EMPLOYMENT TRIBUNALS

Claimant: Mrs C White

Respondent: The Chief Constable of Nottinghamshire Police

AT A FINAL HEARING

Heard: Remotely by CVP (nominally at Nottingham)

On: 11 – 20 April 2022
21 and 22 April in Chambers

Before: Employment Judge Clark
Mr R Loynes
Mr J Purkis

Appearances
The claimant: Mrs White in person
The respondent: Mr D Leach of Counsel

JUDGMENT

1. The claim of indirect disability discrimination **fails and is dismissed**.

2. The claim of unfair dismissal **fails and is dismissed.**

REASONS

1. Introduction

1.1 Mrs White was one of the best emergency call handlers that Nottinghamshire Police has employed in its command and control room. She also has no useful sight. She is competent in touch typing and using computer systems with the aid of screen reading software. This claim concerns the respondent's replacement of its command and control computer system and the need to modify and make the new system accessible for the claimant.

1.2 Mrs White claims the delays in implementing a workable modification led her to fear that one would not be found and that that amounted to a fundamental breach of the implied term of trust and confidence in respect of which she says her contract of employment was repudiated, that she accepted the repudiation and claims unfair dismissal. She also claims the introduction of this new command and control system amounted to indirect discrimination.

2. Preliminary matters

2.1 This hearing has been conducted entirely by CVP. The adjustments planned at the preliminary hearing have been maintained and included an extended timescale, the presence of the claimant's husband throughout, including during her giving evidence, and allowing time for documents to be read to Mrs White, either by her software or her husband.

3. The issues

3.1 The parties have agreed a list of issues which we adopt as setting out the questions of fact and law that we have to answer. In summary, the agreed and disputed issues in each claim are: -

Indirect disability discrimination

3.2 The PCP relied upon is the introduction of a new computer system called SAFE. The respondent accepts that that PCP was applied to persons with whom the claimant did not share the characteristic of the claimant's particular disability.

3.3 The respondent accepts that the PCP puts, or would put, persons sharing the claimant's disability at a particular disadvantage in comparison with those not sharing it, in that unforeseen technical problems meant that the new system was not initially as accessible to the claimant as its predecessor had been. (Such persons could not access the system as they had its predecessor. Specifically, the problems fall into two categories. One is "scripting" so that the accessibility software worked with SAFE. The other is the inability to "split" the sound from the telephone with the sound from the software.)

3.4 The parties agree that the respondent had a legitimate aim in replacing the Critical Control Room computer system to keep it technologically up to date and to ensure continuity of service given the impending expiry of contracts for the provision of the outgoing system and the removal of supplier support for it.

3.5 The only issue in dispute was whether the means of implementing SAFE was proportionate, in the sense that it was appropriate and reasonably necessary.

Unfair dismissal

3.6 What was the reason for the claimant's resignation? The immediate reason was set out in the ET1 as the claimant being worried she was never going to be able to return to the control room and started looking for another job. She was offered a job with another police force which she accepted, resigning in October 2020.

3.7 Was the respondent in fundamental breach of the implied term of mutual trust and confidence so as to entitle the claimant to terminate the contract without notice (even though she in fact resigned on notice)?

3.8 The conduct relied upon as having constituted the fundamental breach of contracts the alleged failure by the respondent to rectify accessibility problems with the new "SAFE" control room computer system which the claimant contends prevented her from using it. Accordingly:

a) Was there an ongoing failure to rectify such accessibility problems with the new "SAFE" system as a matter of fact? When, if at all, were they resolved?

b) To the extent that there was any such ongoing failure, was there "reasonable and proper cause" for it? If not, was it calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent?

3.9 If there was a breach, when did the breach crystallise?

3.10 In light of that did the claimant affirm the contract?

3.11 If there was a breach, was that breach at least a part of the reason for resignation?

3.12 If there was a dismissal in law, was it for a potentially fair reason and fair within the meaning of s.98(4) and the range of reasonable responses test? The respondent will rely on Some Other Substantial Reason

Other potential claims

3.13 For completeness, we record that there is no claim of failure to make a reasonable adjustment. That does not mean that the possibility of an adjustment is wholly irrelevant to the case as the concept could well feature within the question of proportionality.

4. Evidence

4.1 We have heard from Mrs White in her own case.

4.2 For the respondent we heard from: -

a) Ms Jo Miller, Technical Project Manager at the time for the replacement of the command and control system.

b) Mr Brian Foster, the Contact Management Project Manager for the replacement of the command and control system.

c) Mr Matthew Lee, Business Systems Development Manager.

d) Ms Sandra Brown, People Services Business Partner (HR).

e) Superintendent Paul Burrows, Head of Contact Management.

4.3 All witness in attendance affirmed their evidence and were questioned. We also received a witness statement from Ann-Marie Orr-Palladino, Manager of the File Preparation

Unit to which the claimant was briefly and temporarily assigned whilst attempts were made to resolve the initial technical problems. Her evidence was accepted unchallenged.

4.4 We received a bundle running to 433 pages. We received additional disclosure during the course of the hearing which was accepted. That included:-

a) The claimant's leaver form dated 10 October 2020.

b) Emails explaining the financial budgets already in the bundle.

c) A missing report from "Blazie".

4.5 Both Mr Leach and Mrs White made closing submissions speaking to well-prepared written submissions.

4.6 We had anticipated giving an oral decision. During our deliberations a further case was submitted by the respondent and we felt bound to invite the claimant to make any comments she wished on that case. Whilst that meant we had to timetable that process, it was highly likely that we would not have concluded our deliberations in time to give an oral decision in any event and we notified the parties accordingly.

5. Facts

5.1 It is not the Tribunal's function to resolve each and every last dispute of fact between the parties but to focus on those matters necessary to determine the issues before us and to put the case in its proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

5.2 The respondent is a large employer. For present purposes it is well resourced. It has explicitly stated that any potential financial limitation was not an issue in this case. It has been an unusual case to engage with in the context of contested litigation as there was an expression of genuine and mutual warm regard between all witnesses and the claimant. We find, as it was common ground, that everyone who was involved in trying to make the new command and control system accessible genuinely had Mrs White as a priority, genuinely regarded her as one of the best call handlers in the team were all equally frustrated by the delays to finding the solutions as she was.

5.3 The claimant has no useful vision. She uses various screen reading software which, through an audio interface, literally reads to her the text on screen that sighted call handlers would see. In the work environment, she has used a system called Job Access With Speech, or "JAWS". This system was procured and its implementation started soon after she first started her employment with the respondent as a customer service advisor in March 2009. That role is now called a police emergency call handler ("PECH").

5.4 The previous command and control computer system was called "Vision". We find Mrs White started her employment around the time of the implementation of this system. We find there was a genuine desire to get Mrs White up and running in this role and work started to bring about the necessary technical adjustments so that JAWS could work alongside Vision

without issue. That initial coding was eventually achieved after its own technical problems, around 15 months later. We find that the need for such coding is not a one-off event. Whilst the initial work may be the biggest single piece of work, there was always an ongoing need for further coding to keep JAWS working effectively. That need arose from periodic software updates to the Vision system and also in how it interfaced with other systems used by the PECH staff.

5.5 We find Vision was not an integrated system. It was one of a number of systems PECH staff used in their work all of which had evolved at various stages over time and were based on different technologies and maintained by different bodies. One such system was the police national computer ("PNC"). Another system that would be introduced sometime later was "Niche". This was an evidence and case progression system tacking the development of each police incident and investigation. We find the claimant also used Microsoft Outlook and relied on Microsoft Word as her main means of communicating and note taking. Alongside the computer software, another essential tool was, of course, the separate telephone system. The success of JAWS depended on the technology and programming of the software it was attempting to "read".

5.6 We find the telephone system at this time was separate to the software. The two sources of audio (i.e., phone and JAWS) meant it was possible to use a "splitter box" so that she could listen to the telephone call in one ear and the screen reader software in the other.

5.7 We find the claimant and her managers worked well together to address the disadvantages presented from time to time and to find solutions. They included innovative responses to developments such as the move to a touch screen log-in by creating a plastic template through which the claimant could enter pass codes, innovative use of desk phones and word documents with regular phone numbers. The claimant was party to these solutions and agreed to them. She describes how they all worked as well as anyone could have expected. In her evidence these were termed "workarounds" a term we detected was used to convey mild criticism that she could not perform the PECH role in exactly the same way as her sighted colleagues. We understand that sentiment and it is true a number of these "workarounds" responded to a situation where something about the workplace was presenting a disadvantage to the claimant in how she could perform her work. From our perspective, another word to describe these workarounds might be an adjustment to remove a disadvantage created by the convergence of a PCP and her particular disability.

5.8 From the start of the claimant's employment the respondent has contracted with a company called Blazie to provide the necessary software coding to make the audio interface between its computer systems and a visually impaired user work effectively. They write scripts, that is computer coding, to handle the process in the interface between the software used and JAWS. The respondent facilitated a close relationship between the claimant and Blazie and she worked alongside its programmers from time to time to help them understand her needs and update the coding so the audio interface was up to date.

