able to welcome her back to work as soon as the claimant was well enough to return.

39. Later that morning, the claimant responded by email indicating that she was unable to consider all the points raised by Ms Ridger at that time but asked to be sent the email where expressions of interest had been invited for the new Area Director role. The claimant chased up that information on 6 March 2019. Ms Ridger informed her that she was waiting to speak with Mr Farrington-Horsfall before responding with the information the claimant requested.

40. On 13 March 2019 Louise Ridger sent a further email to the claimant conceding that the claimant was right and that the Area Director post for Wales had not been advertised internally. Her email said that the stage of inviting internal applications for the role "*somehow got missed*" and the vacant role was immediately placed with a recruitment agency. The email said that Ms Ridger had wrongly understood that the role was first advertised internally.

41. In addition, Ms Ridger went on to say that the post should have been opened for application to internal candidates but was not. However, she sought to reassure the claimant that she had not been treated any differently to other

locality manager colleagues for Wales. She said that no opportunity had been provided for any internal candidate to apply for the new Area Director role. Accordingly, Ms Ridger said that, although the process followed was not ideal, the claimant had suffered no discrimination under the Equality Act as suggested in her grievance.

42. Ms Ridger apologised that the claimant had not been given the opportunity to apply for the role but said that, as someone had now been recruited into the role, there would be no further opportunity for internal candidates to apply for the position of Area Director for Wales.

43. On 22 March 2019 the claimant sent a further email to Ms Ridger. In it the claimant said that she was confused by Ms Ridger's earlier email which suggested that her grievance had been dealt with without following a formal grievance process. She referred expressly to the respondent's grievance procedure and said that, having taken advice, she was entitled to have her grievance investigated. She asked for an independent investigation to be conducted and raised a number of points which she wished the respondent to consider. The points were all focused upon the three points raised in her original grievance email but identified specific issues of concern to the claimant and which she wanted the respondent to look into. The claimant concluded her email by saying that she felt that the respondent's actions not only breached her rights but also demonstrated a callous and uncaring approach to her. She said that the respondent was fully aware of her health condition but, rather than take steps to provide reassurance and support, had instead given her more to worry about. That was disgraceful in the claimant's view, particularly at a time when she was due to start treatment. She pointed out that, as a company providing support to people with disabilities, the respondent should be leading on the expectations of compliance with the Equality Act. The claimant asked that the matters identified were investigated by an independent person external to the respondent.

44. In the same email, and in response to a suggestion made by Ms Ridger for ongoing contact between the respondent and the claimant during her absence, the claimant indicated that she did not wish to be contacted by Mr Farrington-Horsfall but was happy to receive calls from Ms Ridger.

45. Later that day Ms Ridger responded to the claimant by email. She stated that the claimant's grievance was not concluded and that her initial response was simply an attempt to try and give some assurances to the claimant whilst she was absent from work. She said that the claimant's grievance had been logged and that a meeting would be arranged with her when she was ready to return to work. She said that the priority was the claimant's health and recovery and

indicated that she would be available to provide support to the claimant, even if just to chat things through. She concluded by saying that all of the points the claimant had raised in her email would be kept on file and would be revisited at the relevant time.

46. On 27 March 2019 the claimant emailed Ms Ridger and said that, after giving the matter great thought, she would appreciate it if the respondent could carry out the investigation requested immediately by a person external to the company. She indicated that her treatment was due to begin in the week commencing 8 April and would therefore prefer the investigation to proceed so that it was done and dusted before her return to work.

47. Two days later Ms Ridger responded to the claimant stating that the respondent would make the necessary arrangements for her grievance to be heard the following week. She said that the claimant's request for an external investigator could not be accommodated because it was not something provided for within the respondent's policies. The email specified that Moira Jevons-Hunt (known at that time as Moira Bennet-Jevons) had been appointed to hear the grievance. The email said that, given the tight timescale, Ms Jevons-Hunt would meet with the claimant by Skype or telephone call on 1 April at a time convenient to the claimant. The email said that, as the meeting was a grievance meeting, the claimant had the right to be accompanied either by a work colleague or trade union representative.

48. Before the grievance meeting and prior to speaking with the claimant, Ms Jevons-Hunt carried out some preliminary investigations. On the morning of the grievance meeting, she sent an email to Karen Griffith and Matthew Butcher, those responsible for recruitment within the respondent's organisation. She indicated that she was investigating the claimant's grievance and asked for a chronology of their involvement in advertising the roles in Wales and providing any emails or written instructions to advertise the roles.

49. Later that morning, Karen Griffith responded by email which read:

"*This is what I advertised internally and externally (this was the indeed advert but the same was on our website) created on Feb the 14th. Sam asked me verbally to put it up in the morning. Then later on when I was going to post it I had asked you was Julie not coming back and you said yes she was just off sick and still working for us. We then both rang Sam and said we couldn't put the post down as full-time as Julie was still with us and that it would need to be fixed term. Then he mentioned that there was a possibility to go full-time and we questioned again and he said that in a couple of months there could be something coming up on the CMG side of things that if the candidate was good the new candidate might be able to slot into. We then both mentioned we*

wouldn't want Julie thinking her job had been taken and he said that Julie was aware of the situation. (I think Matt should have sent an email to you from Graham saying he had discussed things with Julie)."

50. At 11am that day, Ms Jevons-Hunt spoke to the claimant by telephone and carried out the grievance meeting with her. No one else was present. The claimant set out details of her grievance. She said that she had not been present on the conference call with Sam Collier when he set out details of the new organisational structure although she had received the invitation to join. She said that no one had contacted her about the new structure and that she was first aware that Kay Beacham's position had been filled when she was informed by Mr Farrington-Horsfall. He had sent her a text to say the position had been filled. The claimant also observed that Tania Palmer had been made an Area Director in the new structure, despite the fact that (in the claimant's view) she had been employed in a position comparable to the claimant prior to the merger. The claimant complained that she had been provided with no opportunity to apply for the Area Director role for Wales and was keen to understand how Mel Isherwood had been appointed into that position. In respect of the advertisement for the interim replacement for her role, she said that she was concerned upon seeing the advertisement and particularly at a time when her confidence was at an all-time low. She said she felt vulnerable and that she was next, by which she meant next to leave the respondent's business in the same way that Kay Beacham had recently left employment.

51. On the following day, Karen Griffith sent some further information to Ms Jevons-Hunt which comprised emails showing the procedure that had been followed when appointing Simon Rogers and Melanie Isherwood. The emails provided the detail set out earlier in this judgment showing how those two individuals had come to be appointed.

52. Ms Jevons-Hunt wrote to the claimant on 5 April 2019 setting out the outcome of the claimant's grievance. The letter was detailed and responded to each of the points raised by the claimant in her written grievance. In summary, the outcome provided by Ms Jevons-Hunt was as follows:

    52.1 In the new structure following the merger, the roles within the organisation were Group Operations Director overseeing the work of a number of Area Directors to whom a further cohort of Regional Managers reported. It was the (correct) understanding of Ms Jevons-Hunt that the claimant's concerns related to the position of Area Director for Wales;

    52.2 Whilst every effort had been made to ensure that opportunities within the new organisation had been advertised primarily internally, there was an

oversight in relation to the role of Area Director for Wales and therefore no internal candidates were made aware of the opportunity;

52.3 Whilst Ms Jevons-Hunt was assured that there was no intention to withhold the position of Area Director from the claimant or other internal candidates and there was no intention of victimisation or discrimination, she upheld the claimant's grievance and acknowledged that the respondent had not advertised the role of Area Director for Wales internally. Moving forward, the respondent was said to be establishing a new structure and recruitment team and systems to ensure the same did not occur again in the future;

52.4 when reviewing the company structure as part of the merger, an external organisational consultancy had been involved in facilitating decisions around the new structure. A job matching exercise had been carried out and those roles that had an 80% match to the new roles in the new structure were automatically slotted in to those new roles. It was established that the role of Regional Director in the respondent's organisation before the merger was a match to the new Area Director role. In the claimant's case the equivalent of her role as locality manager was the new role of Regional Manager and therefore the claimant had been slotted into that role in the new structure;

52.5 As a result of a misunderstanding (which it appears to mean a misunderstanding on the claimant's part) around the job titles in the old and new structures, the claimant had been led to believe that she had been overlooked for the role of Area Director. However, based on Ms Jevons-Hunt's explanation, the claimant's grievance was not upheld in respect of her being overlooked;

52.6 The claimant's concerns about Melanie Isherwood being appointed as Area Director for Wales were not upheld although no specific details or personal information could be divulged in respect of her;

52.7 In respect of the advertisement of the role for the claimant's replacement during her sickness absence, Ms Jevons-Hunt acknowledged the wording of the advertisement but confirmed, after discussing the matter with Sam Collier and Karen Griffith, that the advert covered two roles, namely the temporary replacement for the claimant and a possible second permanent role that may be required in the future;

52.8 The claimant's grievance in respect of the wording of the advertisement was partially upheld and Ms Jevons-Hunt recommended that, in future, to avoid any unnecessary confusion, adverts for fixed term and permanent

roles would be kept separate or described separately to make the position clearer;

52.9 it was acknowledged that 2 adverts had been placed by CMG for a regional director position in North and South Wales. However, the advert had been placed in that way to maximise the potential number of candidates for a position that could have been based in either Regard's offices or in the offices of CMG. Insofar as the claimant had expressed concern about the advertisement of those two roles, her grievance was partially upheld;

52.10 as to the claimant's concerns regarding her position generally and a lack of consultation with her or communication with her, her grievance was not upheld. Insofar as the claimant had expressed concern about changes to the services she was responsible for managing, Ms Jevons-Hunt concluded that that part of her grievance was not upheld.

53. The grievance outcome letter concluded by informing the claimant of her right to appeal and said that, should she wish to appeal the outcome, she should do so in accordance with the company grievance procedure and address any appeal to Sue Donley, HR director. The letter said that the normal timeframe for submitting any grievance appeal could be extended in light of the claimant's forthcoming treatment.

54. On 8 April 2019, the claimant sent an email to Ms Jevons-Hunt indicating that she would be appealing the grievance outcome. She also raised concern about addressing her appeal to Sue Donley. She observed that she had referred to Sue Donley during her grievance meeting and felt that it would be inappropriate to address any appeal to her. She requested that her appeal be heard by a person external to the company. In light of her forthcoming treatment, she said that she would appeal as soon as she was well enough to do so.

55. On 8 May 2019 the claimant sent an email to Ms Jevons-Hunt and Ms Ridger. She sought clarification that she should now submit her appeal to Rob Dawson (who had been identified as the person who would consider and determine any appeal submitted by the claimant). She also indicated that there had been some delays in her treatment and that she would have her grievance appeal ready as soon as she felt better after the next tranche of her treatment.

56. Two weeks later, on 22 May 2019, the claimant wrote to Ms Jevons-Hunt submitting a Subject Access Request. She was requesting any correspondence within the respondent's organisation or within CMG containing her name, any correspondence relating specifically to her role either

in the capacity of locality manager or regional manager and any correspondence identifying how she was assessed on the Area Director position. Her email concluded by saying that whilst she focused on her health and awaited the outcome of her Subject Access Request, she would be unable to submit any appeal.

57. Joanna Armitage, the Data Protection Officer employed by the respondent, sent an email to the claimant on 4 June 2019 in respect of her Subject Access Request. After apologising for the delay in writing to her, Ms Armitage asked the claimant to complete a form providing full details of the request and the data required. The claimant returned the forms as requested two days later. On the same day, the claimant sent an email to Ms Jevons-Hunt seeking confirmation that the respondent was happy for her to submit her grievance appeal once she had received a response to her Subject Access Request. The following day, the respondent confirmed that it was content to do so.

58. Whilst that process was going on, the claimant had also provided the respondent with some updates in relation to her treatment and as to the length of time she would be absent from work. Correspondence was sent to the claimant during that period confirming that her sick pay would be extended until August 2019 to cover the period of her absence.

59. On 11 June 2019, Sam Collier sent an email to all of the regional managers (including the claimant) in respect of the payment of a bonus to them. The email stated that the bonus would unfortunately not be processed for payment until the following week.

60. The following day, Ms Armitage sent an email to the claimant assuring her that her Subject Access Request was being handled with the priority required and that she was in the process of collecting the data as requested by the claimant. She sought further clarity on a number of points which she set out in her email and said that further information on those points could assist the respondent to access the data more expediently. She observed that the correspondence and information disclosed to the claimant was likely to be redacted to remove data in respect of third parties. She also said that an extension may need to be applied to the initial one-month period but that she would advise the claimant about any such extension if it was necessary. The claimant responded by email the next day providing further information about the documents which she wished to receive as part of her Subject Access Request.

61. On 19 June 2019, Ms Armitage wrote to the claimant by email notifying her of the need to apply an extension to the timescale for responding to the claimant's

Subject Access Request. The reason given for applying an extension was due to the timescales of locating the data relevant to the claimant as the claimant had requested specific correspondence which were stored in different locations and by different departments. The email specified that the extension would be applied from 24 June 2019. The email again assured the claimant that her request was being dealt with as a priority.

62. The following day, Ms Jevons-Hunt sent an email to the claimant confirming that whilst Ms Armitage was collating the information in relation to the claimant's Subject Access Request, the respondent would await any grievance appeal.

63. On the same day, Ms Ridger emailed the claimant providing contact details for Mel Isherwood suggesting that it would be worth the claimant having a catch up or regular catch ups with her. The email acknowledged the claimant had been keeping abreast with emails and that she liked to keep involved but suggested that it would be worth, maybe once every month or every two months, touching base with Mel for a chat. The claimant responded the following day saying that she was happy for Mel to keep her updated of operational developments or changes via email each month which she could then look at on her good days. Otherwise, the claimant indicated she would prefer to liaise with Ms Ridger in respect of her illness and absence.

64. Between 24 June 2019 and 28 June 2019, the claimant sent three emails to the respondent in relation to issues she was experiencing in accessing her work emails. The first email was sent to Ms Ridger only. The second and third emails were sent both to Ms Ridger and Ms Jevons-Hunt. The initial email indicated that, when the claimant had tried to access her emails, the system was asking her for a password. She said that she had input her password but the system was still not allowing her access. She asked to be told why she had been cut off from her emails. Having received no reply, the claimant sent the second email saying that she had many thoughts going through her head as to why access to her emails had been denied. She was concerned that she may have missed a response from Ms Armitage to her Subject Access Request and asked that the matter be looked into as soon as possible as it was causing her a great deal of stress. Having again received no reply, the claimant sent the third email expressing extreme concern as to her employment status. She said that she did not understand why her email access had been cut off and no explanation had been provided to her. She was also concerned about the lack of reply from either Ms Ridger or Ms Jevons-Hunt. The email concluded with the claimant indicating that she was constantly in a state of anxiety and that the behaviour of the respondent was making it worse.

65. Whilst that was going on, on 24 June 2019 Mel Isherwood sent an email to the claimant to introduce herself as the new Area Director for Wales. She said that she had been hesitant in contacting the claimant whilst she was off work as she did not wish to cause the claimant any concern but recognised that her not contacting the claimant could also have caused concern. She provided her details, should the claimant wish to make contact. She also advised the claimant that in her next pay she would receive a bonus of £1,200. The email also acknowledged that the claimant would be off work until November 2019 and said that the claimant may well need a phased return to work and an effective handover so, in order to facilitate that, the fixed term engagement of Simon Rogers had been extended until 31 December 2019.

66. On 1 July 2019, Ms Ridger spoke to the claimant on the telephone in respect of the issues she was experiencing with her emails. Unbeknownst to Ms Ridger, the claimant recorded the telephone conversation and a transcript of it appears at page 262A of the bundle. After a very brief exchange between them, Ms Ridger put the claimant through to Skender Azemi in the respondent's IT department. He asked the claimant to explain what the issue was. She said that she was unable to login and the system was asking for her password. She said that when she put her password in the system said it was wrong and then when she tried signing into office 365, the system said the account had been blocked to prevent unauthorised access. With the claimant's agreement, Skender reset the claimant's password. The claimant also raised concern with him that emails from her personal Hotmail account were also not getting through to their intended recipients. The claimant then asked Skender why the issue may have occurred. He responded by saying that every so often the password needed to be changed and that it could only be changed if the employee concerned called the IT department. He explained that that is how the respondent's IT systems were set up. He reassured the claimant that she had not done anything wrong. He also said that the account was "definitely not blocked from this end". He said he could see that the account was not locked. The claimant told him that she was receiving a message saying her account was temporarily locked but Skender could not see anywhere on the system where it was locked. The claimant again asked what the explanation could be for her Hotmail emails not coming through to which Skender replied that the system may have thought if there were emails being sent by the claimant from two different email accounts (meaning her work account and her personal account) that her email account had been compromised in some way. Towards the end of their conversation, Skender said:

"*I think what Microsoft is doing is, some of it is controlled through Microsoft, you know, they have their policies so it could be because of that so but either way I will have a look and if it's there I will release whatever you sent.*"

67. Throughout their conversation, and after resetting the claimant's password, Skender explained to the claimant that it might take 10 or 15 minutes for the system to reset.

68. A short time after the claimant's conversation with Skender, Ms Ridger confirmed to the claimant in an email that her emails had now arrived. She said that Skender had assured her that the problem was something relating to Microsoft and that, following the reset of her password, the claimant should now be able to access her email account. After saying to the claimant that there was "no conspiracy theory at play", Ms Ridger said that the issue was something beyond the respondent's control.

69. On 10 July 2019, the claimant received an email from Nick Martin, head of payroll. The email was addressed to a number of employees, all of whom were regional managers within the new organisation. The email referred to Mr Martin having received "*a few emails regarding £1k pay rise*" and went on to provide some information in respect of it.

70. On the same day, the claimant contacted Ms Ridger and Ms Jevons-Hunt confirming that she was now able to access her work emails again. However, she raised a further point of concern to her, namely that she had been told that Robert Dawson (who she had been told would be dealing with her grievance appeal) had left the respondent's employment with immediate effect and she had not been informed. She asked for the matter to be looked into and to be told to whom she should now submit her grievance appeal once she had received a response to her Subject Access Request.

71. Ms Ridger responded to the claimant on 19 July 2019. She confirmed that Mr Dawson had left the respondent's employment and said that Aine Ni Chonchuir had been identified as the new appeal chair. She confirmed that the pay increase applied to the claimant and that she would be paid at the new rate in the early August payday. She accepted that the respondent needed to be mindful in the future as to how they communicated with staff who were away from the business for significant amounts of time. Finally, Ms Ridger said that the respondent would like to start thinking about a phased return to work with the claimant which would mean submitting an occupational health referral to explore whether that was something that could be facilitated.

72. Joanna Armitage again emailed the claimant on 24 July 2019 to provide a progress update on her Subject Access Request. She said that she was

currently in the process of collating documents and would be in touch in due course to start the process of handing the documentation over to the claimant. Later that day, the claimant sent an email to Louise Ridger complaining about the delay in response to her Subject Access Request and indicating that the delay was adding a great deal of anxiety and stress for her. She also indicated that, as a result of her treatment, she was feeling too weak and ill to respond to Ms Ridger's email but would do so when she felt well enough. Ms Ridger responded within half an hour acknowledging the claimant's email. She also advised the claimant that the person identified to chair any grievance appeal made by the claimant had again changed and would now be Anna Irvin, head of HR. The claimant was told that Aine Ni Chonchuir was no longer able to chair any appeal due to unexpected diary or work commitments.

73. The following day, Ms Armitage responded to the claimant's email acknowledging but explaining that an extension had been required due to the complexity of gathering and collating data from various sources in the format requested by the claimant. She explained that when an extension is applied it allows up to an additional two months to handle the Subject Access Request, in addition to the initial one-month period and explained that the current Subject Access Request was therefore due to expire on 23 August 2019. During her oral evidence, Ms Armitage accepted that the respondent's own policies suggested that only a one-month extension could be applied but she explained that the applicable legislation (namely GDPR) in fact permitted a two-month additional period and that the respondent's policies misstated the position. The Tribunal accepts the evidence of Ms Armitage on that point. In addition, Ms Armitage informed the claimant that it was within her rights to make a complaint to the Information Commissioner's Office. She concluded by apologising for the anxiety and stress the claimant had said the matter was causing her. She offered any support she could provide in giving further advice on the process. She also indicated that, as a Data Protection Officer, she was impartial to and independent of other departments and was there to support both the data controller and the claimant in matters falling under the scope of the data protection legislation.

74. The documents requested by the claimant were sent to her by Ms Armitage pursuant to her Subject Access Request on 30 July 2019.

75. In cross-examination it was put to Ms Armitage that she had delayed dealing with the claimant's Subject Access Request. It was suggested to her that was either because she had been directed to delay it by somebody else within the respondent's organisation or that she had done so because she was aware of the claimant's grievance. Ms Armitage was forthright and adamant in rejecting both assertions. She was quite clear in her evidence that she adopted an

impartial position from the respondent and the claimant when dealing with any Subject Access Request and applied the relevant legislation and guidance when dealing with any such request. She said that she took her role extremely seriously and fulfilled her duties with the utmost diligence. She was particularly concerned to explain that any extension of time required would be the subject of a request from her to the ICO for approval. The Tribunal finds Ms Armitage to be a clear, credible and impressive witness. The Tribunal accepts her evidence as to the nature of her duties and the manner in which she approached them. The Tribunal accepts her evidence that any delay in dealing with the claimant's Subject Access Request was in no way connected to the fact that the claimant had raised a grievance with the respondent.

76. On 25 July 2019 the claimant submitted her grievance appeal to Anna Irvin. Ms Irvin acknowledged receipt of it on 29 July 2019. In doing so, she indicated that as the HR team was specifically referred to as part of the claimant's grievance, she considered that the appeal would be better heard by somebody outside of the HR Department. She advised the claimant that she had therefore arranged for Michael Fullerton to hear the appeal.

77. The claimant's grievance appeal meeting took place on 8 August 2019. The claimant attended. The meeting was chaired by Mr Fullerton and a member of the HR Department was present to take notes. Mr Fullerton went through the claimant's appeal letter with her and asked her a number of questions to further explore some of the issues set out within the appeal. Towards the end of the appeal meeting, the claimant noted that the grievance policy stated that she would be told of the outcome within 5 working days but acknowledged that Mr Fullerton had already indicated he may need a little bit extra time. Mr Fullerton said that he would do his best to get an outcome to the claimant within five days but if he was unable to do so he would let her know.

78. On 13 August 2019, Mr Fullerton sent an email to the claimant apologising that there would be a delay in confirming the outcome of her appeal. He said that he had been making enquiries following the meeting and had been trying to ensure he had sight of all the correct information, and that he had spoken to all relevant people, in order to respond. He said that had not been possible due to the availability of others and the information he wished to consider. He was also due to be on leave for two weeks until 27 August and, therefore said that he would have a written outcome to the claimant by Friday, 30 August 2019. Regrettably, Mr Fullerton seems to have overlooked the fact that he was due to go on a period of leave when conducting the appeal hearing with the claimant. Understandably, the claimant observed in her evidence that it would have been preferable (at least) if Mr Fullerton had advised her of that fact during the appeal meeting.

79. After the claimant had sent emails chasing Mr Fullerton for an outcome of her appeal, the grievance outcome was sent to her on 5 September 2019. The outcome of the claimant's grievance was to uphold the conclusions of the original grievance hearing conducted by Ms Jevons-Hunt. In summary, the grievance appeal outcome said the following:

    79.1 it was acknowledged that the respondent had not advertised the role of Area Director for Wales internally and that, moving forward, the respondent would establish a new structure and new recruitment team to ensure that all opportunities were advertised internally;

    79.2 Mr Fullerton provided an explanation for why Tanya Palmer had been slotted into the role of Area Director for the south-west when she had been a regional manager within CMG prior to the merger. The claimant had suggested that she and Tanya Palmer had fulfilled comparable roles prior to the merger and that, therefore, she had been treated less favourably than Tanya Palmer when the slotting in exercise had been carried out. Mr Fullerton did not accept that suggestion and indicated that, in his view, Tanya Palmer had fulfilled a role significantly different to the claimant's role prior to the merger;

    79.3 Mr Fullerton could see no evidence that Graham Farrington-Horsfall had discriminated against the claimant in any way nor any evidence that he had attempted to cover up any discrimination;

    79.4 Mr Fullerton rejected any suggestion that the respondent had treated the claimant differently to others or otherwise.

80. Mr Fullerton's letter concluded by again apologising for the delay in responding to the claimant's appeal due to his leave and the need to ensure he could speak to others before responding. He then also said that for all internal purposes the matter was now closed.

81. On 6 September 2019 the claimant submitted her letter of resignation which was accepted on the same day by the respondent. The claimant's letter appears at page 386 of the bundle. The first paragraph of the claimant's letter said the following:

    "*Further to Michael's response to my grievance appeal and my email below, it is with much thought and deliberation that I write to you in order to submit my formal resignation with immediate effect. As you are aware, I am not a person to mince my words and as such need to clarify why I feel I have no other alternative than to resign. I feel I have been forced into doing this due to the*

abhorrent way I have been treated whilst on sickness absence with grade 3 aggressive breast cancer. Due to the discrimination, victimisation, the continuous delays created by the company, specifically in relation to my grievance appeal outcome, the lack of correspondence responses from the company and the fact I am continually having to chase up matters, I am unable to keep going through this level of stress and is most probably creating other ailments within me which is exacerbating my already serious health matters, examples being the stress and anxiety leading to heart palpitations which required further investigation and the time spent driving in my role which I have been informed most likely created the back problems I initially went off sick for. I need to focus on my health in order for me to get well again without all this additional stress and anxiety to content with."

82. The claimant then set out in a number of paragraphs concerns she had as to the changes in the environment within the respondent and the sense that she felt that she was being pushed out of her post. She said she was leaving her post with an immense sadness because she believed she would remain with the respondent until she was ready to retire. She also went on to say that it was obvious that various people had been placed in posts which were well outside of their competence and capability levels and that, if anyone spoke up about issues concerning them, they would not be around for long.

83. Towards the end of her letter, the claimant wrote that receiving the grievance appeal outcome letter from Mr Fullerton was the final straw. She said that the letter only served to evidence that the newly merged company has no understanding of their responsibilities towards a disabled person and continually attempts to cover up the discrimination she had been subjected to. She said that as a result of the respondent's continued behaviour towards her, including all of the failures set out above in her letter, she felt she had no alternative other than to resign as she had lost all trust and confidence in the respondent as her employer and its ability to treat her fairly.

The applicable law

84. In her written submissions, Miss Garner provided a helpful and thorough review of the various legal principles applicable to each of the claimant's complaints. At the commencement of his submissions, Mr Morris indicated that he agreed with her explanation of the various applicable principles and was content to adopt them. The Tribunal is grateful to Miss Garner for her assistance and the very helpful summary of the applicable principles she provided, much of which is repeated below.

Direct discrimination

85. Section 13(1) of the EqA states as follows: -

    (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

86. The Tribunal should ask itself whether the Claimant has demonstrated facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed, or is to be treated as having committed, an unlawful act of discrimination (s.136 EqA)?

87. As a first stage, it is for the Claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed, or should be treated as having committed an unlawful act of discrimination *Igen Ltd v Wong* [2005] IRLR 258.

88. If it is proven that there was differential treatment, the second element of the burden of proof requires the Tribunal to consider whether the Respondent had a neutral reason for its conduct in relation to each allegation. The Tribunal can consider firstly whether the Claimant would have been treated in the same way 'but for' the fact that she was disabled, and then turn to consider the 'reason why' the Respondent treated her so (*B v A* [2007] IRLR 576). In order to demonstrate that the reason for the treatment was because of the Claimant's disability, it should be more than a minor or trivial part of the cause (*Villalba v Merrill Lynch Co Inc* [2007] ICR 469).

89. Although the tribunal may look at all of the information globally when considering the second limb (see *Madarassy v Nomura International plc* [2007] ICR 867]*)*, this does not negate the need for the tribunal to be satisfied that there are facts from which it could be established that the claimant was treated less favourably because of their protected characteristic, absent an explanation from the respondent (*Hewage v Grampian Health Board* [201] ICR 1054).

Discrimination arising from disability

90. In relation to discrimination because of something arising from disability, s. 15 of the EqA states:

    "(1) *A person (A) discriminates against a disabled person (B) if—*

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

91. The Claimant has identified the unfavourable treatment she says she received because of something arising from her disability, as identified in the issues set out in the Order of EJ Vincent Ryan of 20/11/19.

92. Once the tribunal has identified the treatment complained of, it should focus on the words "because of something" and identify the "something" that is said to give rise to the treatment. It should then consider whether the "something" arose in consequence of the claimant's disability (*Basildon and Thurrock NHS Foundation Trust v Weerasinghe* [2016] ICR 305).

93. In the case of *Pnaiser v NHS England* [2016] IRLR 170 the EAT framed the process as: -

    (a) The tribunal first identifies whether there was unfavourable treatment and by whom;

    (b) It should then determine what the cause of the treatment was. Here, the tribunal should focus on the reason in the mind of the alleged discriminator, consider the conscious or unconscious thought processes of that person (the motive of the alleged discriminator is irrelevant);

    (c) The next issue is whether the 'something arose' in consequence of the claimant's disability". This could involve considering a range or chain of causal links. This is an objective assessment, where the alleged discriminator's thought processes are not relevant to the issue of whether the 'something' did, or did not arise from the disability.

    (d) The knowledge required on the part of the respondent is of the disability, not necessarily that the 'something' arose from the disability.

94. This clarifies that it is sometimes best to consider first (although the order is not essential) what the 'something' is, and to establish whether – objectively – it arises from the disability. In considering this, it may be necessary to look at whether there are further 'links in the chain' to connect the alleged 'something' to the disability.

95. It is not necessary for the Tribunal to establish that the respondent knew that the 'something' arose from the disability as distinct from knowing that the claimant did in fact have a disability. The 'something' in this case is said to be the Claimant's sickness absence. It is agreed between the parties that this is something which arose from her disability.

96. The next issue is whether the treatment alleged to have taken place did in fact take place, and if so whether it was in fact unfavourable.

97. The tribunal would then need to address whether the proven unfavourable treatment was caused by the 'something', using effectively the same test on causation that is set out in *Nagarajan*. The claimant's disability (or the 'something') should have had 'significant' influence on the unfavourable treatment, or it can be a cause which is not the main or the sole cause, but which was nonetheless an effective cause of that treatment (*Gallop v Newport County Council* [2014] IRLR 211 (a case which preceded the EqA)).

98. If proven that the unfavourable treatment was caused by the something arising, the next step is for the Tribunal to consider whether that treatment on the part of the respondent was a proportionate means of achieving a legitimate aim (s.15(1)(b)).

99. So far as burden of proof is concerned in relation to s.15 and generally in this case, s.136 EqA operates to so as to require that if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred but that does not apply if the respondent shows that the alleged discriminator did not contravene the provision i.e. for 'disability neutral' reasons.

Indirect discrimination

100. Section 19 of the Equality Act 2010 reads: -

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
> *(2) For the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
> *a) A applies or would apply it to persons with whom B does not share the characteristic,*
> *b) It puts, or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

c) It puts, or would put, B at that disadvantage, and
d) A cannot show it to be a proportionate means of achieving a legitimate aim"

101. The first requirement is to demonstrate a PCP. The PCP can 'be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites qualifications or provisions.' (EHRC Code).

102. If the Claimant's PCP is determined to be valid, the Tribunal would also be required to consider the group disadvantage, and whether an identifiable group is adversely affected, whether actually or potentially, by the ostensibly neutral requirement (*Eweida v British Airways plc* [2010] ICR 890). The point for consideration is the extent to which the members of the pool have suffered a 'particular disadvantage'.

103. The tribunal would also need to address causation, most recently addressed by the Supreme Court in the case of *Essop v Home Office* [2017] I.C.R. 640.

Failure to make reasonable adjustments

104. The requirement to make reasonable adjustments for employees is in s. 39(5) EqA and is set out in detail in ss. 20, 21 and 22 and Schedule 8. Section 20 reads:

(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.

…

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

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

105. Section 21 provides that a failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments (section 21(1)) and A discriminates against a disabled person if A fails to comply with that duty in relation to that person (section 21(2)).

106. In *Environment Agency v Rowan* [2008] IRLR 20 it was noted (in relation to the then current provisions in the DDA) that a tribunal considering a claim of failure to make reasonable adjustments should identify:

a) the provision, criterion or practice applied by or on behalf of an employer, or
b) the physical feature of premises occupied by the employer,
c) the identity of non-disabled comparators (where appropriate) and
d) the nature and extent of the substantial disadvantage suffered by the Claimant.

107. It was further said that unless the four factors above (or three if (b) is not relevant) are considered the tribunal cannot properly determine whether any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person at a substantial disadvantage.

108. In respect of the PCP, Paragraph 6.10 of the 2011 EHRC Code ('the Code') suggests that 'provision, criterion or practice' should be "*construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions*." The Claimant relies upon the same PCP as she does for the indirect discrimination claim, namely '*not advertising the Area Directors Posts for recruitment/promotion internally*'.

109. The comparison in relation to reasonable adjustments is to establish whether the claimant is placed at a substantial disadvantage, thus there is no need for the comparator or comparator group to have the same disability as the claimant.

110. On the meaning of 'substantial disadvantage, paragraph 6.15 of the Code refers to s.212 of the EqA and says: *"The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis."* It is also necessary for the Tribunal to consider whether

the respondent knew or could it reasonably be expected to have known that the Claimant would be placed at the alleged substantial disadvantage (Part 3; Sched 9 EqA)? The fact that the failure to advertise the post was a mistake may be relevant to the Tribunal's consideration of this point.

Victimisation

111. Section 27 of the EqA provides: -

(1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—
(a)bringing proceedings under this Act;
(b)giving evidence or information in connection with proceedings under this Act;
(c)doing any other thing for the purposes of or in connection with this Act;
(d)making an allegation (whether or not express) that A or another person has contravened this Act.

112. In line with other types of discrimination, it is incumbent upon the claimant to demonstrate that she suffered detriment.

113. The detriment element should be proven by demonstrating that the alleged detriment was capable of being objectively regarded as such (*St Helens Metropolitan Borough Council v Derbyshire* [2007] ICR 841) In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, at 35, it was held that 'an unjustified sense of grievance cannot amount to 'detriment'.

114. On causation, the standard of proof (being broadly the same as in s.13) was considered in *Chief Constable of West Yorkshire v Khan* [2001] IRLR 830. An assessment requires the tribunal to look subjectively at what was in the mind of the alleged discriminator; but ultimately it is factual assessment of what actually caused the treatment, not whether they intended to discriminate or not.

115. The protected act must be a significant factor, in the sense of being more than trivial (*Villalba v Merrill Lynch & Co Inc* [2006] IRLR 3470; and it must be the substantial or effective, not necessarily the sole or intended reason for the discriminatory treatment (*R v Commission for Racial Equality ex p Westminster City Council* [1984] IRLR 230) or not 'any part of the reasons for the treatment in question': *Barton v Investec Henderson* [2003] IRLR 332).

(Constructive) unfair dismissal

116. The Claimant has claimed unfair constructive dismissal in relation to her resignation. This claim requires the tribunal to consider whether the claimant has proven that the respondent's behaviour amounted to a fundamental breach of contract. The classic test for determining whether the conduct of a party amounts to breach that goes to the root of the contract is from *Malik v BCCI SA* [1997] IRLR 462 -

 "The conduct 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. That requires one to look at all the circumstances" (at para. 14)
 And 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 the employer and the employee.*" (At para 54, quoting the Court of Appeal's judgment.)

117. A constructive dismissal amounts to an unfair dismissal under s.94 of the ERA. If it is clear that there is a fundamental breach which terminates the contract, reasonableness on the part of the employer (under s.98(4)) cannot 'cure' the contractual breach (see *Bournemouth University Higher Education Corp v Buckland* [2010] ICR 908).

118. The Respondent in the present case maintains that the Claimant resigned, and does not therefore put forward an alternative fair reason for dismissal.

119. The basic questions for consideration by the tribunal in considering the constructive dismissal claim are: -

 a) Has there been a breach of contract by the employer?

 b) Was the breach a fundamental breach, thus justifying the employee's decision to resign, or was it the last in a series of incidents that, taken together, justify that decision?

 c) Did the employee leave in response to the breach; and was decision to leave delayed, or was there any other conduct on the part of the employee that acted as an affirmation of the contract and/or a waiver of the breach? (Per *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27).

120. Where there are a number of breaches on the part of the respondent and the claimant does not choose to immediately act upon them, it is permissible to rely on those earlier breaches to claim that, taken together, all the incidents

amount cumulatively to a breach of the implied term of trust and confidence (*Lewis v Motoworld Garages Ltd* [1985] IRLR 465).

121. The final act relied upon by the claimant does not have to be a fundamental breach in its own right. Instead it should be an act that can correctly be characterised as one of a series of incidents that amount to a breach, or a series of breaches, in that although not necessarily blameworthy or unreasonable of itself, it did contribute something to the breach (*Omilaju v Waltham Forest London Borough Council* [2005] ICR 481).

122. As the test is a purely contractual one, the employee's decision to treat the employer's conduct as amounting to a fundamental breach needs to be viewed objectively. See *Niblett v Nationwide Building Society* UKEAT/0524/08 in which HHJ Richardson noted that "*the implied term of trust and confidence is a reciprocal obligation owed by employer to employee and employee to employer. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term*".

123. The tribunal should consider and *identify* which acts and/or incidents are deemed to constitute the chain of events leading to the decision to resign, and in particular should identify the final act relied upon (*Wishaw and District Housing Association v Moncrief* (2009) KEAT/0066/08/2204).

124. The employee must have resigned in response to the breach however the claimed repudiatory breach need not be the only or principal reason for the decision to resign (*Logan v Celyn House Ltd* (2012) UKEAT 0069/12/JOJ). If there are mixed reasons for resigning, the repudiatory breach being relied upon should form at least a 'substantial part' of those reasons (see *Nottinghamshire County Council v Meikle* [2004] IRLR 703). See also *Abbeycars (West Horndon) Ltd v Ford* EAT 0472/07, where it was said that 'the crucial question is whether the repudiatory breach played a part in the dismissal', and that where there are different reasons, constructive dismissal can be claimed 'if the repudiatory breach is one of the factors relied upon'. This is a matter of fact and it is not a point that a claimant needs to prove.

125. As this is a case where there are a series of actions over a period of time that are said to cumulatively amount to a breach of the implied term it is likely that the issue of affirmation will need to be considered. *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 gave recent guidance in relation to a constructive dismissal where the repudiatory breach was said to fall over a period of time and there was said to be affirmation of some or all of those alleged breaches: In *Kaur*, Underhill LJ noted the following : -

"55. I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been

constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) 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?
None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."

Analysis and conclusions

Indirect discrimination and failure to make reasonable adjustments

126. The Tribunal first considered the claimant's complaints of indirect discrimination and failure to make reasonable adjustments. The Tribunal did so because, having considered the relevant principles and the evidence, the Tribunal considered it could determine those complaints swiftly.

127. Both complaints require a finding of a Provision Criterion or Practice (PCP) on the part of the employer as a component part of establishing the relevant form of discrimination. As the PCP is a necessary element of establishing indirect discrimination and/or a failure to make reasonable adjustments, the claimant must establish the relevant PCP.

128. The PCP contended for in this case by the claimant is set out in the list of issues. The same PCP is relied upon for both complaints. The list of issues identifies the issue to be determined as "*did the respondent have or apply the following PCP: not advertising area directors posts for recruitment/promotion internally.*"

129. It is true to say that, as a matter of fact, the Area Director for Wales role was not advertised internally. However, the Tribunal considers that the failure of the respondent to internally advertise that position on one occasion does not amount to a Provision, Criterion or Practice for the purposes of either complaint pursued by the claimant.

130. Far from having established that the respondent had or applied a PCP of not advertising area directors posts internally, the respondent's witnesses and

the claimant herself all agreed that the respondent's normal approach when advertising roles for recruitment or promotion was to advertise them internally.

131. In the Tribunal's view, that evidence in fact demonstrates the opposite of the case being advanced on behalf of the claimant. The evidence is simply not present to demonstrate, on the balance of probabilities, that the respondent had or applied the PCP contended for by the claimant.

132. In submissions, the Tribunal asked Mr Morris to explain the basis of these two legal complaints in light of the evidence. In seeking to do so, he made clear that the complaints of indirect discrimination and failure to make reasonable adjustments are very much "alternative" complaints relied upon by the claimant. The tribunal does not fully understand the suggestion that those complaints are "alternatives" to the other complaints of discrimination because they involve entirely different legal tests and the evidence required to establish discrimination in those forms is wholly different to the evidence required to prove discrimination pursuant to the other sections relied upon by the claimant.

133. For all of those reasons, the Tribunal concludes that the claimant's complaints of indirect discrimination and failure to make reasonable adjustments are not well founded and should be dismissed.

Victimisation

134. The tribunal next considered the claimant's complaint of victimisation. It did so recognising that the other three complaints rest upon similar, if not identical, factual allegations whereas the complaint of victimisation relies upon quite separate factual matters and could be seen and determined in isolation.

135. The first aspect of a complaint of victimisation which must be established is that the claimant has done one or more protected acts as defined by section 27 of the Equality Act 2010. The claimant relies upon two protected acts, namely her written grievance dated 28 February 2019 and the comments and observations she made during her grievance hearing on 1 April 2019. The respondent accepts that the claimant raised the written grievance and that she made the comments which the claimant contends she made during the grievance hearing. Further, the respondent accepts the written grievance and the claimant's comments and observations are capable of being protected acts for the purposes of the victimisation complaint.

136. The next aspect of a victimisation complaint is that the claimant was subjected to one or more detriments. The detriments the claimant relies upon are set out in paragraph 17 b) of the list of issues. There are four alleged detriments and the Tribunal has considered each in turn. If any of the

detriments are established as a fact, the tribunal must then also consider whether the claimant was subjected to any such detriment because she had done a protected act.

137. The first detriment upon which the claimant relies is that the respondent blocked her access to emails. The tribunal accepts that, towards the end of June 2019, the claimant was unable to access her work emails. It is evident from the correspondence between the claimant and the respondent in late June 2019, culminating in the telephone conversation between the claimant and the respondent's IT department that she was unable to access her emails.

138. However, it is not at all clear to the tribunal that the claimant had been blocked from accessing her emails by anything done by the respondent. Once the claimant raised the issue in correspondence in late June 2019, it was relatively quickly resolved by the respondent. The respondent's resident expert from the IT department who spoke to the claimant on 1 July 2019 was able to resolve the issue swiftly once the matter had been referred to him. The Tribunal also considers that there is significant weight to be attached to the explanation he gave to the claimant in resolving the problem, indicating that there was likely to be a problem either in the way the respondent's systems were set up or with the system provided by Microsoft. He was adamant during the telephone conversation that there was nothing to suggest at his end that the respondent had blocked the claimant's access to her emails or that her email account had in some way been locked by the respondent. The tribunal notes that there is no evidence to suggest that the member of the IT department who dealt with the issue was in any way connected or concerned with the claimant's grievance or the comments which she had made during the grievance hearing on 1 April 2019. There is, therefore, no evidence or reason to suspect that he was telling the claimant something which was untrue or which he did not believe to be true.

139. In addition, it is surprising in the Tribunal's view that, if the claimant's inability to access her emails was connected in some way to her grievance or what she said at the grievance hearing, that any blocking of her email account took place almost three months after the grievance hearing had taken place. In the tribunal's view, there is no obvious trigger event which would have led to the respondent suddenly deciding to block the claimant's access to her emails at that point in time.

140. For all of those reasons, the Tribunal concludes that the respondent did not subject the claimant to a detriment by blocking her access to her emails and, in any event, to the extent that the claimant was unable to access her emails that was in no way connected to the fact that she had raised a grievance.

141. The second detriment relied upon by the claimant is that she was excluded from email correspondence. The Tribunal accepts that the claimant is a person who is interested in the detail when it comes to her work. That is clear from the claimant's evidence and was also conceded by the respondent's witnesses. It is also clear that, at least towards the end of the claimant's employment, she was indicating to the respondent that she wished to be kept updated by email in respect of work-related matters. At page 241 of the bundle, the claimant wrote to the respondent agreeing to receive monthly updates as to organisational matters from Mel Isherwood.

142. Notwithstanding that, there are examples of the claimant not being kept informed of certain matters. One example is the pay increase referred to at page 269 of the bundle. It is clear and the Tribunal accepts that the claimant was unaware of that issue. Further, in paragraph 29 of the claimant's witness statement she sets out a number of emails which she was not copied into between late July 2019 and early September 2019.

143. During the course of oral evidence, there was significant dispute between the parties as to the level of contact which it was appropriate for the respondent to engage in with the claimant during a period when she was off work through ill health, particularly bearing in mind the nature of the illness the claimant was contending with. The thrust of the respondent's witnesses evidence on this point was that it was simply inappropriate for the respondent to copy the claimant into every piece of internal correspondence dealing with all issues arising during her absence. Whilst the respondent accepted that it was appropriate to keep the claimant informed of major structural or organisational changes, the respondent was adamant that it would not be appropriate to engage in correspondence extending beyond that.

144. The respondent's witnesses gave two explanations for that position. First, it would be irresponsible to engage in that level of correspondence with an employee who was absent through sickness from work, particularly where part of the reason for the absence was that the employee concerned was experiencing significant levels of stress and anxiety. Secondly, the respondent pointed to the fact that it had engaged Mr Rogers as a temporary replacement for the claimant and that, accordingly, it was appropriate to allow him to deal with day-to-day operational matters arising during the claimant's absence rather than informing the claimant of those issues, thereby opening up the possibility that the claimant would take a different view to Mr Rogers or create some uncertainty in who should be dealing with any such issues.

145. Having considered the matter carefully, the Tribunal accepts the explanations provided by the respondent. In the Tribunal's view, it is entirely understandable for the respondent to take that approach even if the claimant takes a markedly different view. An employer owes its employees a duty of care. Part of that duty is to ensure that they are not overburdened during periods of sickness absence.

146. The Tribunal is satisfied that, where the respondent did not engage in detailed correspondence with the claimant, it is likely that it did so for one or both of the reasons the respondent advances. The Tribunal is not persuaded that any such failure to include the claimant in correspondence occurred because of the claimant's grievance or what she said at the grievance hearing. Accordingly, the Tribunal is not persuaded that any such omissions amount to acts of victimisation within the meaning of the Equality Act 2010.

147. The next alleged detriment relied upon by the claimant is the delay in her receiving an outcome to her grievance, including the changes made to the person chairing her grievance appeal.

148. Once again, the Tribunal accepts that, as a matter of fact, the claimant's grievance took longer to deal with than would ordinarily have been the case. It is also right to say that the person identified to deal with the claimant's appeal changed on a number of occasions.

149. Initially, the claimant was told to direct any grievance appeal to Sue Donley. Having considered that correspondence, the Tribunal is not clear that the claimant was being told that Ms Donley would be the person determining any appeal as opposed to being the person (as a member of the HR Department) to whom any appeal should initially be sent with a view to her then identifying another appropriate person to act as the chair for any appeal hearing. In any event, even if she was to be the person initially identified to be the chair of any appeal hearing, the respondent instead appointed Mr Dawson to do so at the claimant's own request. Mr Dawson and the person then identified after him to chair the appeal became unavailable to deal with the matter for reasons connected with their own employment. Mr Dawson left the respondent's employment and his successor did the same. Whilst it might have been better for the respondent to have communicated those issues to the claimant without delay, it is difficult to see what else the respondent could have done where individuals identified to chair any appeal hearing became unavailable as a result of their employment with the respondent coming to an end.

150. It should be noted at this stage that, notwithstanding the changes of appeal chair identified so far, during the period that those changes took place the

claimant had not in fact launched her appeal because she was waiting for the outcome of her Subject Access Request before doing so.

151. Therefore, the tribunal concludes that any delays which may have been caused by the changes in identity of the appeal chair would have made no difference to the period within which the appeal was dealt with because the appeal could not be resolved until such time as the claimant had set out her appeal in writing as required by the respondent's grievance policy.

152. Thereafter, Anna Irvin was appointed as appeal chair but stood aside upon reading the claimant's appeal and recognising that her department was at least partly the subject of the claimant's grievance. The Tribunal considers that there was nothing inappropriate in Anna Irvin's decision to step aside and in fact can understand her rationale in doing so in light of the issues identified by the claimant as part of her grievance and her grievance appeal.

153. As for Mr Fullerton's involvement in the grievance appeal, it is clear that there was some delay in him dealing with it. There was also a failure on Mr Fullerton's part to inform the claimant at the appeal hearing that he was due to commence a period of leave shortly after the appeal hearing took place. Overall, it took Mr Fullerton a period of approximately six weeks to deal with a grievance appeal which the respondent's own policy indicated should have been dealt with within a period of five days.

154. However, the tribunal concludes that any delays in the process were not occasioned by the fact that the claimant had issued a grievance or because of what she said at the grievance hearing on 1 April. The delays occurred for separate reasons. A number of the delays occurred because of the need to change the identity of the appeal chair. A significant portion of the period of delay was occasioned by the delay in the claimant submitting a grievance. Thereafter, delays were occasioned by other unrelated matters affecting Mr Fullerton's ability to deal with the grievance appeal within the prescribed time.

155. The Tribunal is not satisfied that any of those delays came about or were caused because of the claimant's grievance itself. Accordingly, the Tribunal concludes that the delay in the outcome of the grievance was not an act of victimisation.

156. The final detriment relied upon by the claimant is the delayed response to her Subject Access Request. The respondent took longer than its own policy stated to respond to the claimant's Subject Access Request. Ms Armitage accepted that was the position but explained that it was necessary, because of the complexity of the nature of the documentation sought by the claimant and the form in which it was requested, to extend the initial one-month period

provided for by the respondent's own policy. As set out earlier in this Judgment, the Tribunal found the evidence of Ms Armitage to be extremely impressive. She was an individual who the Tribunal concludes is a diligent Data Protection Officer and was in no way swayed in the discharge of her duties either by the fact that the claimant had made a grievance or by what the claimant had said during her grievance hearing.

157. Ms Armitage accepted that the process had taken longer than it might otherwise have done, but was adamant that she had discharged her duties with all due diligence. The Tribunal accepts her evidence and concludes that any delays in dealing with the Subject Access Request were in no way connected to the fact that the claimant had raised a grievance.

158. It follows that the claimant's complaint of victimisation fails and is dismissed.

Direct discrimination, discrimination arising from disability and constructive unfair dismissal

159. In their submissions, the parties both addressed these three complaints at the same time. The reason they did so is that the factual allegations upon which the three complaints are based are the same. That is clear from the list of issues. There are four factual allegations made by the claimant underpinning the three different complaints. The Tribunal has adopted the same approach as the parties in considering each one.

160. The tribunal has reached conclusions as to the factual allegations made and has then considered, in respect of each one, whether it amounts to an act of unlawful discrimination (pursuant to either section 13 or section 15 of the Equality Act 2010) or whether it amounts to a breach of the implied term of trust and confidence either on its own or as part of a series of events which cumulatively amounts to a breach of the term.

161. The first matter relied upon by the claimant is the advertisement that was placed for her temporary replacement. The advertisement appears at page 156 of the bundle. The terms of the advertisement are set out earlier in the judgment. The role was advertised on the basis of a fixed term with "the possibility of full-time". On the evidence the Tribunal received, the Tribunal is satisfied that the term "full-time" in fact meant permanent. The advertisement contained no explanation as to what those words meant. Upon reading the advertisement, the claimant clearly formed the view that the respondent was advertising for a role, potentially on a permanent basis, to replace her. In circumstances where she was absent through ill-health, and particularly bearing in mind the nature of her disability, the claimant concluded that the respondent felt that she may not be returning to work.

162. In the Tribunal's view, that interpretation was a reasonable one. In the absence of any other explanation in the advert itself or provided separately to the claimant (of which there was none) it was reasonable for the claimant to conclude as she did. The Tribunal is fortified in that view by two further matters. First, in oral evidence, two of the respondent's witnesses appeared to accept that it was understandable for the claimant to have interpreted the advertisement in that way. At the very least, Ms Jevons-Hunt recognised the difficulty which the wording of the advertisement had caused and accepted that advertisements should be made clearer in their terms. Secondly, and in any event, it is clear from the email sent by Karen Griffith on 1 April 2019 that, when she read the advert, she interpreted it as meaning that the claimant would not be returning to work. The email she sent makes that clear because otherwise there is no explanation for why she sought clarification as to whether or not the claimant would be returning to work after reading the advertisement. Ms Griffith had considered the email and realised how it might be interpreted. However, despite that and after referring the matter to Sam Collier, no changes were made to the wording of the email.

163. In considering the claimant's complaint of direct discrimination, the Tribunal must be satisfied that the placing of the advertisement in those terms amounted to less favourable treatment of the claimant because of her disability. The claimant does not rely on any actual comparator for the purposes of this complaint but instead asserts that a hypothetical comparator in circumstances not materially different to hers would have been treated differently. In terms, the tribunal is asked to accept that a person absent through work for a prolonged period of time but who did not also have cancer would have been the subject of a job advertisement placed by the respondent in terms different to those used in respect of the claimant's role. On the evidence available, the Tribunal does not accept that assertion. The Tribunal is not persuaded that there is any real evidence to suggest that the job advertisement would have been placed in any different way in respect of another hypothetical employee in circumstances not materially different to the claimant's. Accordingly, the Tribunal concludes that the job advertisement does not amount to an act of direct discrimination.

164. The Tribunal takes a different view, however, in respect of the other two complaints upon which this factual matter relies. The Tribunal does conclude that the job advertisement amounts to an act of discrimination arising from disability.

165. The placing of the advertisement in the terms it was placed amounted to unfavourable treatment of the claimant. In deciding whether there is

unfavourable treatment, no comparator is required. Whether or not treatment is unfavourable is to be determined objectively. The question to be determined is whether any particular treatment, viewed objectively, is adverse to the claimant.

166. In this case, the claimant was absent from work following a diagnosis of stage 3 cancer. She did not know what the future held for her and was facing a relatively prolonged period of absence from work. Without recourse to her, or other explanation, her role was advertised in terms which suggested (on a reasonable interpretation of the wording used) that she may be being permanently replaced in her role at work. It was reasonable for the claimant to interpret that as meaning that the respondent felt that she may not be in a position to return to work. The tribunal is satisfied that that amounts to unfavourable treatment for the purposes of this complaint.

167. The tribunal is also satisfied that the advertisement was placed because of the claimant being absent from work as a result of her disability. The advert would not have been placed if the claimant was not absent from work. It was an advertisement placed specifically to cover her temporary absence.

168. The absence from work arose from her disability and, therefore, the Tribunal is satisfied that the claimant was unfavourably treated because of something arising in consequence of her disability.

169. The Tribunal has carefully considered whether or not the respondent can rely upon the statutory defence to this complaint by establishing that the approach it took was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon by the respondent are set out in paragraph 19 of the respondent's written submissions. Although not set out in the grounds of resistance, no point was taken by the claimant as to the respondent's ability to rely upon those legitimate aims as part of the final hearing.

170. Whilst the tribunal accepts that the aims set out in the written submissions are legitimate aims for the respondent, placing a job advertisement in the terms it was placed was not a proportionate approach to take. It was entirely open to the respondent to advertise for a temporary replacement for the claimant in different terms and in terms which did not amount to unfavourable treatment of the claimant. The evidence shows that was open to the respondent. In her oral evidence, and in her determination of the claimant's grievance, Ms Jevons-Hunt accepted that the job advertisement could have been worded differently. The outcome of the grievance was that steps would be taken to ensure that a job advertisement was not placed in those terms again in the future.

171. The tribunal concludes that if those steps could be identified by her as part of the grievance process, it is difficult to understand how they were not proportionate steps to take at the time this advertisement was placed. Further, that is even more the case when the issue was identified prior to the advert being placed by Ms Griffith, was considered by the respondent (in the form of Mr Collier), and yet the respondent continued to place an advertisement in terms unfavourable to the claimant nevertheless.

172. For the same reasons, the Tribunal also considers that the act of placing an advertisement for the claimant's temporary replacement in those terms is also an act capable of amounting to a breach of the implied term of trust and confidence. At the very least, it is an act capable of contributing to a series of events which cumulatively amounted to a breach of the term.

173. The tribunal next considered the issue of the Area Director role not being advertised internally and the claimant being precluded from applying for it as a result. In reality, the underlying facts in relation to this issue were not in dispute between the parties. There is no dispute that the respondent normally advertised roles internally and externally prior to filling vacancies. There is no dispute that the Area Director role for Wales in the new organisation was not advertised internally. There is no dispute that, as a result, the claimant was unaware of the vacancy and the opportunity to apply for it before it was offered to and accepted by Mel Isherwood.

174. The real dispute between the parties is as to whether those facts amount to any form of unlawful discrimination and/or whether they are facts capable of amounting to a breach of the implied term of trust and confidence either individually or as part of a series of events.

175. The Tribunal has concluded that those facts do not amount to direct disability discrimination. The tribunal is unable to identify any evidence that the claimant in respect of this issue was treated less favourably than any other person with whom she should be compared for the purposes of this complaint. In fact, on the evidence before the Tribunal, the claimant was treated in exactly the same way as all other regional managers. The fact that the new role was not advertised internally was equally prejudicial to the claimant and all of her colleagues who may have wished to apply for the vacancy had they been aware of it. The tribunal's conclusion is that the claimant has not discharged her initial burden of showing that there are facts from which the Tribunal could conclude that she has been the subject of direct disability discrimination in respect of this issue.

176. As to the suggestion that it amounts to an example of discrimination arising from disability, the Tribunal also rejects that assertion. Fundamentally, the Tribunal has focused upon the reason why the Area Director role was not advertised as that is the act said to amount to unfavourable treatment of the claimant.

177. The Tribunal accepts and finds that failing to advertise the role and thereby precluding the claimant from applying for it is unfavourable treatment of her for the purposes of section 15 of the Equality Act 2010.

178. However, the Tribunal must also be satisfied that the claimant was subjected to that unfavourable treatment because of something arising in consequence of her disability, namely her absence from work. The Tribunal finds, on the balance of probabilities, that the reason the Area Director role was not advertised internally is because decisions were made within the respondent's organisation (probably by Sam Collier) to offer the role to Mel Isherwood after she had applied initially for the regional manager role. The tribunal is unable to identify any evidence to suggest that that decision was taken for some reason connected with the claimant's absence from work through sickness. The Tribunal accepts that the decision taken had the effect that the claimant was not aware of the role and therefore could not apply for it but the Tribunal is not satisfied that that is the reason why the decision was taken. For those reasons the Tribunal concludes that the failure to advertise the role internally did not amount to discrimination arising from the claimant's disability.

179. Although the Tribunal has concluded that the failure to advertise the Area Director role does not amount to an act of unlawful discrimination in any way, the Tribunal does conclude that it is an act which breaches the implied term of trust and confidence either of itself or is capable of contributing to a series of events which amount to a breach of the term. By its own admission, the respondent failed to abide by its usual practice of advertising the role internally. It did so at a time when the claimant was absent from work on long-term sick having been diagnosed with cancer. The role in question would have been a natural progression for the claimant from the role which she had been fulfilling for a number of years before. The Tribunal accepts the claimant's evidence that it is a role that she would have been interested in and that she felt prejudiced and disadvantaged as a result of being unable to apply for it. The claimant was simply not informed in any way that the role was available for application until such time as the role had already been filled. Even when the claimant became aware that the role had been available, she was told that the role had now been filled and that that was the end of it. Those are actions which, in the Tribunal's view, are likely to destroy or seriously damage the

relationship of trust and confidence between employer and employee viewed objectively.

180. The third act relied upon by the claimant is an alleged change of her role. Having considered this issue carefully, the Tribunal has concluded that it formed a very limited part (barely being noticeable) of the claimant's evidence or of the questions posed of the respondent's witnesses in cross examination. In reality, the Tribunal is only able to identify one change made to the role of regional manager during the period of the claimant's sick leave which was to add an additional service to her area. The Tribunal is not, however, satisfied that such a change amounts to unlawful discrimination in any form or breaches the implied term of trust and confidence. The tribunal is satisfied that it was a short-term alteration to the role made at a time when the claimant's temporary replacement was fulfilling that role and which was to be the subject of review upon the claimant's return to work after sick leave.

181. The final issue relied upon by the claimant is the failure of the respondent to consult her in respect of a pay rise. On the evidence before the Tribunal, it is actually far from clear as to whether other colleagues were consulted. There is one email that is pointed to in which it is stated that some colleagues have been asking questions about the £1,000 pay rise. In the Tribunal's view, that evidence alone does not establish that colleagues had been consulted about the pay rise.

182. However, even if the evidence was sufficient to establish that there had been consultation with others, the Tribunal is not satisfied that the fact that the claimant was not consulted amounts to either less favourable treatment, unfavourable treatment because of something arising from her disability or that it breaches the implied term of trust and confidence.

183. In reality, the claimant was told that she would be receiving a £1,000 pay rise and she did receive it. She was treated (in that sense) in no different way to any of her colleagues. The alleged failure to consult her did not, in the Tribunal's judgment, amount to unfavourable treatment particularly where the claimant in fact received the pay rise and at the same time as her colleagues.

184. Given those conclusions, the tribunal does not understand any suggestion that any failure to consult with the claimant about the pay rise amounted to or was capable of amounting to a breach of the implied term of trust and confidence.

185. In summary, therefore, the Tribunal concludes that the respondent did unlawfully discriminate against the claimant (in the form of discrimination arising from disability) in respect of the wording of the job advertisement for

the claimant's temporary replacement. The Tribunal also concludes that the wording of the job advertisement and the failure to advertise the Area Director role internally (thereby precluding the claimant from applying for that role) were acts which either individually or cumulatively amounted to a breach of the implied term of trust and confidence.

186. In order to determine the claimant's complaint of constructive unfair dismissal, there is a further issue to be considered. The two acts which the Tribunal has concluded amounted to a breach of the implied term occurred in the early part of 2019. The claimant resigned in early September 2019. In those circumstances, the Tribunal has to consider what the reason was for the claimant's decision to resign and whether or not it can be said that she had affirmed the contract. In answering those questions, the Tribunal bears in mind that the claimant's case is that this is a "final straw" case and that the final straw which led her to resign was her receipt of the grievance appeal outcome.

187. The Tribunal is satisfied that the claimant received the grievance appeal outcome on or around 5 September 2019. She resigned by letter dated 6 September 2019. The letter expressly refers, albeit in part, to the issues now complained of by the claimant as being part of the reason for her decision to leave her employment. The Tribunal is satisfied that the claimant's receipt of the grievance appeal outcome was the trigger for her decision to resign and did amount to the last straw for her.

188. The tribunal is also satisfied that her receipt of that grievance appeal outcome is capable in law of amounting to a last straw. The Tribunal has had in mind the authorities on this issue and is satisfied that the receipt of that outcome letter was capable of adding something to the acts which had gone before it. In particular, the grievance appeal outcome really simply reinforced the decisions which had been taken earlier in the year as part of the original grievance outcome. Specifically, it concluded that there was no evidence that the claimant had been subjected to any form of discrimination. The claimant did not agree with that and, for reasons which we have already given, the Tribunal does not agree with it either.

189. The tribunal is satisfied that the claimant was entitled to feel further aggrieved by receipt of that grievance appeal outcome and, although it did not amount of itself to a breach of the implied term of trust and confidence, it was capable of adding something to the earlier acts which the tribunal has found amounted to a breach of that term.

190. The question of affirmation gives rise to a consideration of the guidance from the case of *Kaur v Leeds Teaching hospitals NHS trust [2018] IRLR 833*

set out in the respondent's opening submissions. The Tribunal has to ask itself the series of questions set out in that authority:

190.1 The first question is: what was the most recent act on the part of the employer which the employee says caused, or triggered, her resignation? The tribunal has concluded that it was the receipt by the claimant of the grievance appeal outcome;

190.2 Has she affirmed the contract since that act? The Tribunal concludes that the claimant did not affirm the contract given that she received the grievance appeal outcome on 5 September 2019 and resigned the following day;

190.3 If not, was that act by itself a repudiatory breach of contract? For the reasons we have already given, the grievance appeal outcome was not, of itself, a repudiatory breach of contract;

190.4 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 breach of the implied term of trust and confidence? For the reasons we have given, we are satisfied that the grievance appeal outcome was a part of such a course of conduct in the sense set out in *Omilaju*. It is important to note that the guidance in *Kaur* explains that, if the act in question was a part of such a course of conduct there is no need for any separate consideration of a possible previous affirmation following the earlier acts which also form part of the course of conduct;

190.5 Did the employee resign in response (or partly in response) to that breach? The Tribunal answered that question in the affirmative.

191. For all of those reasons, the Tribunal has concluded that the claimant did resign in response to a fundamental breach of the contract of employment as a result of the respondents breach of the implied term of trust and confidence. She was entitled to do so and to treat herself as dismissed within the meaning of section 95 of the Employment Rights Act 1996.

192. The respondent does not seek to argue that any dismissal which the Tribunal finds occurred was a fair dismissal and, therefore, having concluded that the claimant was dismissed, the Tribunal also concludes that she was dismissed unfairly for the purposes of section 98 of the Employment Rights Act 1996.

193. Although issues of *Polkey* and contributory conduct are raised very briefly in the respondent's opening submissions at paragraph 57, in her closing submissions Miss Garner did not seek to argue that there should be any reduction to any award by reason of either *Polkey* or contributory conduct and therefore the Tribunal concludes that there should be no such reduction.

Remedy

194. The hearing focused upon issues of liability only even though the preliminary hearing orders envisaged the hearing dealing with all issues including remedy. As it was, there was insufficient time within the reduced time estimate for the Tribunal to deal with all issues including remedy.

195. As a result of the Tribunal's findings in this judgment, remedy will now need to be considered in respect of a) the one aspect of the claimant's complaint of discrimination arising from disability which has been successful and b) the claimant's unfair dismissal complaint.

196. The Tribunal wishes to give the parties the opportunity to seek to reach agreement on issues of remedy before the Tribunal fixes any further hearings in respect of the claim. Accordingly, the Tribunal requires the parties to provide an update to the Tribunal within 42 days of this judgment being sent to them to indicate whether agreement has been reached and/or whether there is a need for the Tribunal to fix a remedy hearing and give directions for preparation for such a hearing. If a remedy hearing is required, the parties are required to seek to agree directions necessary to prepare for that hearing and to file agreed directions with the Tribunal for the Tribunal to consider. The parties should do so at the same time as writing to the Tribunal indicating whether a remedy hearing is required.

Employment Judge R Vernon

Dated: 17 December 2021

REASONS SENT TO THE PARTIES ON 11 January 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche