EMPLOYMENT TRIBUNALS

Claimant: Ms A Short

Respondent: Northumbrian Water Limited

Heard at: Newcastle-upon-Tyne Hearing Centre **On:** 19-22 April 2022, 30-31 August 2022

Before: Employment Judge Johnson
Ms J Blesic
Ms S Mee

REPRESENTATION:

Claimant: Ms C Robinson (Citizens Advice Bureau)
Respondent: Ms R Kight of Counsel

RESERVED JUDGMENT

1. The claimant's complaint of unfair constructive dismissal is not well-founded and is dismissed.

2. The claimant's complaints of unlawful disability discrimination are not well-founded and are dismissed.

REASONS

Introduction

1. This final hearing was originally listed for 4 days, from 19-22 April 2022. On that occasion, the claimant did not have legal representation and conducted the hearing herself with the assistance of her father on one day and her partner on the remaining 3 days. Unfortunately, on the morning of the 4th day, Ms Short was unable to continue due to ill-health and the hearing had to be postponed. The final 2 days were heard on 30 and 31 August 2022. On those 2 days the claimant was represented by Ms Robinson of the Citizens Advice Bureau. Ms Robinson had the

difficult and unenviable task of picking up the case part of the way through cross - examination of the respondent's witnesses. The Tribunal is grateful to Ms Robinson for her valiant efforts on behalf of the claimant.

2. By mid-morning on the first day of the resumed hearing, (31 August 2022) the claimant was again unable to continue. and it was agreed by Ms Robinson and Ms Kight for the respondent that the hearing would proceed in the claimant's absence.

3. By claim form presented on 2 March 2021 the claimant brought complaints of unfair constructive dismissal and unlawful disability discrimination. The respondent defended the claims.

4. The claimant suffers from bipolar rapid cycling disorder, anxiety and depression and post traumatic stress disorder. The respondent concedes that the claimant is and was at all material times suffering from a mental impairment which amounts to a disability as defined in section 6 of the Equality Act 2010, and that it knew of that disability from the date of its Occupational Health report on 14 May 2019.

5. The claimant makes 6 specific allegations of unlawful disability discrimination and relies upon those acts of alleged disability discrimination as individual, fundamental breaches of her contract of employment, or as collectively amounting to a course of conduct over a period of time which constitutes a fundamental breach of her contract of employment. The claimant maintains that the acts of disability discrimination amount to a breach of the implied term of trust and confidence which must exist between an employer and its employee.

6. The claimant gave evidence herself, but did not call any other witnesses to give evidence on her behalf. The respondent called evidence from Mr Michael Keating (Water Treatment Supervisor), Ms Kate Fannon (People Business Adviser) and Mr David Bruce (Area Manager). The claimant and the 3 witnesses for the respondent had all prepared witness statements containing all the evidence which they intended to give to the Tribunal. Those witness statements were taken "as read" by the Tribunal, subject to questions in cross-examination and questions from the Tribunal. There was an agreed bundle of documents marked R1, comprising an A4 ring-binder containing 419 pages of documents. Ms Kight for the respondent prepared typed, closing submissions which were marked RS1.

7. The Tribunal acknowledged the claimant's difficulties in conducting these proceedings over the first 4 days. The claimant frequently became emotional and tearful and regularly asked for breaks to compose herself. The claimant was clearly frustrated by the replies given by the respondent's witnesses to her questions in cross-examination. The claimant did however manage to give clear and concise answers to questions put to her in cross-examination by Ms Kight for the respondent. The Tribunal acknowledged that the claimant genuinely believed that, because of her disability, she was entitled to different and better treatment from the respondent so that she would have been able to continue in her employment with the respondent. That belief does not of itself mean that the respondent committed the alleged acts of unlawful disability discrimination.

8. The Tribunal found the respondent's witnesses to have understood the claimant's medical difficulties and to have been both sympathetic and supportive towards the claimant throughout the relevant period.

9. The Tribunal found each of the respondent's witnesses to have a clear, accurate and consistent recollection of those matters which formed the subject matter of the claimant's allegations. Where there was a difference between the claimant's evidence and that of the respondent's witnesses, the version given by the respondent's witnesses was consistently supported by the documents in the bundle and by the evidence of the other witnesses. The claimant frequently strayed from her specific allegations and from the issues (the questions which the Employment Tribunal was required to decide) which had been identified at an earlier case management hearing and which had been agreed by the claimant as the remaining issues at the start of this hearing.

Findings of Fact

10. The findings of fact set out below are based upon the Tribunal's assessment of the claimant, the respondent's witnesses and the documents in the bundle, and where there is any dispute are based upon a balance of probability.

11. The claimant is now aged 29 years and began work for the respondent in January 2018. The claimant described her job as "Flexible Operator", whereas the respondent's evidence was that her role was a "Production Operator (Flexible)". The evidence of the respondent's witnesses and the documents in the bundle clearly show that the claimant was employed as a Production Operator (Flexible). The claimant described her roles and responsibilities as "actively supporting any work being carried out on site, including stakeholders, inducting people onto site, ensuring care and maintenance of assets, follow strict health and safety guidelines and document any issues following correct procedures, carrying out analytical tests, interpret data and manage effective changes where appropriate, carry out basic fault finding and follow correct procedures for reporting and recording and follow any relevant legislation, respond to varying pieces of work and issues on shift, flood conditions, treatment issues, changes in task priority". The claimant acknowledged that these duties were of critical importance to the respondent as a supplier of water and water services. The claimant accepted in her witness statement that her role also involved being available to cover shifts.

12. Mr Keating described how at any of the respondent's water treatment works there is normally one fixed shift Production Operator working at any one time and also a Production Operator (Flexible) throughout the working day from Monday to Friday. The claimant was the dedicated Production Operator (Flexible) for the Warkworth site, supporting a team of six Production Operators. The duty Production Operator on shift at the time has full responsibility for the treatment works and processes during that shift, and the Production Operator (Flexible) supports the team of Production Operators. Mr Keating described the claimant's role as "to operate, control and maintain water treatment installations which involves ensuring work assets are appropriately operated to maintain compliance, whilst ensuring a good standard of housekeeping is maintained". Mr Keating's evidence (which was accepted by the Tribunal) was that all Production Operators (flexible) have to work

safely and demonstrate safety awareness at all times, follow procedures and report all issues promptly to their team manager.

13. The Production Operators work a rotating 24 hour shift cycle across 7 days per week on a rota system. This means that each Production Operator works 5 night shifts, followed by 1 field shift, followed by 2 days' break, followed by 4 afternoon shifts, followed by 1 day break, followed by 2 field shifts and then 3 night shifts, followed by a 3 day break, then 4 day shifts, a 1 day break, 3 afternoon shifts and finally 10 days' holiday. The rota for that individual then starts again from the beginning and repeats every 6 weeks. In contrast, a Production Operator (Flexible), such as the claimant, generally works fixed hours from 8.00am to 4.00pm or occasionally from 7.00am to 3.00pm. The purpose of the role is to be flexible so that the Production Operator (Flexible) may be required to step in and provide cover for Production Operators in the event of sickness, holidays or other absence. Where a Production operator (Flexible) is not required at a specific point in time to be carrying out cover for the Production Operators, they perform tasks on site during the working day which involve supporting the running of the treatment works. Because the Production Operator (Flexible) role is designed to be flexible, they may join the Production Operator rota and work that shift pattern (including day shifts, afternoon shifts, night shifts and field shifts). The Production Operator (Flexible) receives an additional shift premium payment when performing the shift work covering the Production Operators.

14. The claimant was initially interviewed for the role of Production Operator (Flexible) in December 2017. At the interview, she did not mention any medical condition which may adversely affect her ability to perform that role. Once the claimant accepted the position and began work in January 2018, she was referred for an assessment of her fitness to perform night work and that confirmed that she was medically suitable for night work. Throughout the first year of her employment, the respondent did not notice any particular issues with the claimant's health and she did not make the respondent aware of any such issues, nor did she have any significant absences during that period.

15. Following several short absences between June 2018 and February 2019, a "return to work" meeting was held with the claimant at which she indicated that she was "having a few personal problems" and that these were being addressed via her GP. The respondent offered to refer the claimant to Occupational Health, but the claimant declined, saying that she preferred to deal with the issues via her own GP.

16. In April 2019, Mr Keating became the claimant's direct line manager, at which time the claimant expressed an interest in becoming involved in the respondent's "Continuous Improvement" initiative. This was a strategy designed to drive discussion, improve processes, equality and performance, and to drive better decision making across the new water supply headline titles such as safety, quality, delivery, cost and people. Mr Keating admired the claimant's desire to get involved in that initiative, which could be carried out during her normal working day and without any additional overtime. However, following his appointment as the claimant's line manager, Mr Keating began to notice a deterioration in the level of the claimant's general performance. Mr Keating thought that the claimant's general demeanour and attitude to work had changed and that she seemed "more anxious

and less engaged with her work". Mr Keating discussed the matter privately with the claimant in May 2019, when the claimant disclosed that she had a history of anxiety and depression and was currently being treated with medication by her GP. It was agreed that the claimant should be referred to the respondent's Occupational Health specialist to see what further support could be provided. The Tribunal accepted Mr Keating's evidence that this was the first time he became aware of any personal problems or mental health difficulties with the claimant.

17. The Occupational Health report dated 14 May 2019 appears at pages 77-78 in the bundle. The referral states that the claimant, "is currently seeing her GP for mental health issues and depression. She is currently in the preventative measures, on medication, and is looking for some more advice and support to ensure she does not worsen the situation and affect her health, home life and capability to work". The report states that the claimant had symptoms relating to anxiety and depression, was receiving medication for that and waiting to start counselling. The report recommends that the claimant would benefit from additional counselling via the workplace, but that the claimant remained fit to continue in her current role "with adjustments". The report states:-

> "I would recommend a review and explore different work options since there is research evidence to show that in some cases night work could exacerbate depression. I would advise management to discuss this further with Ms Short to find out the effects of night work on her condition."

18. The report indicates that the claimant's condition is "likely to be covered under the Equality Act".

19. The respondent concedes that as from the date it received that report, it was aware that the claimant suffered from a mental impairment which amounts to a disability as defined in section 6 of the Equality Act 2010.

20. Following receipt of that report, Mr Keating discussed its contents with the claimant. At that time the claimant was not doing regular night shifts, but may have be required to undertake an occasional night shift, if covering for a Production Operator. Mr Keating asked the claimant if she would be comfortable doing night shifts if required and specifically asked her whether she was concerned about any potential impact of those night shifts on her mental health. The claimant said she would be comfortable doing night shifts. Mr Keating assured the claimant that should the requirement for her to undertake night shifts increase to a more regular basis, then this would be discussed with her before any changes were implemented.

21. In June 2019, one of the claimant's colleagues, a Production Operator at Warkworth, was offered a development opportunity which required being transferred to a different site for approximately 6 months. Mr Keating discussed with the claimant whether she would be prepared to undertake the Production Operator's shift position for that 6 month period from June 2019. That would mean the claimant would work 7 night shifts every 6 weeks in accordance with the shift pattern referred to above. The claimant would work night shifts Monday to Thursday in week one and then from Friday to Sunday in week three on a rolling basis. Mr Keating met with the claimant to discuss whether she felt comfortable changing her shift pattern, and particularly because there would be an increase in night shifts. The claimant

informed Mr Keating that she would be happy to slot into the Production operator's shift pattern, including the night shift work, and confirmed that she was able to do so. Mr Keating's letter to the claimant dated 7 June 2019 appears at page 81 in the bundle and confirms the contents of that discussion.

22. Between June 2019 and October 2019, the claimant did not raise any concerns with Mr Keating about the shift pattern or the night shifts. The claimant had 3 days' absence from 23-25 September with physical ailments unconnected to her mental health condition. Mr Keating had bi-weekly meetings with the claimant and at no time did she provide any indication that she was having any difficulties in completing the work including the night shifts.

23. The claimant's absences triggered the respondent's sickness absence policy and as a result Mr Keating met with the claimant to discuss her absence record. The meeting took place on 9 October 2019. The claimant had taken 9 days' sick leave during the previous 12 months, but none of those related to any mental health condition. During the meeting on 9 October 2019, the claimant informed Mr Keating that she was managing her mental health issues and had coping mechanisms in place.

24. Mr Keating continued with regular face to face meetings with the claimant between October 2019 and January 2020. The claimant did not express any concerns to Mr Keating about the shift pattern or the night shifts and gave no indication that she was struggling with the work.

25. The claimant alleges that she was "required to work night shifts for a prolonged period and take on additional responsibilities". The respondent's case was that the claimant was not "required" to work night shifts or take on any additional responsibilities. The claimant was offered the opportunity to undertake the work which involved night shifts. The claimant could have declined to do so and would not have been instructed to do so against her will. The claimant did not complain at the time about the night shifts or the burden of any additional responsibility. The claimant's representations to Mr Keating were that she was coping with and enjoying doing that work.

26. In January 2020 the respondent introduced a new Continuous Improvement programme, the purpose of which was to ensure compliance with improvement targets and performance. Mr Keating noticed that the claimant was struggling to meet some of those health and safety targets. The claimant's explanation was that she was finding it difficult, because she was working shifts and was thus finding it difficult to manage her time.

27. On Friday 31 January 2020, the claimant suffered a panic attack at work, which she said had been brought on by her mental health. The claimant went home and sought advice from her doctor. She returned to work on 3 February 2020 and told Mr Keating that her GP had recommended that she be referred to a psychiatrist. Mr Keating suggested that it would be in the claimant's best interest for her night shifts to be removed from her working pattern with immediate effect. The claimant agreed with that proposal and was thankful for it. By email dated 3 February 2020, Mr Keating informed the rest of the claimant's team that she would no longer be working night shifts for the foreseeable future (page 104A). The claimant made no

complaint at the time about being removed from night shift work. Being removed from night shift work also meant that the claimant had no responsibilities relating to health and safety matters. Those health and safety matters were accepted by the claimant as crucial to the work undertaken by the Production Operators.

28. The claimant alleges that the reason why she was removed from those duties was because she is disabled. The Tribunal found that the reason why the claimant was removed from those duties was because she was not at that time capable of performing those health and safety critical roles to a standard required by the respondent in accordance with its duties and obligations to the public and its other employees. The Tribunal did not accept that the claimant was being treated in any way "unfavourably", because she had specifically agreed with Mr Keating that night shifts, loan working and health and safety critical work would be removed from her while she was unwell and incapable of safely performing those duties.

29. Mr Keating again referred the claimant to Occupational Health, who prepared another report, dated 19 February 2020 which was discussed with the claimant on 27 February 2020. The report specifically recommended that the claimant should not undertake lone work. "Lone working" specifically means going out on site and completing a task with a health and safety element. Those tasks carry inherent risks and require health and safety considerations. The claimant accepted the contents of the report and specifically agreed that she should not be undertaking lone work.

30. In March 2020, the COVID-19 pandemic began to impact upon the respondent's operation and in particular upon the work which could be performed by its employees. During a meeting on 19 March 2020, the claimant informed Mr Keating that she was "anxious about the ongoing COVID situation". Mr Keating explained that he had noticed that the claimant appeared to be less focussed and that some of her tasks were not being properly completed. The claimant informed Mr Keating that she believed she had contracted COVID, and Mr Keating suspected that the claimant was starting to have a panic attack. The claimant became upset, and Mr Keating suggested that she should go home and seek medical advice. The claimant was thereafter absent on sick leave until 27 March 2020.

31. Mr Keating's next review meeting with the claimant took place on 9 April 2020, when Mr Keating noticed that the claimant's anxiety was high and that she again appeared unwell. Mr Keating had noticed that the claimant's timekeeping had deteriorated and that she had regularly been arriving late for work. The claimant was then disappearing for periods of time and failing to properly complete her timecard. The claimant acknowledged that she was struggling to be productive. Following that meeting, Mr Keating noticed that the claimant's health continued to deteriorate. Her attendance became erratic and she had a period of absence for anxiety from 14 April to 3 May. During that absence Mr Keating helped the claimant to arrange counselling sessions via "Blue Therapy". The claimant returned to work on 3 May and had a sickness absence review meeting with Mr Keating. Mr Keating pointed out that the claimant had taken 26 days of sickness absence, across 5 separate periods in the previous 12 months. The main cause of the absences was "anxiety and stress".

32. The respondent then arranged a psychiatric assessment for the claimant over the course of 3 sessions at the Spire Hospital via Alliance Health. The claimant acknowledged that she was finding it difficult to manage her wellbeing and that this was affecting her ability to carry out her duties safely and effectively. Mr Keating noticed that the claimant appeared tearful and upset and was unable to focus. The claimant accepted that she was tired, due to lack of sleep. Mr Keating explained that the respondent had concerns over her own health and safety as well as that of her colleagues and the respondent's customers. Mr Keating made it clear to the claimant that if she did not think she was up to her duties, then she should inform him so that alternative arrangements could be made. The claimant acknowledged that she felt that working shifts was detrimental to her health. Mr Keating said he would discuss with the respondent's HR department as to whether shift working could be removed from the claimant's pattern. Within 2 weeks it was agreed that shift work would be removed from the claimant's rota altogether. The claimant would work a set pattern of 8.00am to 4.00pm Monday to Friday. On 18 May 2020 in a meeting with Mr Keating, the claimant agreed that this would be the best thing for her health in all the circumstances. The claimant did not work any other shift pattern thereafter.

33. Mr Keating was satisfied that the claimant was unable to effectively perform any health and safety critical tasks, due to her lack of concentration and confusion. The Tribunal accepted Mr Keating's evidence that the claimant's role played a critical part in the operation of the water treatment works, as the Production Operator (Flexible) role means responsibility for keeping the site running properly and effectively. The respondent cannot take risks with regard to mistakes being made on site with regards to water quality, as there are potentially serious consequences to the health of the population and in terms of penalties and reputational damage for the respondent.

34. As a result of being unable to carry out the key aspects of her Production Operator (Flexible) role, the claimant was undertaking mainly administrative tasks on site in an office-based role.

35. Mr Keating met with the claimant on 21 May 2020 and pointed out that she was not performing her substantive role and unable to perform the flexible role because she could not undertake many of the tasks on site. The claimant agreed that, at that time, she was unable to undertake those duties. Mr Keating suggested that, as a short-term solution, the claimant may wish to consider redeployment to another role within the business. The claimant agreed that she did not wish at that time to be in the type of operational environment in which she had been workring. The claimant was again referred to Occupational Health to obtain an up-to-date opinion, particularly on whether the claimant was suitable for redeployment and whether that wasin her best interests in the circumstances at that time. The Occupational Health assessment appears at pages 145-155 in the bundle. The report states that the claimant would struggle in the foreseeable future, because she would only be fit for her normal role if long-term permanent adjustments could be made, including the removal of shift work and avoiding lone working. Mr Keating considered that those adjustments were so significant that they were essentially removing all the key aspects of the Production Operator (Flexible) role and turning it

into a completely different role. Mr Keating considered that this may have been sustainable in the short-term, but operationally could not be a long-term option.

36. The Tribunal accepted the respondent's evidence that the claimant both acknowledged and accepted that she was at the time incapable of performing the roles which formed a crucial part of the Production Operator (Flexible) position. The claimant agreed that it would be appropriate for the respondent to try and find alternative duties for her. The Tribunal rejected the claimant's assertion that she was "told she would not be allowed to do the flexible worker role any longer and would be placed in redeployment". That was a decision which was made with the claimant's agreement, following a meaningful discussion with her, which included consideration of her own representations about her health and the contents of the Occupational Health report. The Tribunal rejected the claimant's assertion that she had been "pressurised" into agreeing to redeployment. It is clear from the letter sent to the claimant and dated 9 July, (page 164) that redeployment had been discussed at length, that the claimant had agreed to its implementation and that the claimant accepted that redeployment was in her best interests. The letter also makes clear (page 165) that if the redeployment process did not identify a role suitable for the claimant and if there were no further adjustments which could be made to enable the claimant to continue working for the respondent, then the claimant's contract of employment may come to an end.

37. The respondent's redeployment process was described by Ms Kate Fannon (People Business Adviser). The respondent's redeployment process is invoked where an employee is looking to be redeployed either because of ill health or redundancy. The redeployment process is one where the employee is supported to find an alternative role within the business. Redeployees are given priority in the search for alternative roles over others who are not in the redeployment pool. The claimant was informed that she would receive a list of vacancies on a weekly basis and that she would then meet with Mr Keating to discuss potential roles. The claimant was told that she would be provided with support from Mr Keating and/or Ms Fannon to update her CV and obtain any training which may be required to develop any skills necessary for her to obtain an alternative role. That evidence from Mr Keating and Ms Fannon was not challenged by the claimant at this hearing.

38. The claimant identified a number of roles which she considered may be suitable for her and completed the appropriate paperwork by way of applications for those roles. Unfortunately, the application forms contained a number of "killer" questions, which, if answered in the negative, meant that the application would be rejected. For example, if the question asked whether the applicant has any previous experience in that particular role and the applicant answers "no", then the application may be rejected. By the end of July, the claimant had identified some potential roles but had not been invited for an interview for any of them. The claimant met with Mr Keating and Ms Fannon on 28 July and for the first time raised concerns about the distance she may have to travel, were she to be successful in her application for any of these roles. The claimant was assured that she would be entitled to travel compensation for distance and time in excess of her current commute, once any trial period for the new role had elapsed. Mr Keating and Ms Fannon became concerned that the claimant was becoming disillusioned with the process. By email dated 21 July, Mr Keating informed Ms Fannon that the claimant had informed him that she

was “not interested at the moment” and did not know if she wanted to continue working for the respondent any longer. Mr Keating informed Ms Fannon that the claimant's approach seemed to be that she expected the respondent to find a job for her, whereas the real position was that it was up to the claimant to identify a role and apply for that role as part of the redeployment procedure.

39. By the middle of August 2020, Mr Keating and Ms Fannon agreed with the claimant that she would from that date take unpaid leave every Friday, because she was becoming tired at the end of the week and finding it impossible to concentrate.

40. On 12 August 2020 the claimant attended an interview for the role of Planner at the respondent’s premises at Pity Me in Durham. Ms Fannon spoke to the hiring manager prior to that interview and made the manager aware that the claimant was a redeployee and explained the circumstances in which she was applying for the role. The interview did not go particularly well. The claimant became extremely nervous and tearful during the interview to such an extent that she “could not speak properly” and was unable to recall or answer some of the questions put to her. The hiring manager contacted Ms Fannon after the interview to express his concern about the claimant’s general welfare.

41. The claimant was due to attend a further interview the following week for a position as an Operation Support Assistant at the respondent’s Cramlington site. Ms Fannon’s evidence to the Tribunal (which was not challenged by the claimant) was that she was genuinely concerned about the deterioration in the claimant's mental wellbeing. Ms Fannon believed that the redeployment process was not only proving unhelpful to the claimant, but was adversely affecting her wellbeing. Ms Fannon was particularly concerned that the claimant should not be subjected to the stress of another interview. Ms Fannon contacted the claimant by telephone on 17 August to explain that she did not think it was in her best interests to continue with the redeployment process and proposed that it should be paused, pending further medical investigation. The claimant agreed with that proposal in general, but still wished to attend the interview in Cramlington. Ms Fannon was aware that the claimant had an appointment with her specialist psychiatrist on 27 August and suggested that any further applications and interviews be postponed until after that consultation. Ms Fannon’s evidence (again which was not challenged at the hearing by the claimant) was that the claimant agreed to this proposal and that the redeployment process be paused until she had the outcome of the medical consultation. That agreement was set out and confirmed in Ms Fannon’s letter to the claimant dated 17 August which appears at pages 193-194 in the bundle.

42. In her claim to the Tribunal, the claimant alleges that “the respondent would not permit the claimant to proceed with an application for a role in Cramlington and would not consider her for that role”. The Tribunal accepted Ms Fannon’s evidence, that she had strongly advised the claimant that it would not be in her best interests to attend the interview for the role in Cramlington, that the claimant agreed with that advice and also agreed that the interview should not proceed.

43. Thereafter, Ms Fannon proposed to the claimant that the respondent would adjust its process so that it would no longer be necessary for the claimant to undertake a competitive interview in order for her to apply for a role. This meant

that if the claimant applied for a role and met the criteria after a discussion with the hiring manager, then she would be offered that role on a trial basis during which the claimant would assess whether the role was suitable, and the manager would assess the claimant for her suitability. Ms Fannon assured the claimant that the entire redeployment process would start again from the beginning so that the claimant would have an initial 6 week process in which to identify potentially suitable roles. Thereafter there would be a 3 week review period when everybody would consider the position then. The claimant was assured that the termination of her employment with the respondent would "only ever be a last resort".

44. At this meeting, the claimant said for the first time that she would only be able to consider roles which were part-time. The claimant said she did not want a purely office-based role and would prefer a mix of operational work on site. The claimant was politely reminded that Occupational Health advice was still that she should not carry out night work, lone work or shift work in a high risk or health and safety critical role. It was agreed at this meeting that the application of the respondent's attendance targets would be removed, and that the respondent would generally review the claimant's position as the redeployment process progressed.

45. The claimant was again assessed by the respondent's Occupational Health Department on 7 October 2020, after the claimant was signed off work from 5 October 2020 due to "anxiety and low mood". The claimant in fact did not return to work after that date until she resigned in February 2021.

46. By early November 2020, the 3 month timeframe of the redeployment process was due to expire and the claimant contacted Ms Fannon on 2 November to ask whether she could meet with Ms Fannon to discuss whether or not her contract of employment was to be terminated. That meeting took place on 4 November, during which Mr Keating specifically informed the claimant that, whilst they were awaiting a diagnosis for her condition, he considered it best to continue with the redeployment process to see whether an alternative role could be identified. The claimant's requirements for an alternative role were again discussed. The claimant accepted that she could not undertake night shift work or any shift work, could not work alone or in a role which was health and safety critical. That meant that the vast majority of operational roles were excluded. The claimant insisted that she only wished to explore part-time roles and roles which involved a mix of administrative and operational duties. The claimant also limited her search location to the respondent's Cramlington office, which was within easy commuting distance of her home. Of the vacancies that were identified during the redeployment process, most were not feasible to be undertaken from another site. For example, a Sampler is required to collect samples throughout a specific geographical area and to deliver them to either Horsley or Howden, where analysis took place. That could not be moved to the Cramlington office, which was one of the conditions imposed by the claimant upon her search for alternative roles.

47. At no stage did the claimant identify to the respondent a particular role which she considered may be suitable, but for the requirement to travel to a specific office. At no stage did the claimant identify a particular adjustment which, if made, would mean that she could apply for and possibly obtain an alternative role. The respondent's policy is that the redeployee should apply for a specific role and then, if

successful, discuss with her manager any adjustments which may be reasonably required to enable the redeployee to undertake those duties. The claimant's position was that she required assurances that her requested adjustments would be made to the role before she was prepared to submit an application for that role. Ms Fannon's evidence (again which was not challenged by the claimant at this hearing) was that if, by the end of the redeployment process, it became apparent that there were simply no roles that were suitable for the claimant, then the respondent would have considered making adjustments to the roles themselves to see whether or not the claimant would then have been willing to apply for the role. By the time the claimant resigned, no such roles had been identified.

48. The claimant made it clear to Mr Keating and Ms Fannon that she did not wish to travel to a site which involved a longer daily commute than that which she had undertaken in her previous role. None of the medical reports, psychiatric reports or Occupational Health reports identified travelling distance or travelling time as a particular obstacle to the claimant undertaking work for the respondent. The claimant alleges in these proceedings that the longer daily commute put her at a disadvantage in comparison with someone without a disability. The claimant did not identify exactly what was that disadvantage, other than stating that she did not wish to travel further than the distance to which she had become accustomed. Nowhere in her witness statement does the claimant indicate how she would be disadvantaged by a longer daily commute. All she says is, "I also raised concerns that a lot of the jobs were based in Durham and I was concerned about the travelling".

49. On 9 November 2020, the claimant raised a formal grievance about "how my current situation in regards to my ill-health has been handled, as well as the treatment I have received due to my mental health issue". The grievance document appears at pages 238-239 in the bundle. In these Tribunal proceedings, the claimant makes no complaint about the conduct of the grievance process itself. The grievance was dismissed. The claimant appealed against that by a letter dated 12 January 2021 and the appeal hearing was listed to take place on 26 January 2021. However, the claimant submitted her resignation on 29 January 2021. The principal points of complaint set out in the claimant's original grievance letter may be summarised as follows:

(1) In March 2020 it was agreed to make reasonable adjustments to the flexible worker role so that I did not have to work night shifts. In June 2020 I was told I could not fulfil the requirement to work shifts in the flexible worker role and I would be placed in redeployment.

(2) This caused me additional stress and anxiety and I voiced the concerns I had about interviews and trial periods. I am very concerned about the travel, not because I feel unable to travel distances, but before I feel travel during rush hour on busy roads would be an anxiety inducing task before and after work and not conducive to me being a productive and efficient worker. Long distances on smaller quieter roads are something I feel is manageable and have been able to do as part of my role previously.

(3) I applied for a role in Cramlington which was similar to the role I had been carrying out but which did not require any shift work or lone working. The day before the interview was due to take place on 18 August 2020, I was advised by HR that I could not participate in the process because it was felt it would cause me too much anxiety and on the back of feedback from a previous interview. I was very upset about this as I considered this an ideal role for me and I had worked very hard to prepare myself for the interview.

(4) I was told, "We will continue to follow the redeployment process, however if we are unable to resolve your situation through reasonable adjustments or redeployment we will arrange a meeting to discuss whether as a last resort your contract of employment should come to an end".

(5) I feel as though I have been restricted to the point where there are no jobs that I can apply for. There has not been any discussions around phased return or reasonable adjustments to any new roles and I no longer have a role which can be adjusted.

(6) As a result of the way in which the redeployment has been handled my mental health has deteriorated further and I am currently not fit for work.

(7) I would like it to be understood that my current state of mental health is temporary, something I am willing to work with and has only been ongoing for such an extended period due to the uncertainty and lack of consistency from yourselves.

50. As is set out above, before the claimant's appeal against the dismissal of the grievance could be heard, the claimant submitted her resignation by a letter which appears at page 298 in the bundle. The letter states as follows:-

> "I am writing to inform you that I am resigning from my position in Northumbrian Water with immediate effect. I do not make this decision lightly, but I feel it is the best decision for my future. The company's failure to make reasonable adjustments for my disability and the unfair and unreasonable treatment I have been subjected to I feel that I have no other alternative but to resign from my position. Due to the actions outlined above and after the change in manner of discussion at our last meeting, I believe the employer/employee relationship has been irrevocably broken and I resign as a resign as a result of the fundamental breach of the employment contract and Equality Act 2010. I consider this to be a fundamental breach of the employment contract, by not fulfilling the duty of care as an employer. Please acknowledge receipt of this letter as soon as possible."

51. That letter of resignation was accompanied by a covering email, which appears at page 300 in the bundle and is also dated 29 January 2021. The addressees include Mr Keating and Ms Fannon. The email states as follows:-

> "Dear all

> I hope you are all well. Please find attached my letter of resignation. I would like to thank everyone for their time spent. I would especially like to thank my team at Warkworth, Michael Keating, Karen Sandell, members of the maintenance team and other teams who as individuals who have supported me throughout my time with the company. I am disappointed in the circumstances which have unfolded and which have brought me to my resignation. I have tried continually to work with the company for a resolution, but feel as though without the acknowledgement of the failings which have occurred, I will not be able to progress this route. I feel as though this has highlighted a lack of empathy within the company, as well as a lack of understanding of mental health illnesses and how to appropriately handle and approach these issues. I would like to hope that the company take advantage of this circumstance to learn and better prepare going forward to ensure that no-one suffers as I have these past months.
>
> Best wishes
>
> Alexandra Lilly Short"

52. By a claim form presented on 2 March 2021, the claimant issued her proceedings in the Employment Tribunal.

The Law

53. The claimant's complaints of unlawful disability discrimination engage the provisions of the Equality Act 2010. The claimant's complaint of unfair constructive dismissal engages the provisions of the Employment Rights Act 1996. The relevant statutory provisions are set out below.

EMPLOYMENT RIGHTS ACT 1996

54. Section 94 states:

> <u>The Right</u>
>
> (1) An employee has the right not to be unfairly dismissed by his employer.
>
> (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

55. Section 95 states:

> <u>Circumstances in which an employee is dismissed</u>
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if) –
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(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.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if –

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

56. Section 98 states:

General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an

enactment.

(3) In subsection (2)(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

57. The claimant acknowledges that she was not “dismissed” by the respondent, but that she resigned. The claimant's case is that she resigned in response to the respondent’s fundamental breach of her contract of employment, which amounts to constructive unfair dismissal in accordance with section 95(2) of the Employment Rights Act 1996.

58. Where an employee resigns and claims unfair constructive dismissal, 3 things must be established:-

(1) A repudiatory breach of the contract of employment by the employer. Such a repudiatory breach may come from a series of acts or omissions.

(2) The employee must elect to accept that breach and to treat the contract of employment as at an end. The employee must resign in response to the breach.

(3) The employee must not delay too long before accepting the breach and resigning, as otherwise he/she may be regarded as having accepted the breach and waived the right to resign in response.

59. To constitute a fundamental breach of contract, the alleged breach must be significant and either go to the root of the contract or show that the employer no longer intends to be bound by one or more of the essential terms of the contract. Such terms may include express terms in the contract of employment, or terms which are implied into that contract by law. One such implied term is that which was redefined in **Malik v Bank of Credit and Commerce International SA [1998] AC20**. The Court of Appeal found that the employer will not, without reasonable

and proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of trust and confidence which ought to exist between the employer and the employee. Very often it is not possible to point to one single event which has destroyed or seriously damaged that relationship. The employee may point to a series of breaches of contract, or a course of conduct by the employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence (**Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**).

60. Where the claimant seeks to rely upon a final straw, the Tribunal must ask what was that final straw and was it the last in a series of acts or incidents which cumulatively amount to a repudiation? The final straw itself must contribute something (even if it is relatively insignificant) to the breach. It must not be utterly trivial, but does not have to have the same character as earlier acts. It is not necessary to characterise a final straw as "unreasonable or blameworthy" conduct in isolation. However, an entirely innocuous act cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of their trust and confidence in the employer.

61. The test of whether the employee's trust and confidence has been undermined is objective. In simple terms the question to be asked is, "Would the reasonable, average employee take the view that this employee should not and could not be expected to put up with that kind of conduct". It is not necessary for the employer to intend any breach of contract. It is generally accepted that a breach of the implied term of trust and confidence will amount to a fundamental breach of the contract of employment. If so, the employee must resign in response to that breach.

EQUALITY ACT 2020

62. Section 13 states:

> Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
>
> (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex –

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

63. Section 15 states:

Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

64. Section 19 states:

Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are –

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation.

65. Section 20 states:

Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

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

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

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to –

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to –

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	**Applicable Schedule**
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

66. Section 21 states:

Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

67. Section 136 states:

Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

68. Where the employee alleges direct disability discrimination, contrary to S.13 of the Equality Act 2010, the employee must establish facts from which the Tribunal could infer that the reason why the employee was treated that way, was because of her disability. The employee must establish that the treatment was less favourable than that which would have been administered to someone who was not disabled.

69. Where the claimant alleges a breach of S.15 of the Equality Act 2010 (unfavourable treatment because of something arising in consequence of disability), then the employee must establish 3 things:-

(1) Unfavourable treatment;

(2) "Something" arising in consequence of her disability;

(3) That the unfavourable treatment was administered because of that "something".

70. If the claimant establishes those 3 points, then the burden passes to the respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

71. Where the claimant alleges a failure to make reasonable adjustments, then again the claimant must establish 4 things:-

(1) That the respondent applied to her a provision, criterion or practice ("PCP");

(2) That the PCP puts disabled people at a disadvantage when compared to people who are not disabled;

(3) That she personally was put to a disadvantage;

(4) That there were available adjustments which could reasonably be made and which would have removed the disadvantage.

Conclusions

72. At a case management hearing before Employment Judge Aspden on 18 May 2021, the claimant agreed that she had 6 specific allegations of unlawful disability discrimination, which she wished to pursue before this Tribunal. Those are:-

(1) She was required to work night shifts for a prolonged period and undertake additional responsibilities, which requirement put her at a disadvantage when compared with someone without a disability. The respondent was under a duty to take reasonable steps to avoid that disadvantage by not requiring her to work night shifts and removing her additional responsibilities.

(2) The respondent would not allow the claimant to do work involving health and safety matters, lone working and/or any form of shift work from May 2020. The claimant alleges this to be direct discrimination contrary to S.13and discrimination because of something arising in consequence of her disability contract to S.15.

(3) In June 2020, the respondent told the claimant she would not be allowed to do the flexible worker role any longer and would be placed in redeployment. This is alleged to be direct discrimination contrary to S.13 and unfavourable treatment because of something arising in consequence of disability contrary to S.15.

(4) In August 2020 the respondent would not permit the claimant to proceed with an application for a role in Cramlington and would not consider her for that role. This is alleged to be direct discrimination contrary to S.13 and unfavourable treatment because of something arising in consequence of disability contrary to S.15.

(5) On 16 September 2020, the respondent put a limit on the time it would consider the claimant for redeployment, thereby putting her at risk or losing her job. This is alleged to be direct discrimination contrary to S.13 and unfavourable treatment because of something arising in consequence of disability contrary to S.15.

(6) During the redeployment process, the requirement for jobs to be based at a specific location put the claimant at a disadvantage because they were based at sites which would have involved a longer daily commute.

> It would have been reasonable to agree with the claimant in advance that the job could be carried out at another location closer to the claimant's home. This is alleged to be a breach of the respondent's obligation to make reasonable adjutsments contrary to S. 20/21 of the Equality Act 2010.

73. The Tribunal findings of fact in respect of the circumstances surrounding each of those allegations are set out above in the body of this Judgment. Dealing with each allegation separately, the Tribunal's findings are as follows:-

Allegation (1)

74. The respondent accepted that it applied to the claimant a requirement for her to work night shifts, to undertake lone working and to undertake health and safety critical work. The respondent accepted that this was a provision, criterion or practice ("PCP") which put the claimant at a disadvantage, because of her disability, when compared with persons who did not have such a disability. The Tribunal found that the respondent did not know and could not reasonably have been expected to know about the claimant's disability until it received the Occupational Health report dated 14 May 2019. Before that date the respondent was not in possession of any facts which could lead it to conclude that she had a disability. Before liability for unlawful disability discrimination can be established in these circumstances, the employer must have actual or constructive knowledge of the facts constituting the employee's disability (**Gallop v Newport City Council [2014] IRLR 211** and **Stott v Ralli Ltd UKEAT/0223/20/VP**).

75. The claimant accepted in cross examination that this was the first time when she informed the respondent that night shifts were an issue for her. The Tribunal found that as soon as the respondent became aware of the disadvantage caused to the claimant by that requirement, it was immediately removed, so that the claimant was no longer required to undertake night shifts, lone working or health and safety critical work. The claimant accepted that after that date she was no longer required to do so.

Allegation (2)

76. The Tribunal was puzzled by this particular allegation. In allegation (1), the claimant sought the removal of the requirement to undertake work involving health and safety matters, lone working and any form of shift work. In allegation (2) the claimant alleges that the removal of those duties amounted to both direct discrimination contrary to S.13 and unfavourable treatment because of something arising in consequence of disability contrary to S.15.

77. The Tribunal found that the removal of those requirements was not because the claimant is disabled, but because performing those roles was having and was likely to have an adverse effect upon her mental health and wellbeing. It was not "less favourable" treatment than would have been administered to someone who was not disabled but who was equally unable to perform those particular parts of the role. Furthermore, the removal of those duties could not and did not amount to "unfavourable treatment". In discussions with the respondent, the claimant agreed that it was in her best interests for her to stop undertaking those particular duties.

The claimant accepted that it was in her best interests to do so. Accordingly, it could never have amounted to "unfavourable" treatment, in the sense that the claimant was being put at any kind of disadvantage or even that she would have preferred to have been treated differently. Even if the claimant had been able to establish those points, the respondent satisfied the Tribunal that the removal of those duties was a proportionate means of achieving a legitimate aim. The aim was to protect the claimant's health and wellbeing, to protect the claimant's colleagues and to protect the respondent's customers. The removal of the duties meant they had to be performed by other members of staff, which could and was achieved in the short-term. It was therefore a proportionate means of achieving a legitimate aim.

Allegation (3)

78. The claimant alleges that being told she would no longer be allowed to undertake the flexible worker role and that she would be placed in redeployment amounted to direct disability discrimination contrary to S.13 and unfavourable treatment because of something arising in consequence of her disability contrary to S.15.

79. The Tribunal found that the reason why the claimant was removed from those duties and placed in redeployment, was because she was no longer able to perform those duties and because she had agreed it was in her best interests for those duties to be removed so that she could be placed in redeployment to try and obtain an alternative role. A Production Operator (Flexible) who was not disabled but who was unable to perform those duties, would not have been treated any differently. Accordingly, the claimant was not treated less favourably than someone who was not disabled in similar circumstances. Again, the claimant agreed that the redeployment process was one which was at the time in her best interests as a means of retaining her employment without having to undertake those duties which were at that time unsuitable for her. Again, the respondent had a legitimate aim for removing her from the flexible role, namely to protect her mental wellbeing, to protect her colleagues and to protect the respondent's customers. Those are clearly legitimate aims. Removing the claimant and placing her in redeployment was entirely proportionate in all the circumstances. The Tribunal found that the respondent, and in particular Mr Keating and Ms Fannon, did everything that could reasonably have been expected of them to support the claimant throughout the redeployment process. Being placed in the redeployment process was not "unfavourable" treatment, particularly because the claimant agreed at the time that it was in her best interests. The Tribunal found that it was entirely proportionate for the respondent to do so.

Allegation (4)

80. The claimant alleges that the respondent's refusal to permit the claimant to attend the interview for the Cramlington role was direct discrimination contrary to S.13 and unfavourable treatment because of something arising in consequence of her disability contrary to S.15.

81. The Tribunal found that the reason why the claimant was not allowed to attend the interview was not because she was disabled. The reason was because Ms Fannon genuinely and reasonably believed that, if the claimant attended the

interview, she was likely to suffer further deterioration in her mental wellbeing. A different employee in the same circumstances who was not disabled would have been treated in exactly the same way. Accordingly, the treatment was not less favourable and the complaint under S.13 is not made out. The Tribunal found that the treatment was not "unfavourable", particularly because the claimant again agreed that she should not attend the interview. At the time, the claimant accepted that it was not in her best interests to do so. The claimant has not shown that she was put at any kind of disadvantage by being advised not to attend the interview. Had she been able to do so, the Tribunal would have accepted the respondent's explanation that its advice to the claimant was a proportionate means of achieving a legitimate aim. The aim was to protect the claimant's mental health and wellbeing by avoiding the stress and anxiety associated with an interview, particularly because the claimant had recently broken down during the course of a similar interview. Advising the claimant not to attend the interview and suspending the redeployment process was both reasonable in all the circumstances and a proportionate means of achieving the legitimate aim of protecting the claimant's health and wellbeing.

Allegation (5)

82. The claimant alleges that on 16 September 2020 the respondent put a time limit on the time it would consider the claimant for redeployment and thereby put the claimant at risk of losing her job. The claimant alleges that this is direct discrimination contrary to S.13 and unfavourable treatment contrary to S.15.

83. The Tribunal found that there was an initial 6 week period which was indicated to the claimant as the time during which she would be considered for redeployment. However, the 6-week period was never actually applied to the claimant. The claimant had a period of sickness absence, following which the redeployment process was "paused" pending further investigation into the claimant's mental illness. Thereafter, no specific time limit was ever imposed. The Tribunal found that, in those circumstances, the treatment administered to the claimant was certainly not "less favourable" than that which would have been administered to someone who was ill, in the redeployment process but who was not disabled. If anything, the claimant was treated more favourably because of her disability. The initial indication of the length of the redeployment process was found by the Tribunal not to amount to "unfavourable" treatment because of something arising in consequence of the claimant's disability. It is entirely appropriate to inform an employee as to the length of time which is likely to be granted for them to obtain alternative employment in circumstances where they are unable to perform their normal duties. The claimant was never told that, at the end of the 6-week period, her employment would be terminated. The Tribunal found that the redeployment process and the length of time it would last, was under constant review and was actually extended to suit the claimant's circumstances.

Allegation (6)

84. The claimant alleges that the respondent failed to comply with its duty to make reasonable adjustments, by requiring her to consider roles via the redeployment process, which involved a longer daily commute than that which she had undertaken when working at Warkworth. The claimant alleges that the

respondent implemented a PCP of requiring her to travel longer distances to undertake roles identified in the redeployment process.

85. The Tribunal found that the respondent did not apply any such PCP to the claimant. What the respondent did, was to invite the claimant to partake in its redeployment process. That process involved the claimant identifying roles for which she considered herself to be suitable, making a formal application for those roles and, if successful, considering whether she wished to undertake any such role. The Tribunal accepted that the roles advertised would specifically state the location at which the duties were to be performed. That is not the same as saying that the claimant would have been required to undertake all the duties at that specific location. The Tribunal accepted the respondent's evidence, which was that once the claimant had successfully obtained a role, she could invite the respondent to make such adjustments as she may require to remove any particular disadvantage caused by having to travel longer distances than those to which she had become accustomed. The Tribunal found that the claimant had failed to show that travelling a longer distance would put her at a substantial disadvantage, as is required by section 20(3) of the Equality Act 2010. The claimant's case in her grievance letter was simply that she was "very concerned about the travel, not because I feel unable to travel distances, but because I feel travel during rush hour on busy roads would be an anxiety inducing task before and after work and not conducive to me being a productive and efficient worker". The claimant has not identified a particular role which she could have undertaken and would have been prepared to undertake had she been able to perform the duties at a site different to that which was identified in the job description. The imposition of the PCP was simply not made out, nor was the identification of a substantial disadvantage.

86. The claimant finally alleges that her resignation amounted to an unfair constructive dismissal. The claimant relies upon the alleged acts of unlawful disability discrimination as both individually and collectively amounting to a fundamental breach of her contract of employment. For the reasons set out above, the Tribunal found that none of the respondent's actions amounted to unlawful disability discrimination.

87. The Tribunal was invited to consider the respondent's general conduct towards the claimant, during the period of time from January 2020 until her resignation in January 2021. The Tribunal found that the claimant was genuinely frustrated at the unfortunate and unhappy situation in which she found herself. Her mental health impairment was such that she was unable to perform the duties for which she had been employed. Despite their best endeavours, the claimant and the respondent between them could not identify an alternative role which was suitable for the claimant. The Tribunal found that throughout the entire process, the respondent, and in particular Mr Keating and Ms Fannon, were entirely supportive of the claimant and did everything which could reasonably have been expected of them to protect the claimant's wellbeing and to retain her as an employee. Nothing in their conduct could be identified as an individual act which amounted to a breach of contract, nor was there a course of conduct over a period of time which collectively amounted to a breach of contract. The claimant at no stage sought to identify a "last straw" upon which she relied as something which finally showed that the respondent no longer intended to be bound by one or more of the essential terms of the contract

of employment. The Tribunal was satisfied that there had been no breach of the implied term of trust and confidence which must exist between employer and employee.

88. For those reasons, the claimant's complaints of unfair constructive dismissal and unlawful disability discrimination are not well-founded and all are dismissed.

Employment Judge Johnson

Date: 3 November 2022