5.9 After a time in her PECH role with the respondent, the Mansfield control room closed and all its staff moved to police headquarters at Sherwood lodge.

5.10 Over time we find Mrs White's particular competence as a PECH operator was noted and she became a PECH Tutor and trained a number of new PECH staff.

5.11 In 2014 a software update meant JAWS stopped working effectively in its interface with the PNC and was not able to read its pages. No one had predicted this problem. PNC was a system the respondent had access to but did not have control over its technical development and coding. Blazie were unable to re-write the scripts. The result was that the claimant became unable to access the PNC. A workaround was agreed with the claimant whereby she would tag any PNC issues and a colleague would work on the PNC related matters. We accept this was not at all ideal but it was a reasonable solution which enabled her to continue in her role. It was, however, the first of a number of significant technical hitches to blight Vision's effectiveness and the claimant's ability to perform her role to the full. These all served to highlight Vision was coming to the end of its working life.

5.12 In 2015, changes to BT's national phone systems and how it handled additional data (such as location of the caller) also affected Vision and meant changes to how 999 calls were handled in the system. It was not possible to replicate it in a test environment for Blazie to undertake system development before it went live. This meant there was an immediate problem for the claimant taking 999 calls. To her credit she recognised the importance of 101 calls were equal to 999 calls and agreed to work on those enquiries. There was then a short period of time of about 4 months when a glitch in the software meant she seemed to be the priority PECH for all 101 calls, even if others were available. This put pressure on the claimant. That particular issue was then discovered to be a problem with the system which was capable of rectification.

5.13 In or around 2016 the Niche system was introduced. Again, this required additional scripting by Blazie to make it and JAWS compatible. The decision was taken not to commission Blazie to re-write the script. The same low-tech solution was implemented as had been used with the PNC accessibility whereby the issue the claimant was dealing with would be tagged and a colleague would address the Niche issues. Once again, it was agreed but not ideal. We have no doubt that the claimant was concerned that aspects of her role were being eroded as the technology aged further. However, we also find that the reason the re-write was not commissioned was not out of a reluctance on the part of the respondent to support the claimant. Steps were initially taken to prepare a business case for the work. Managers were supportive of the claimant in her need to regain access to PNC. All of those issues arise from the fragmented IT systems used by PECH operators and all those concerns appeared to be overtaken by the respondent's need not simply to solve the issues arising for Mrs White, but to replace the entire system with up to date technology having some capability to integrate more effectively with its other systems.

5.14 We find Vision was built on old technology, at least by the time we get to the turn of 2017 into 2018 it was a system which was technologically under pressure and said now to be "creaking". It was increasingly unable to interface with other systems built on more modern platforms. All PECH staff were affected by its unreliability. As other systems were upgraded around it, or their technology otherwise evolved, the interfaces with Vision began to fail. The system itself came to the end of its serviceable life and the ability to write fixes for the new

problems arising was also ending. We find the respondent was put on notice by the suppliers that it would no longer be technically supported at all from March 2020. We accept, as the claimant herself does, that a replacement system was essential.

5.15 We find that explains why the growing list of problems with VISION that the claimant began to face were not capable of technical resolution and were, to some degree, put on hold in anticipation that any new system would seek to overcome those issues. The hope and expectation of not only the claimant but also her managers was that the new system would facilitate her access to PNC and possibly also Niche by drawing in the data from those separate systems. As the only interface she would then need would be with the new command and control system, the hope was that that would simplify the claimant's access and the JAWS coding, as indeed it would simplify use for all PECH staff.

5.16 In 2018 the project to procure a new system commenced. We find the claimant's circumstance and making it work for the claimant was a key objective of the project form the outset. Mrs White was included in regular briefings about the project from its inception in 2018 and was optimistic that this would be an improvement.

5.17 The respondent embarked on a tender process. Superintendent Paul Burrows was the respondent's disability lead. We find he had a career background in championing the abilities of people with disabilities. He was significantly involved in the design of the tender process and, as a result, we find the respondent had in mind disability and accessibility issues in its tender process from the outset. The tender was designed so that 30% of the tender evaluation was based on cost and 70% was based on the bidder's commitment and track record in other areas of importance to the respondent. Those other areas were split into various factors which were subject to qualitative assessments. Each factor to be assessed was weighted to reflect its importance to the tender. The weightings varied from the lowest of 0.5% to the highest of 3% of the total. We find as a fact that accessibility, as the word is used in the context of this case, was an important factor in its own right and the tender made particular reference to visual impairment and the use of JAWS. In reality, we find this part of the tender was designed specifically with the claimant and her personal situation in mind. We find this criterion attracted the highest possible weighting of 3% of the total and we find that to reflect the importance of disability access, and Mrs White's circumstances in particular, for the respondent.

5.18 We infer the market for police command and control systems is not particularly large. We find there were only four tenders submitted for the work. The company that would become the supplier was the Swedish industrial company, SAAB. We find it made statements in its tender about compatibility and accessibility that the respondent relied on and scored the highest amongst the four tenderers. This was part of its success in being awarded the contract. The claimant challenged the generalised manner of their submission in that tender as being unspecific and that the respondent should have done more to check. There may have been different steps that the respondent could have taken but we find the steps it did take were genuine and did not end with this tender statement. Moreover, we accept the respondent's evidence that SAAB submission scored the highest on this criterion. Even if there were criticisms, it was the best option available to the respondent.

5.19 We find it was always the respondent's intention to continue to engage Blazie in supporting the accessibility interface. In the summer of 2019, it commissioned Blazie to advise them on accessibility issues arising from SAAB's bid to develop and install its SAFE system. This was not a generic enquiry, it was commissioned specifically in respect of Mrs White's needs and the subsequent report, produced in July 2019, is entitled "making SAFE accessible for Carmen White". In that, Blazie reported to the respondent confirming the relative simplicity of the process of making it accessible. This was not just an empty statement, it was supported by the fact the entire software platform was moving to a windows 10 environment, one which Blazie were comfortable coding within. The report covers a number of issues it anticipated would arise for the claimant based on the design format of SAFE and how they would go about converting the visual, mouse driven interface to a voice interface with option commands.

5.20 We find the respondent set a budget for the accessibility part of the project but we find this was more of an estimate for budget purposes in that we do not understand the respondent to have put a limit on it. Whilst it would be wrong to say there was no limit whatsoever, we do find the substantial sums the respondent was prepared to spend meant the work was not financially constrained in any material way. The initial quote from blazie for the initial coding was c.£19,000. Other costs over the time relevant to this took that up to around £35,000 but as the total figure estimated was up to £100,0000, we are satisfied that there was never an issue about not affording the work to be done. The limitations that the parties would encounter in the success of the accessibility were, therefore, entirely of a technical nature, aggravated by the restrictions of covid-19 landing on top of the main implementation period. A purchase order was raised immediately in response to Blazie's quote and Blazie began work. Indeed, Mrs White accepts there has never been a suggestion of the respondent "dragging its feet" over this issue.

5.21 We find Mrs White's initial engagement with the project left her and her managers feeling very positive about what SAAB were offering. She met regularly with the SAFE team and engaged specifically about what they were doing to make it accessible to a visually impaired user. Again, we record that the claimant and her managers were optimistic that the new front end provided by SAFE would mean it did the interfacing with PNC and possibly Niche and this would remove the problems of coding an interface with a number of stand-alone systems. It appeared to suggest that Mrs White could look forward to full access and even possibly returning to 999 calls. It is fair to say there was some variability in the levels of optimism. At some point, the various system interfaces meant it looked as though Niche access may not be essential for the PECH role.

5.22 The SAFE software was "delivered" to the respondent in versions. An initial "quality assurance" version was provided in 2019 for it to engage with the system and show its capabilities. As we understand it, this was akin to a demo version and not the actual version to be deployed in the respondents control room. As the respondent's specific needs were developed, this turned into a "pre-production" version which could be used for training. To the extent there would ever be a "final" version in a setting of continuous evolution, this too was not the final version to be deployed on the "go live" date but was used to explore the way it

worked and met the respondent's needs. We find it was also used for demonstrations to staff, to explain the process and to conduct the initial training. Blazie were brought in from July 2019 to begin their work on coding.

5.23 Discussions between the SAFE project team and Blazie in early July 2019 forged out what they would need. One aspect was the need for the real final testing of the coding to happen in the real world after go-live. Part of the issue for Blazie was that they were aware of the potential for the telephony part of the system, in this case Skype for Business, to interfere with how JAWS operates. It was known at that stage that the pre-production testing may not identify issues that could be expected to emerge in the live version as there was known to be a delay to the skype elements for all concerned, not just Mrs White, and the interface could not be replicated in a development environment. The consequence was that however well the coding went on the pre-production version, there was always going to be a period of further testing, development and debugging after the go live. It was common ground that the full capabilities had to be tested and worked on in a fully deployed "live" SAFE environment. That meant all understood work would continue after the go-live date and, in the event, they continued their coding and testing in the middle of the live call taking control room. That would explain why later, the issue of security clearance for remote access was such a serious issue for the respondent.

5.24 SAAB and Blazie continued to work together during 2019, and indeed after go-live on 28 January 2020. Some of the work was simply Blazie coding what it needed to make SAFE and JAWS work together. On other occasions, Blazie's work identified deficiencies with the SAFE coding itself, at least from an accessibility perspective. This resulted in SAAB undertaking further coding and an additional "software drop" would be delivered. It is clear from the correspondence that the accessibility issues, specifically for Mrs White, were being identified alongside other technical and systems adjustments in the periodic updates from SAAB on the work they had to do.

5.25 We find all PECH staff including the claimant underwent periodic training every few months. In 2019, a recurrent theme of that training was the programme to move to SAFE.

5.26 We find all staff were offered an introductory "walk through" of the SAFE system in groups of 2 or 3. We cannot be certain that the parties were not at crossed purposes when they each recalled different accounts of whether the claimant did or did not attend such a session. We find she did attend a session on a 1:1 basis with Mat Lee specifically for the purpose of giving an initial overview of the SAFE system. Whether this was identical to that which other staff received, and the claimant says she missed out on, we cannot say for certain but it appears to be sufficiently similar in content to be the same. We can find that there was a specific objective of explaining the general layout of SAFE and navigation and that Mr Lee has a particular reason for recalling the session he had due to the fact he had to prepare to explain the navigation in words, as opposed to simply demonstrating it as he had done with other staff. We do not understand this to have been a session at which Mr Burrows attended, contrary to how the respondent put it, although it seems he was physically in the vicinity when it took place. That may be why the claimant was unable to recall a session at which he is said to have been present.

5.27 From late 2019, PECH staff started to receive their training for SAFE. They were each allocated 13 hours over 2 days. We find as early as July 2019, specific consideration had been given to the claimant's potential training needs recognising she had both a new system to learn and a new version of JAWS to learn, all of which was still under development. That had raised a concern over the risks of training Mrs White too soon. Not only did the development of the new version of JAWS have to be sufficiently completed, but there were also concerns about the fact that the training could interfere with her use of the existing, outgoing control system and it was proposed that she be scheduled for training close to go-live date to minimise this. We find the amount of training was not limited. An initial estimate anticipated Mrs White should receive double the training time as her sighted colleagues, increasing it from two to four days.

5.28 At the end of July 2019 Faye Boucher, the Planning Coordinator for the project team, pencilled in four dates for 8th, 9th, 15th and 16th January 2020 for Mrs White's training. The significance of the timing of those dates was it was only a couple of weeks before the planned go-live date at the end of January 2020. In the event, the claimant received her training a week later as Blazie were not ready with the coding of JAWS. Instead, the training took place on 15th, 16th, 24th, and 25th January and then further, ongoing training was scheduled for 3rd, 5th, and 10th February 2020. We accept the number of days was not only down to the amount of training Mrs White would need, but also because the sessions were conducted alongside a Blazie coder to deal with issues as they arose in real time. In the event, they came up against a number of problems in the interface which meant some of the days inevitably went short whilst the fixes were resolved or otherwise the training continued as best as possible.

5.29 On 23 January Lynva Llewellyn, the IT trainer, spent some time with the claimant on the Skype for Business element of the system. This had been unavailable to all staff and it seems this part of the induction to the new system was happening at the same time as it was for everyone who had not yet had opportunity to practice with the new telephony system.

5.30 On 28 January 2020 SAFE went live. Vision was decommissioned and was no longer accessible to anyone. This is about a month before it would no longer be supported or capable of being serviced should any issues arise. As the accessibility interface with SAFE was not yet functioning to an acceptable standard Mrs White was not able to take live calls in the control room. Mrs White accepted it was reasonable that she should not be expected to take live calls in those circumstances. We find throughout the period of engaging Blazie in July 2019, through the go-live period in January and thereafter, the respondent's managers had pressed SAAB and Blazie to identify and resolve whatever the accessibility issues were that arose. We suspect the nature of the technical problems were bigger than both Blazie and SAAB had themselves anticipated and we have seen emails where this was effectively what SAAB would later say to the respondent. Time estimates for a resolution from each contractor were vague, being measured simply as "it may take some time". At times, we accept the evidence of both parties that when one issue was resolved, another seemed to crop up and sometimes that would be something which had previously worked perfectly well but which would now not work. Everyone was frustrated that the accessibility software was facing as many difficulties as it was and preventing Mrs White from getting on with her

training and doing the role she was so good at. A list of what it could and could not enable her to do was drawn up. Each side of the list is as long as the other but at that time there were a number of key aspects not yet covered, including the telephony. From 11 February 2020, the respondent began contemplating other meaningful roles for the claimant to do on a temporary basis whilst the accessibility issues were resolved. One option was garden leave. In an email dated 13 February 2020 Superintendent Burrows expressed his own frustration, set out a number of potential options off the top of his head including his concern about garden leave and concluded with short term directions to protect and support Mrs White's position stating:-

> ***• Ensure she remains on shifts allowances regardless of what she works;***
>
> ***• Speak with her about what shifts she can work and how this would fit in with any support, role she may undertake;***
>
> ***• Establish where she can physically work— can she Work at Mansfield if this is where the mentors are?***
>
> ***• Behind the scenes establish what admin functions she can actually undertake and seek her support in doing these.***
>
> ***I would not want Carmen to be asked to stay at home as it is important that she feels an important part of the team, which she is.***

5.31 Mrs White agreed that by this date it was reasonable to change the initial plan. Very quickly a proposal emerged to use the claimant's recognised experience in call handling to act as a tutor to the new recruits. We find there was a logic behind the proposal in that the claimant's skills and experience could have been used in a useful and rewarding way by her supporting the development of others. Nevertheless, the respondent accepted it was always a decision for the claimant and although she had worked as a tutor previously, she expressed concerns about the new "Pod" environment, whereby a small group of tutors supported a large group of PECH's including floor walking and responding to queries with people putting their hands up. Previously, she had worked on a 1:1 basis. We recognise the obvious concerns the claimant had, particularly as she is a professionally proud person and keen to be productive. The respondent was equally sensitive not to force anything on the claimant and accepted her rejection of the proposal. However, it would effectively result in her being on home leave until the accessibility interface was resolved. It follows that the claimant was consulted and involved in this decision making.

5.32 Consideration was given to other work, including typing although the options were limited. One option that was identified was typing audio recordings of suspect interviews in the criminal justice/file preparation unit. That required some preparatory work to relocate a computer and arrange a location for the claimant. Mr Foster mirrored the concern for Mrs White that had previously been expressed by Superintendent Burrows. He was concerned that not being able to do the role fully would lead to disillusionment, and that he was inclined to focus on what Lynva and Mrs White were telling him she could do, without ignoring the parts that could not be done as it seemed to him there was potential for some control room work on 101 calls, even if it required additional support. When the option of the audio typing role emerged, he wrote a detailed email setting out the initial steps necessary to being about this alternative role. His concern for her situation was clear when, amongst other directions,

he gave two additional days leave at the organisations expense to allow the set up needed for the new role, he required the team to maintain contact with Mrs White to be keep her up to date and, because the training planned was effectively being aborted, he asked his colleagues: -

> ***Please update her duties. She has been with us all week but we were unable to train her Tuesday and Wednesday as well as tomorrow and Saturday which will all need accounting for so she does not lose leave or time off.***

5.33 He went on to set out the fall back as: -

> ***If all of this falls through then Carmen can work with the tutors at Mansfield helping out with KYI communications, WPG updating work and anything else that may assist the department. Her computer will need locating at NCR near the pod If this happens.***

5.34 We find the claimant was being supported by her UNISON representative, Vicky Booth from at least mid-February. On 19 February she asked Mr Foster for an update on Mrs White's work situation. Mr Foster replied the same day summarising the efforts made to make the PECH role work so far and the temporary alternative roles being contemplated, that nothing had been forced on Mrs White and she had said she was very happy with the temporary audio typing solution. He ended by reassuring Ms Booth that: -

> ***Carmen is a priority for me and I am very keen to get her back to her role.***

5.35 Ms Booth replied, expressing concern that: -

> ***if we cant resolve the systems then we would have to look at redeployment options and this can be a worrying time for the member***

and concluding with: -

> ***Carmen has said that you are doing everything you can.***

5.36 A temporary alternative was therefore in place to ensure Mrs White had productive work to do and did not lose out financially as a result of the problems now being encountered with the accessibility coding. From 27 February 2020 Mrs White took up the alternative role in the file prep unit. She was given the choice as to where she was located based on where she felt most comfortable. As might be expected, a range of other challenges presented in this work including the accessibility with the two potential systems being used called "evidence works" and "script". The claimant continued to use JAWS but it was identified that there may be other coding issues for Blazie as these pieces of software had not been coded for JAWS. An issue then arose about whether Blazie should be taken off the SAFE accessibility to work on the FPU software. Workarounds were put in place to enable the work to be done using Word first before being transferred to the record of interview. Despite the uncertain timescale, the respondent was being repeatedly led to believe by both SAAB and Blazie that a solution was just around the corner and the respondent was concerned not to delay the work needed to get the claimant back to her substantive role by diverting Blazie resources to the temporary role which, we find, was an understandable and logical decision when other work arounds were working in FPU.

5.37 The alternative work did, however, throw up an issue with audio control. It was not possible to use the splitter box as, unlike previously where there were two audio feeds, here the audio feed was presented in a single channel. This meant Mrs White received both types of audio feed at the same time. This foreshadowed what would become a similar issue with SAFE and Mrs White herself contacted Blazie in early March to say she

> ***had a feeling she would face the same issue once back in the control room because of the way phone calls will be coming through via Skype.***

5.38 Mr McDuff from Blazie responded reassuring the claimant that: -

> ***There is most likely a solution, somehow! However, without the opportunity to get hands-on I have no further suggestions at the moment.***

5.39 Pausing there, there is no dispute that Mrs White was given permission to use her personal email account to maintain communication with her employer, and by extension any work-related matter.

5.40 We find there is a fundamental difference in the consequences between the two roles was that unlike taking a live call in SAFE, where the claimant would have no control over what the caller was saying and when, in the typing environment she would have some control to pause the audio being typed in order to use the JAWS facility. We find she did this but was concerned it made her slower, although we cannot see anyone was ever criticising her output. One problem she did encounter was controlling the volume of softly spoken interviewees, which needed turning up, and JAWS, which then came through too loud.

5.41 On 25 February 2020 the claimant says she identified a potential solution to the audio splitting issue in the FPU role. This is before she started the role and must have arisen as a result of some initial testing of the role. We accept she passed this on to various technical and other people in the organisation but that it was investigated and found not to work. The issue was raised again when contemplating a return to control room and the same fix was explored again by Mat Lee. He took further steps to check the compatibility with those that had the technical experience and was also told it would not work.

5.42 On 9 March 2020, we find Mr Foster contacted the claimant's line manager, Shelley Summerville-Clarke for the purpose of agreeing a strategy to keep Mrs White updated on developments in which he suggested Ms Summerville-Clarke be the point of ongoing contact so Mrs White had immediate access to one consistent message, not two from each of them.

5.43 Mrs White maintained the temporary role for a couple more weeks before deciding she could not continue due to the audio problem. She made contact again with her union representative, Vicky Booth around 9 March 2020. Her email summarises the recent issues, recognises the support from Mr Foster but it is clear Mrs White was beginning to contemplate her position as she explicitly sought advice on her legal rights at this time.

5.44 The discussion between Mrs White and Vicky Booth, is, we find, significant in the decision that Mrs White would later make. During the discussions, Mrs White was clear that Vicky booth introduced the idea that she would be put at risk of dismissal and, moreover, that it was up to her to find alternative employment. Of even greater concern to the claimant was

being told that she had three months to do it or she would be dismissed. We have not heard from Ms Booth and cannot be certain whether this is what Ms Booth actually advised, or whether that is how Mrs White interpreted. The fact is, however, that that is what she then believed to be the situation and that belief arose only from the discussions with the trade union. We find this belief would inform her thoughts in the future.

5.45 In contrast to that advice, there is no evidence that this was ever in the contemplation of the employer at any material time or that Mrs White ever put this fear to her employer. She accepted in evidence that no one other than Ms Booth mentioned the possibility of termination of employment. That suggests she did not have discussions with Shelley Summerville-Clarke along these lines and there is certainly no evidence that Ms Summerville-Clarke said anything consistent with that idea, nor would it be consistent with the messages that Ms Summerville-Clarke did convey to her managers.

5.46 We find that the respondent does have a redeployment policy and if it was not possible to make an adjustment to a role, this would be the policy that would govern the situation. We find an employee in that situation would be given priority for alternative roles with reasonable adjustments but that the policy does not put the burden on finding such an alternative role on the employee concerned nor does it state that there would be a dismissal after three months. We accept Ms Brown's evidence that in a case such as the claimant, it would likely to be a much longer period over which efforts were made to consult, support and hopefully retain such an employee. Additionally, the evidence of the approach actually taken to finding the claimant meaningful work during the time it experienced the problems with the software coding supports our conclusion that, had this situation arisen, it would have been a long and supportive process. Whilst ultimately we accept the process could lead to termination, we are equally certain that this was never in the contemplation of any of the managers in this case.

5.47 On 11 March 2020 Ms Booth emailed Ms Summerville-Clarke seeking a meeting about the FPU work and the problems Mrs White was encountering with the audio feeds. In it she alluded to Mrs White's anxiety over the reliability of the accessibility software which for many years had required amending every time there was a software update and we accept, despite the efforts of the respondent's managers, that there was uncertainty and anxiety creeping into Mrs White's thoughts about her future work.

5.48 In respect of the audio issue, we find the respondent was advising the claimant that when she moved to a windows 10 platform (her work in FPU was still on windows 7) the system would have the ability to personalise various settings including the volume of different apps being run. We find this personalisation was identified in February 2020 although the full extent of the facility was not then known and, in the context of sound settings, it was believed to relate to volume control only. We now know that control goes further than simply the volume. Whether Windows 10 has itself been updated during the relevant period or whether the feature was only latterly discovered, it seems not only can it control volume from different apps but if there is more than one "app" producing sound, it can send the audio to different devices, giving the potential for the sort of splitting solution that was needed.

5.49 Mrs White decided she could not continue with the FPU work. From 12 March 2020, she commenced a period of what the parties' term 'garden leave'. Her manager in FPU, Mrs Orr-Palladino, wrote how if the work on making SAFE accessible cannot be done in a reasonable time attempts will then be made to revisit those issues so that Mrs White could return to FPU. Mrs White's view in evidence was that this was possibly something that could have happened in those circumstances. As the chronology continues, we find there was never a suggestion from the claimant to anyone that the time might have come for this to be revisited as a permanent arrangement. We also find it was not unreasonable in the wider circumstances for the respondent's managers to rely on the technical experts who continued to represent that a solution in Mrs Whites PECH role was imminent.

5.50 On 13 March, the claimant's manager updated Mr Foster on her discussions with Mrs White. A number of valid concerns were expressed about the systems and software including audio splitting with Skype. The local HR advisor made clear that Mrs White should be provided with an update. Mr Foster took this up and chased as he had understood that part was resolved. Ms Miller responded to him at that stage referring to the windows 10 custom settings we have previously referred to. On 18 March, Mr Lee took up a piece of work to set up a local project to test the new accessibility profile with support from Mrs White's colleague, Amy.

5.51 Both Mr Foster and Ms Miller were by this time self-isolating as the Covid-19 pandemic was then starting to have an impact in the UK. Very soon, just about all meaningful progress was then overtaken by COVID restrictions. From 23 March 2020, the full consequences of the COVID pandemic hit and the UK went into lock down. One local measure introduced was to split the control room in two. This was an important control measure for the respondent to keep what we accept is an essential part of the provision of emergency services running. Contact Management had to be based in two separate locations (Mansfield Control Room and Force HQ) to allow for social distancing and to quarantine the workforce into two halves to limit the operation consequences to any spread of the infection.

5.52 There is no dispute that managers were still actively pressing SAAB and Blazie throughout lockdown and that there was nothing else people like Mr Foster could do to move things on quicker or more successfully.

5.53 On 5 April 2020, Ms Summerville-Clarke emailed Mr Foster reporting on Mrs White's current disappointment that she still didn't know any update. She wrote: -

> ***I've explained we are in unprecedented times and it's unfortunate that Carmen's accessibility problems have been delayed due to this.***
>
> ***…***
>
> ***Carmen totally understands that things are difficult due to the current climate. However, she would like to have some answer soon.***

5.54 In fact, Mr Foster had been updating the claimant and had recently attempted to contact her directly with information of where things were at. On 9 April 2020 a further update was sought. Ms Sandra Brown from HR was herself pressing for SAAB and Blazie to give this

their absolute priority, whilst acknowledging the unprecedented times, a solution was still needed. Feedback received from both SAAB, and the receipt of the final invoice from Blazie, only served to further reassure the respondent that the work needed to be done had been done. Relying on those further representations from the technical suppliers, Mr Foster wrote to Ms Summerville-Clarke and Superintendent Burrows in positive terms: -

> ***Just to confirm, Have spoken to SAAB who have completed the work they think they needed to do. Blaize have been spoken to and are yet to confirm that they have completed their work although they were happy to send a bill for £18000 which indicates that they think they have finished too. I am waiting for confirmation of this from them.***
>
> ***I have a call on Tuesday with SAAB's Project manager (she is off this week) and I will see where we are during the call. If all is at it reads we are waiting to test a new version that contains the amendments for Carmen's profile which will need loading onto an environment for test by us.***

5.55 That positive understanding continued and on 17 April 2020, Mr Foster confirmed that SAAB indicated they were just waiting for Blazie to arrange the final testing with Mrs White for "user acceptance testing". We find the messages the respondent was receiving from the third-party contractors was such that it was entirely reasonable for them to understand the situation in the positive way they stated it.

5.56 That optimism proved short lived as further implications of Covid and lockdown hampered the development further. SAAB engineers were working from home and unable to remotely access the respondent's live systems. Their clearance required them to be on site. In addition, there were vetting issues for them to access the respondent's and practical implications for coders to travel. Blazie were still seeking to progress the testing and explored whether there was a ring-fenced environment they could use for testing purposes. We find there was not. We find that through April and May, the respondent's managers were attempting various means of achieving vetting for remote access to overcome this obstacle to progress. This is not a simple issue. We find it requires Home Office approval to be able to effectively tap into a command a control system which is not only a live system, but one handling real calls and real police operations. Nevertheless, what work could be done remotely appeared to continue at least as between SAAB and Blazie. By the end of April, Mrs White had been updated on these developments. Mr Foster reported how: -

> ***it is a slow journey but Carmen has been updated as to this through Shelly and I am pushing to try to get this moving but as you can appreciate things do take a little longer thesedays.***

5.57 There is no dispute between the parties that the implications of COVID was a genuine factor in the further delay to finding a solution. Indeed, we accept Superintendent Burrows' evidence that the convergence of the challenges of the SAFE project generally together with the specifics of achieving accessibility for Mrs White at a time of trying to manage the unknown implications of COVID-19 and still run a policing service amounted to "the most extreme pressure of his professional life".

5.58 From May 2020, Mrs White was offered and agreed to another temporary role to provide feedback on new starter called "dip testing". This was listening in and providing feedback in a standard form which had been adjusted for her to use in word format. Mrs White had to attend work to do this, it could not be done from home. It was not possible for

the claimant to do it from Mansfield as it seems there was no room and what was now a split control room was still in place due to covid measures. Shelley Summerville-Clarke wrote on 9 May: -

> ***My welfare phone call to Carmen was to update her on the progress which is that it's sitting with Blazie at the moment Carmen is obviously very frustrated with the length of time it's taking to sort this.***
>
> ***She understands the added delay is caused by COVID-19. She just wants some answers which is understandable.***
>
> ***I've arranged for her computer to be moved back to SCR so carmen can come to work for a day just to catch up on her emails end do any [update training] outstanding.***
>
> ***I'm also looking into using her to do some call dip testing on the new staff we've got. As we've had 8 new ones it's a lot of work and if Carmen's system allows her to access the audio file we can use her skills there. She used to be a Tutor so she knows what we are looking for and it will allow her to feel valued too.***

5.59 Mr Foster agreed in reply stating: -

> ***I keep asking re Blaize and we are nearly as frustrated as Carmen with the delay.***
>
> ***Thanks for the update. It will be nice to see her again.***

5.60 We find the claimant was happy with this arrangement describing how she was "really looking forward to helping out with this". That is not surprising. She was now physically back with colleagues although that came with some added anxieties as they were now a few months into using SAFE and this gave rise to two additional causes for concern. First, we find there were problems with the operation of SAFE itself. Aside from the accessibility difficulties Blazie were trying to address, sighted users were encountering problems with the operation of the system sometimes of utmost significance to its functionality. Secondly, in discussions with Mrs White about the system, colleagues referred to its use of lots of "fly ins" and "popups" and expressed their own opinion that they thought translating that into an audio interface would be difficult. Though no doubt not intentional, we find that sort of feedback and discussion from colleagues would inevitably have caused more anxiety to Mrs White as she formed her own opinion of the likelihood of success.

5.61 In July 2020, the claimant was advised she could continue her SAFE training. SAAB were made aware of further issues. Superintendent Burrows and HR arranged an update meeting with Mrs White partly to acknowledge the organisations seriousness in trying to resolve the situation and also as Duncan Southall had taken over the operational responsibility for the north control room as a temporary Chief Inspector. This was termed "going up a level". That meeting took place on 12 July and Chief Inspector Southall reported back in terms: -

> ***…***
>
> ***(2) Carmen clearly wants to come back to work in her '101 /Publics' role.***
>
> ***(3) Carmen frustrated and stated the uncertainty was making her anxious.***
>
> ***(4) Carmen also anxious over her long term future with Notts Police if a workable solution was not found for SAFE.***

(5) Carmen wanted some certainty around:

a. Was the interface/software actually doable?

b. If so, what is the time line?

(7) I acknowledged her frustration and was empathetic.

(8) I reassured her that finding a solution and getting her back to work was a priority for the Department (Supervisor, Chief Inspector and Supt).

(9) I assured her that, once Shelley received an update from Matt Lee - this would be communicated to her and finding a solution would remain a priority.

5.62 There is no dispute that his sentiments of getting her back and a solution being a priority were genuine although the claimant was understandably concerned that no one else could understand the frustration from her perspective.

5.63 In July 2020, Blazie reported on the outstanding work. They were able to confirm that the two previous problems of 'Panels UIA not refreshing' and 'Combo boxes UIA not updating' had been resolved by SAAB's remedial work on SAFE. However, in testing those a further issue and been discovered in respect of 'Multi-Select Combo boxes' which again required SAAB to improve the UIA interface for those objects. Although it was frustrating for new problems to be discovered when the earlier problems were solved, we find there was generally progress towards resolving the problems and the technical issues were becoming more in identifying the snagging areas where the interface might fail, than the development of the solution once such snags were identified.

5.64 We find all these later events occurred around the time the claimant had already decided to apply for work elsewhere. In or around late June or early July, the claimant had reflected on her private concerns about her long-term future. She contemplated whether to sell the family home and relocate. She began looking for alternative work. At this time she saw a vacancy for an audio typist with the Greater Manchester Police. The claimant has roots in the Manchester area. It had always been her plan to return to that location, albeit she told us this was a plan for retirement. She applied for the role partly on the basis that one positive effect of Covid had been that it was clear her husband could perform most of his role remotely. She was shortlisted and invited to interview. The claimant could not recall the exact dates when she decided to start job hunting or when she actually applied. We have inferred the sort of timeframe that would be more likely than not in such a public sector recruitment process. The only fixed date we have is that the claimant was interviewed on 27 July 2020. There must have been a period of time in which she responded to the advert, for her application to be considered and for her to be invited to attend an interview.

5.65 Within two weeks of the interview, the claimant had been conditionally offered and accepted the job. On 6 August 2020 steps were taken at the request of Greater Manchester Police to confirm her past sickness absence and other vetting conditions which were actioned by the claimant communicating with her manager and HR.

5.66 Mrs White describes this alternative employment as precautionary. Whilst it is right that until notice of termination is given she could have declined this post and remained

employed by the respondent, we find as a fact that this was a settled decision on her part. The events that happened subsequently would not, and in fact did not, materially alter the course of that decision one way or the other.

5.67 In an email dated 24 August 2020 dealing with the new employer's request Shelley Summerville-Clarke wrote to HR set setting out a brief summary of the recent history and concluded: -

> ***"I am sure this is a contributing factor as to why she is leaving the organisation"***

5.68 We cannot find this sentiment expressed by Ms Summerville-Clarke to reflect an actual discussion to that effect. We find it to be Ms Summerville-Clarke's speculation in the same way that others, Sandra Brown included, would suspect it was a factor. However, Ms Summerville-Clarke, Ms Brown and the entire organisation was met with a consistent account from the claimant of her reason for leaving being the decision to relocate with her family. We find the claimant consistently told colleagues that she wanted to move back to Manchester. For our part, however, we cannot find on balance that this was a decision unconnected with the events in the workplace. We have to conclude as a fact, just as these managers suspected, that it was part of the reasoning for considering alternative employment. Put another way, we are not satisfied on balance that there was a decision to relocate which was wholly independent from the events in the workplace.

5.69 On 21 August 2020 the claimant sought advice from her union once again. This time dealing with a different rep, Chris Berry. In that exchange, and against the context of the SAFE system not having the changes to enable her to work effectively, she expressed how

> ***"she had had enough of that and were going to another force as she and her family were moving"***

5.70 We record for completeness how the claimant was concerned about the support and advice she received from her union and much of the information before us comes from a later union review of its actions after her employment ended and after she had raised a complaint with them.

5.71 Despite it being known, informally at least, that the claimant was leaving, the work on the accessibility software continued as before. In mid-August the respondent's managers were told as was the claimant, that the scripting work on SAFE was now completed. On 26 and 27 August 2020, a Blazie engineer attended to perform some further training for Mrs White and so that he could do the scripting on the spot with any glitches found. By 31 August 2020, the training had been completed, but there were still some issues with JAWS and third-party software. Mrs White agreed that the system was better by now but it was still not working in full, for example there were issue with stability meaning we find it would have been a risk to resume taking 999 calls. It was an example of the frustration all felt that as one issue was solved, another seemed to emerge. Sometimes, in the nature of something that seemed to work previously. We find, however, that there was substantial progress and over the next month or so, it would arrive at what Mr Lee assessed was about 90% resolved, a figure broadly in line with the fact that here would always be some ongoing coding and development need in any event.

5.72 In September, the claimant continued her temporary quality review role dip-testing the calls taken by others.

5.73 SAAB set about fixing the further software issues in early September and, on 11 and 18 September 2020, Blazie attended site to test the resolved issues. Focus now turned more to the audio issue. The solution the parties were aiming for was to split the audio feed into two channels or two outputs such that all the telephone audio could be directed to one ear, and all the screen reader software could be direct to the other. On 15 September 2020, two headsets were ordered as a possible solution, in the event neither was capable of splitting the audio feed.

5.74 In October, the claimant was again told SAFE was ready for testing. Again, it is common ground that there was improvement but that there were still some issues arising. Between 22 September and 6 October, further technical issues with JAWS were identified. As a result, on 16 and 19th October 2020 Blazie attended site to resolve the issues. This appears to have been the final substantial piece of coding. The respondent says there have been no reported issues with JAWS since.

5.75 On 10 October 2020 the claimant formally submitted her resignation. It is an internal form giving notice to HR, payroll and for other administrative reasons. Mrs White says she completed it only because she had heard from Greater Manchester Police that it may be possible to maintain continuity of service. She made an enquiry with HR who directed her to this form. She got help from Amy in completing the form. Mrs White says she did not realise the nature of this form was to give notice. We cannot accept that even allowing for the obvious barriers Mrs White has in handling written forms and correspondence. Firstly, it arose from a telephone conversation concerning her future employer's need for proof of her service with the respondent. That implicitly requires a start and end date. Secondly, and despite Mrs White's concerns about not knowing if this was the correct form, there is no suggestion this form was incorrect or that there is some other form that should have been used. Thirdly, the nature of form starts with a clear heading of "LEAVER FORM Notification of resignation/retirement/transfer". Fourthly, in order to provide the answers that were in fact given, it is hard to understand how it could not be understood as notifying her departure from her current employment. In particular, "reason for leaving', was answered with "moving to GMP Police". That answer is rather circular but the fact it does not say anything related to the circumstances then in existence at the respondent is itself significant and is consistent with what the claimant was telling colleagues and her employer. The question "last day of service" was answered with '5 December 2020'. We understand from the claimant that this date was chosen to reflect the start date agreed with Greater Manchester Police the following day although her recollection was poor as to how that date was arrived at.

5.76 We are also told that on or around 4 November 2020, the claimant sent a further email to her employer which is not before us. The purpose of this email was because the claimant believed she had to do something else to trigger her notice she had to give of one month.

5.77 We have looked carefully at the evidence of what the claimant was telling her employer was the reason for her resignation, whether she challenged the progress in the context of an

ultimatum or whether she continued working in anyway under protest at the fact the accessibility work had not been resolved. We are unable to find any evidence of that. That then begs the question why notice was given at twice the duration as the claimant was required to give? The claimant says that whilst she applied and then accepted the post in Manchester, she hoped the accessibility issues would be resolved and she could then stay. The difficulty we have with that contention is that if that is what the claimant genuinely felt, we find she did not tell anyone at any stage. She says she told everyone that she was relocating with her family back to Manchester so as not to "lose face". We simply do not see that the claimant was in anyway in a position that she had to "save face" nor do we find her colleagues or managers would have regarded that to be the case. If the true reason was, as she said in evidence, to give herself an option in the event that a solution could not be found for her to return to the call handling role then we cannot understand why that was not put to the respondent. Indeed, the respondent's genuine desire to resolve those issues continued in earnest even after it was known the claimant was leaving right up to the end of her employment. We do not accept, therefore, that her resignation prompted a metaphorical sigh of relief from the employer that one of its problems was disappearing. If the truth had been put to the employer, the other evidence we have seen suggests the employer's response would have been to try to persuade the claimant to stay. The claimant also says she was upset that some colleagues assumed she had been paid-off. Again, that would seem to us to have been a trigger for her to put them right about the real reason.

5.78 The claimant is critical of the respondent not holding a formal exit interview. The leaver form we have referred to is in two parts. Part 1 is the part Mrs White completed and sent to HR. Part 2 is the part HR then send back to the employee's manager concerning the necessary formalities of the termination. After receipt of the notice of leaving, the HR response to the local manager contained a reminder that the claimant should be offered an exit interview and also that she could have the option of a discussion with someone other than line manager. We find Mrs White had a positive relationship with Ms Summerville-Clarke. Her criticism is levelled at the organisation in the abstract and not a specific manager. We find no reason to doubt Ms Summerville-Clarke would have offered it and that the claimant must not have taken up the offer but it is entirely possible that that offer was in the context of what Ms Summerville-Clarke already believed from her discussions with Mrs White. That is the same view that Superintendent Burrows had in that if reason was felt to be a "positive" reason for leaving (in this case the stated reason was the family moving back to Manchester) it would not be something that would be pushed and we suspect, on balance that the public message from Mrs White as to her reasoning influenced how Ms Summerville-Clarke approached the issue.

5.79 In November Superintendent Burrows met with the claimant to present her with a certificate. We accept his evidence that he genuinely regarded Mrs White as an exceptional PECH employee. In fact, he was so positive about Mrs White that we are unable to accept that he would have ignored any hint that the situation with SAFE was behind her decision to leave without taking some action. Whether there is scope for both him and Mrs White to recall the same conversation differently, we accept any discussion about the progress with SAFE was not conveyed in anyway as being part of the reason for leaving.

5.80 Through this time, we accept Mr Lee had gone to extreme lengths to find a solution to the audio split. That had involved him contacting coders in Russia and the USA. He stayed late into the evening to have telephone calls with a company in America at their time zone and also engaged with Blazie on the problem. The result was positive and based on these advisers saying they had solved similar issues encountered in other settings. A suggestion was made to trial a gaming headset with its own additional sound card. The claimant agreed to trial the headset but as her last working day was to be 26 November 2020, there was insufficient time to place the order and test the headset before her last shift.

5.81 The claimant's employment came to an end on 6 December 2020.

6. Law

Indirect discrimination

6.1 By sections 39(2) and 19 of the Equality Act 2010, and in the circumstances of this case, it is unlawful for an employer (A) to discriminate against an employee (B) if it applies to B a provision, criterion or practice which is discriminatory in relation to B's disability. Section 19(2) defines the discriminatory nature of that provision as : -

> ***(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.***

6.2 In this case the only dispute is in respect of (d), and even then only in respect of whether the PCP was a proportionate means of achieving the agreed legitimate aim. In other words it is accepted that replacing the force's Critical Control Room computer system to keep it technologically up to date and to ensure continuity of service given the impending expiry of contracts for the provision of the outgoing system and the removal of supplier support for it was a legitimate aim. The question is whether the introduction of SAFE was a proportionate means of achieving that aim.

6.3 The approach to whether an aim is proportionate was considered in **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15**. That is authority for the following propositions: -

a) The test of proportionality means that the measure (the PCP) had to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

b) What is being justified is the PCP, not the discriminatory effect of the PCP.

c) However, part of the assessment of whether the PCP can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer.

d) To some extent the answer depends upon whether there were non-discriminatory (or less discriminatory) alternatives available.

6.4 In **Hardy's & Hansons plc v Lax [2005] EWCA Civ 846 [2005] ICR 1565,** it was held it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement

Constructive unfair dismissal

6.5 It is axiomatic that to claim unfair dismissal, the claimant must have been dismissed. Section 95(1)(c) provides the statutory definition of dismissal thus: -

> ***(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—***
>
> ***(a)…***
>
> ***(b)…***
>
> ***(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.***

6.6 We have directed ourselves to the essential authorities on "constructive" dismissal generally. The key authorities are **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761** on the application of common law principles of repudiatory breach and acceptance in the context of contracts of employment. To **Mahmud v BCCI [1997] UKHL 23** on the implied term of trust and confidence that an "Employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence'.

6.7 It is not necessary that the contractual breach is the only reason for the resignation, nor even that it is the principal reason for the employee's resignation. **Wright v North Ayrshire Council [2013] UKEAT 0017/13**. It is sufficient that the repudiatory breach "played a part in the dismissal" **Nottinghamshire County Council V Meikle [2004] EWCA Civ 859 [IRLR] 703**

6.8 We were also referred to various other authorities on the test. In assessing whether there has been a repudiatory breach, the central question is whether the employer's conduct has objectively evinced an intention to abandon and altogether refuse to perform the contract. (**Tullett Prebon Plc v Bgc Brokers Lp [2011] EWCA Civ 131 [2011] IRLR 420 ; Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168)**

6.9 The employee's acceptance of the alleged repudiation must be unequivocal: **Spencer v Marchington [1988] IRLR 392 (QBD); Hunt v British Railways Board [1979] IRLR 379; Cockram V Air Products Plc [2014] IRLR 672**. The latter being a case in which a period of

notice was given substantially in excess of the contractual notice requirement for the claimant's own purposes and to amount to evidence of affirmation of the contract.

6.10 On the question of affirmation, we were directed to **W E Cox Toner (International) Ltd v Crook [1981] IRLR 443** and its fact sensitive nature **(Mari (Colmar) v Reuters Ltd UKEAT/0593/13; Waltons & Morse V Dorrington [1997] IRLR 488)**.

6.11 Although not said to be the case here, recognising the claimant was acting in person, Mr Leach directed us to a recent case on the requirement to have regard to a claim that might be based on a last straw should we take the view this case was a last straw case. **(CRAIG v ABELLIO LIMITED [2022] EAT 43**). On that basis, and although the case is not put in a last straw basis, we have considered last straw principles, we have regard to **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493** on the necessary contribution of a "last straw" event not needing to be a breach in itself but adding something of substance to the character of the overall state of affairs, being more than utterly trivial. To **Kaur v Leeds Teaching hospital [2018] EWCA Civ 978** on the approach to take in last straw cases. To **Croft v Consignia PLC [2002] 1160/00/3009** on the measure of conduct capable of amounting to a fundamental breach of the implied term and the requirement for both parties to absorb "lesser blows".

6.12 If there is a dismissal in law, the question then turns to section 98 of the 1996 Act and, in the first instance, whether the respondent has shown a potentially fair reason for dismissal. If satisfied that there was a potentially fair reason, a neutral question then follows as to whether the employer acted reasonably in relying on that reason as sufficient to dismiss. Clearly, that test needs to be viewed through the prism of the matters leading to the resignation and the reasonableness has to be assessed against the actions of the employer which are said to lie behind the events relied on by the employee to found her resignation.

6.13 Finally, the respondent submitted a further authority after submissions had concluded but whilst the panel were still deliberating. We gave Mrs White opportunity to comment on it bur she did not. The case was **De Lacey v Wechseln Ltd (T/A Andrew Hill Salon) [2021] IRLR 547**. The specific reason for this being drawn to our attention was the treatment of the inter-relationship between claims of discrimination and constructive dismissal. The essence is that it is a question of fact and degree for the tribunal to asses the extent to which any discriminatory events within the history of a last straw constructive dismissal weigh to the extent that the dismissal itself can be said to be discriminatory where there may be other non-discriminatory events contributing to the cumulative breach of the implied term. On reflection, we have not found this to be of great assistance for two reasons. One is that the constructive dismissal claim here, whilst based on the implied term of trust and confidence, has not be put on the basis of a last straw. Secondly, the alleged discrimination is not one of discrete acts or omissions but one of indirect discrimination arising from a continuing state of affairs flowing from the change to SAFE. Consequently, were there a breach, it seems to us that the principle in De Lacey would likely mean the circumstances rendered the dismissal itself discriminatory. Whether that makes any practical difference in a claim below the statutory cap for unfair dismissal, where no state benefits are to be recouped and where all claims are in time is moot.

7. Discussion and Conclusions - Indirect discrimination

7.1 There is no dispute that there was a PCP in relation to introducing a new control and command system, in particular what became the introduction of SAFE. There is no dispute that that PCP was applied to all including those that do not share her particular disability but that it puts, or would, put those who share the claimant's particular disability at a particular disadvantage. That disadvantage is that it required accessibility modifications without which it could not be used. There is no dispute the claimant herself was put to that disadvantage. There is equally no dispute that it was a legitimate aim to keep the command and control system technologically up to date to ensure continuity of service given the impending expiry of contracts for the provision of the outgoing system and the removal of supplier support for it.

7.2 The only issue in dispute is whether the PCP, that is replacing the system with the SAAB SAFE system was proportionate. In practical terms, the alternatives are limited to either not changing from Vision in the first place or choosing a different provider from SAAB. We consider those specific alternatives before considering the landscape relevant to proportionality generally.

7.3 As to keeping Vision, throughout the case there has been no attack on the need for a system of some sort in what is a critical aspect of the management of policing and public safety. There is no dispute that the previous Vision system was "creaking" and failing as its underlying technology grew further out of date. Crucially, there is no dispute that the technical support for it came to an end in March 2020. We have considered the option of continuing with Vision instead of replacing it, to the extent the claimant did have some access and to the extent that doing that might be said to be a less discriminatory step. We are satisfied that there was simply no scope for that option to be chosen and, to be fair, Mrs White does not suggest so. The prospect of continuing past March 2020 only for some technical failure to leave the entire county police force without a means of handling emergency calls and despatching resources is, simply, not realistic. The scale and nature of the potential consequences far outweigh the potential discriminatory effect in this case. It follows a new system had to be introduced.

7.4 We then turn to whether the problem with SAAB's SAFE system and Blazie's skills in coding the accessibility software were such that the respondent should have contracted with different parties. We have no evidence of another contractor who could have delivered a command and control system with accessibility for Mrs White, through Covid lockdown, any better. The evidence we do have shows that the supply market for this product is limited. We know the respondent took necessary steps to define its needs giving a high priority to accessibility within that tender. We also found that whilst the accessibility aspects were expressed generally, Mrs White's circumstances were in the mind of the organisation when setting those requirements. Four companies bid. The one best demonstrating an ability to achieve that aim was appointed. Similarly, we have been given even less to go on the market for adaptive technology that Blazie operates in. But, again, Blazie was a reasonable choice based on its previous success and established relationship with the respondent and Mrs White. Against that background, if it was telling the respondent it could do what was needed, the decision to appoint them to do it must have been a reasonable step to take. We cannot

conclude therefore, that there was any better or less discriminatory alternative available to the employer to appoint a different providers. Similarly, we cannot accept there was any failing in the suggestion that the respondent should have engaged with Blazie sooner. It engaged with Blazie early, and early enough for Blazie to prepare its initial assessment of the task, which did not raise any issue along the lines of the timescale. Moreover, there is no suggestion that the way the world in relation to SAFE did in fact unfold would not have unfolded in the very same way even if Blazie had been brought in sooner nor is there any suggestion that they did not have time to do their work. Much of their work was dependant on a live system and, as such, the go live in January was always going to be a key date in their work programme.

7.5 We then consider the key steps that were taken and the effect they would have had against the question of proportionality.

a) The respondent went about replacing the system with disability and accessibility in mind. The specification in the tender document placed the highest weighting on accessibility.

b) There are limited contractors in the market able to provide this type of product. Only four responded to the tender. SAAB was chosen partly because its pitch as to accessibility was the most impressive.

c) From the outset the respondent recognised its obligations to disabled employees generally and specifically in respect of the claimant's needs. A report was commissioned from its preferred and tested accessibility coder, "Blazie" in July 2019. The focus of the report was titled "making SAFE accessible to Carmen White".

d) The respondent's expert advisers were representing to it that that SAAB's product "SAFE" would meet the claimant's accessibility needs.

e) When problems became apparent, strenuous efforts were made to resolve them, and while it took time, they were resolved in an objectively reasonable way;

f) There was a substantial budget set aside to tackle the accessibility needs to the extent that it could reasonably be stated that funding was not a limiting factor: there was a reserved budget of £100,000 to facilitate accessibility which was not exhausted.

g) A significant reason for the delays was the COVID-19 pandemic, a factor outside everyone's control. The measures taken to progress the project during the Covid lockdown were themselves reasonable and with Mrs White remaining as a priority.

h) The audio issue was investigated appropriately and reasonably and a potential solution of the gaming headset was identified.

i) The issue faced was one of an unforeseen level of technical problems that proved more difficult for the third-party providers to resolve than they had represented to the respondent. The respondent did not act inappropriately or unreasonably in choosing those suppliers and relying on their expertise.

j) In the time whilst efforts were made to resolve those technical issue, the respondent took reasonable steps to provide the claimant with alternative meaningful work and to maintain her financial position.

k) That even at the date of termination, there was no prospect pending of any steps being taken to consider the claimants employment or need to redeploy her. In short, she was never in danger of being dismissed during the relevant period.

l) To the extent that the claimant believed that would happen, it was driven by opinion of Vicky Booth of Unison and was neither intimated by the respondent nor did the claimant question the employer about the advice she had received.

7.6 Considering the situation in the round, there was no less discriminatory option available to achieve the aim save to the extent of temporary arrangements that were in fact put in place during the delay to implementation such as alternative work and protecting the individual's income. We also consider that the problem was capable of resolving. It was not that the PCP erected an absolute disadvantage to the claimant, but that it took longer than all anticipated for it to be resolved. It would, however, get resolved and soon after the claimant resigned.

7.7 The need for the new system is such that the relative balance of prejudice to the parties of the respondent not applying the PCP against the discriminatory effect also tips in favour of the respondent applying the PCP. In short, we are satisfied that the PCP has be justified as being a proportionate means of achieving the legitimate aim

8. Discussion and Conclusions - Unfair dismissal

8.1 We start with whether the resignation in fact was a dismissal in law. We need first to define the end date of the period that we are concerned with when analysing the alleged breach. Whilst the employment ended on 6 December 2020, there are key dates relevant to the constructive dismissal claim stretching back through the preceding 5 months. Does the analysis of events end when Mrs White formally resigned on 4 November 2020? Is it when she completed her leaver notification form on 10 October 2020 or is it when the claimant made the decision to apply for alternative work around the end of June 2020? The respondent says if her decision to find new work was in response to the situation with SAFE, it crystallised by the end of June and any events occurring after that date are irrelevant. We agree that that date is forensically significant and have found it to be so, but we do not agree that it strictly renders events afterwards wholly irrelevant. At the other extreme, what the claimant describes as her formal resignation on 4 November 2020 was submitted purely because she was under the mistaken belief of some administrative requirement to activate her contractual notice of one month. It does not serve any purpose as a notice of termination as that had been given in the leaver notification form submitted on 10 October 2020. That is the date on which she indicated her resignation. Whilst we have found the decision to move was a settled one, we take the view 10 October 2020 is the date when any repudiatory breach would have been accepted and the employment terminated. For completeness, we have considered the question of the employers conduct at both of those early stages.

Breach of the implied term of trust and confidence

8.2 Mrs White relies on the totality of the situation rather than specific events. For that reason, we have considered the totality in the round. Summarising the elements of that totality, we start with the decision itself to change the system. This is itself accepted as part of the legitimate aim in the discrimination claim. This was seen by all as a positive change as all hoped it would restore the full PECH role to the claimant that had been eroded over time by the poor interface VISION had with other systems.

8.3 There is nothing in the pre-implementation stage that could be said to be conduct likely to undermine trust and confidence. The claimant was involved to a reasonable degree in the SAFE progress meetings from 2018. Blazie were commissioned to prepare their assessment report in July 2019 specifically on the accessibility requirements of Mrs White. The respondent was reasonably entitled to accept the advice from Blazie and SAAB of the functionality of the potential accessibility issues. It set aside more than generous budget for that part of the project. To the extent that decisions were made to delay Mrs White's training, that was with reasonable and proper cause at a time of her participation in the general collective update sessions with Mr Burrows and other periodic updates including the talk through with Mr Lee. When training was started, there was acceptance that the time would need extending. In the event, there was no meaningful cap on the training time.

8.4 So far as there was delay, each stage of that delay came with representations from the third-party providers that they were close to a solution. That is a material consideration when we come to view what other alternatives might have been open to Mrs White including alternative work. For example, the key reason Blazie were not instructed in respect of the role the claimant temporarily performed in the FPU was entirely down to the reasonable belief that the accessibility in the main role was close to resolution.

8.5 As to other alternatives for working, the respondent took a sensitive approach giving Mrs White valuable work to do and preserve her professional independence but in a sensitive way that did not impose anything on her against her wishes. The claimant's wishes at different times to take garden leave and consideration of temporary alternative employment were respected when other work might have been imposed on her. Throughout, there was commitment from senior managers that the claimant should not lose out financially.

8.6 The onset of COVID then hit, particularly with lockdown from 23 March 2020. That raised other issues with Covid security including splitting the single control room into two with two distinct teams. We can see through this period, on 9 April, the respondent continued to receive representations that SAAB and Blazie believed they had finished the fixes and the claimant was updated accordingly. The fact that was not so, is not down to the conduct of the employer and what it was doing to maintain pressure on the contractors within the added complexity of Covid cannot be said to be likely to serious undermine trust and confidence. In May, another alternative role was identified in respect of the Dip testing of other call handlers. By 24 June the respondent was still pressing Blazie and having to overcome the operational issues caused by COVID meaning they had a substantial period of time without access to the system to do their work due to the restrictions on remote access to a live system.

8.7 Nothing in the events up to the time when Mrs White decided to apply for alternative employment could be said, either by itself or cumulatively, to be conduct of the employer likely to seriously undermine trust and confidence or conduct that was without reasonable and proper cause. Whilst motive is irrelevant, this is a case where we can conclude that everything the respondent did was done in a very positive context where all had a real desire and priority to achieve the accessibility needs the respondent had asked for from the outset. Mrs White's frustration and anxiety is entirely understandable but it was felt amongst the respondent's managers as well.

8.8 In conclusion, so far as events up to the decision to find alternative work are concerned, we are not satisfied that there was conduct calculated or likely to destroy or seriously undermine trust and confidence. Of course, that is not the total picture. The claimant submitted how the decision to apply was out of caution that the accessibility would not be achieved. That raises other issues including the fact that she was at this time continuing to affirm the contract, but for present purposes we go on to consider whether any of the events after this time could be said to offend the implied term.

8.9 Notice was actually given on 10 October 2020. Events after that date cannot influence the decision to resign including matters such as not having an exit interview. In that period Blazie had returned to site and resumed working on accessibility with some degree of success albeit new issues continued to be found and the claimant was happy to continue the Blazie training. By 21 August 2020, Mrs White was telling her trade union she had had enough and was going to another force as she and her family were moving. Once again, we have to consider the events up to the point of resignation but just as the act of applying in July indicates the events up to the end of June were the operative events, so too does this suggest the events to this date were what led to her apparently settled intention to leave by that point meaning any later events or continued delay played no operative part on her decision. By August the ongoing progress on the accessibility work was being described as being much better.

8.10 We are again unable to identify conduct by the employer, either individually or cumulatively, which could be said to be likely to serious undermine trust and confidence or was without reasonable and proper cause. If there is no breach of contract, the resignation that follows cannot be a dismissal. As there is no dismissal the claim of unfair dismissal must fail. We have, however, gone on to consider the remaining questions in the list of issues in the alternative, to the extent that is possible.

Causation

8.11 Because the first question has failed, these further considerations are in the alternative and necessarily somewhat artificial in the absence of a finding of a breach.

8.12 The first is whether there is a causal connection between the breach and the resignation. We have found that that the resignation was not wholly unconnected with the situation in the workplace. If there was a breach arising from that situation in the workplace,

we would have to conclude that the necessary causal link had been made out. It is sufficient if the breach only plays a material part in the resignation.

Affirmation

8.13 The final consideration in the alternative is whether the claimant's right to accept repudiatory conduct would have been lost by affirmation. Again, it is somewhat artificial as that will usually only be capable of proper assessment by reference to the nature of the breach and the date it crystallised. In this case we are able to reach a conclusion for the following reasons.

8.14 Consideration of this starts with the surrounding circumstances. The claimant has continued working for some time. That can be preserved when done under protest but in this case there is a complete absence of any expression of working under protest. Nothing even hints at an ultimatum of telling the employer to sort the problem or she will leave. The work that was done was done in performance of the contract and, significantly has included continued engagement with the respondent's attempts to make SAFE accessible as much as at any other time.

8.15 To the extent that a breach may have crystallised before June 2020 such as to prompt Mrs White to seek alternative work, there was a substantial delay of around 2 months between the acceptance of the new post on or around 6 August and notice of leaving being submitted on 10 October. During that time, the contract of employment has been performed, at least so far as is relevant to the question of affirmation and in the context of the alleged breach.

8.16 When notice was given on 10 October a particularly long notice was given in excess of the contractual notice by a factor of about two. The claimant argued that she was uncertain of the significance of the notification of leaver form. Whilst we rejected that as a fact, for present purposes it makes no material difference. If we take the later date of 4 November 2020 (when the unnecessary second resignation was submitted) Mrs White had delayed in resigning by a further month during which the contract had been performed. That in itself may be sufficient to affirm the contract, particularly in view of the positive work done by the claimant to further the accessibility issues. However, the notice given takes this beyond doubt. The claimant gave approximately 2 months' notice. She did so for her purposes as that is the date agreed with her new employer. The case of **Cockram** is relevant to those facts. An employee cannot avoid the affirmation that would arise by waiting for their preferred leaving date simply by resigning early but with longer notice. The concept of notice at all is unusual in the common law concept of accepting a repudiatory breach as the whole point of repudiation is that it releases the other party from her own contractual obligations, including the obligation to give notice to terminate. That was modified in the context of employment by the statutory definition of dismissal now found in section 95(1)(c) which preserves the employee's dismissal even if they give notice. To put it another way, it removes any scope for an employer to say giving notice was itself performance of the contract. But the effect of **Cockram** is that giving long notice for personal reasons may itself affirms the contract. We say may as it seems to us there may be a question of fact and degree. A short period longer

than necessary may not imply affirmation, a prolonged extra period of working will. We are satisfied that this is a prolonged extra period. The nature of the continued work is also supportive of an implication of affirmation even if not itself an unambiguous election. That is only reinforced further when it is added to the period back to 21 August when Mrs White indicated to her trade union she had had enough and potentially further still to June/July when she took the decision to apply for new work. For those reasons, even if there was a breach the contract was affirmed in the circumstances.

Fairness

8.17 There is little meaningful that we can say about fairness of a dismissal by way of any alternative conclusions.

8.18 If the claimant's resignation had amounted to a dismissal in law, we would have then had to go on to consider whether it was nonetheless a fair dismissal having regard to section 98 of the 1996 Act. In doing that, it would be necessary to understand with clarity the breach in order to assess the reasonableness of the actions of the that lay behind it in order to apply the tests in sub sections (1) and (4). We don't have that but it is highly likely that an absence of reasonable and proper cause for such an act would also take the actions outside of the band of reasonable responses for the purposes of section 98(4). As we do not have that factual scenario, we cannot say with certainty what our conclusion would be if the case had in fact got this far.

8.19 We can do no more than make these abstract observations. In this case the respondent relied on "some other substantial reason". First, the broad need to replace the Vision system and the manner in which it was done would amount to a substantial reason of a kind to justify dismissal. Secondly, the question of reasonableness under section 98(4) is so closely related to the questions of both "proportionality" and "reasonable and proper cause" that it is unlikely to arrive at a different conclusion. That is so even though, as a matter of law, the legal questions under each are distinct and must be approached against their own specific tests.

EMPLOYMENT JUDGE R Clark

DATE 6 July 2022

JUDGMENT SENT TO THE PARTIES ON
1 August 2022

AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS