EMPLOYMENT TRIBUNALS

Claimant: Ms G Rouse

Respondent: Andron Contract Services Ltd

Heard at: **London South Employment Tribunal**

On: **14-16 November 2022 & 17-18 November 2022 (in chambers)**

Before: **Employment Judge Ferguson**

Members: **Ms J Cook**
Mr D Rogers

Representation
Claimant: In person
Respondent: Mr J Munro (solicitor)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The complaints of direct disability discrimination, disability-related harassment and indirect disability discrimination are dismissed on withdrawal.

2. The complaint of discrimination arising from disability is well founded and succeeds.

3. The Respondent failed to make reasonable adjustments to the Claimant's work to ensure she was not driving for more than 4 hours a day between 14 November 2019 and 21 February 2020.

4. The Claimant was unfairly dismissed.

5. The complaint of wrongful dismissal succeeds.

6. A one-day remedy hearing will take place on 30 January 2023.

REASONS

INTRODUCTION

1. By a claim form presented on 14 April 2020, following a period of early conciliation from 25-26 February 2020, the Claimant brought complaints of constructive unfair dismissal, direct disability discrimination, indirect disability discrimination, disability-related harassment, discrimination arising from disability and failure to make reasonable adjustments. The indirect discrimination complaint was withdrawn at the start of the hearing.

2. The direct discrimination and harassment complaints related to a single comment made on 6 February 2020. The Claimant accepted during the hearing that the comment had been "taken out of context" and she did not wish to pursue it as a complaint of discrimination.

3. The indirect discrimination, direct discrimination and harassment complaints are therefore dismissed on withdrawal.

4. The remaining issues were agreed to be as follows:

5. Unfair dismissal

   5.1. Was the Claimant dismissed?

   5.2. Did the Respondent do the following things:

      5.2.1. Fail to contact the Claimant to respond to her request for an update on her employment status;

      5.2.2. Fail to resolve the Claimant's "at risk" status within a reasonable period of time;

      5.2.3. Fail to take the Claimant's illness seriously, in that in the Respondent added more and more contracts to the Claimant's workload and failed to progress an Occupational Health referral;

      5.2.4. Fail to arrange a return to work on reduced driving from 8 hours a day to 4 hours;

      5.2.5. Employ and retain Area Supervisors to cover the Claimant's area, making the Claimant feel she was being pushed out of her job;

      5.2.6. Change the Claimant's job to a colleague's area in circumstances where that colleague (Tina Whistler) had been dismissed following a client complaint, making the Claimant feel her employment remained at risk and the Claimant was being set up for dismissal for the same reason;

      5.2.7. Discriminate against the Claimant as alleged below.

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

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

5.3.2. whether it had reasonable and proper cause for doing so.

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

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

5.6. If the Claimant was dismissed, what was the reason or principal reason for dismissal, i.e. what was the reason for the breach of contract?

5.7. Was it a potentially fair reason?

5.8. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

6. Wrongful dismissal / Notice pay

6.1. If the Claimant was dismissed, was she paid for her notice period?

7. Discrimination arising from disability (Equality Act 2010 section 15)

7.1. Did the Respondent treat the Claimant unfavourably by:

7.1.1. Pre-determining the outcome of the restructuring exercise, i.e. deciding that the Claimant would be dismissed;

7.1.2. Failing to permit the Claimant to return to her original role on 14 November 2019;

7.1.3. Pushing the Claimant out of her role by recruiting and retaining Area Supervisors to cover her area, and moving the Claimant to an area where her colleague had been dismissed due to a client complaint;

7.1.4. Not upholding the Claimant's grievance in full;

7.1.5. Leaving the Claimant "at risk" for an indefinite period;

7.1.6. Failing to take steps, adequately or at all, to reassure the Claimant.

7.2. Did the following things arise in consequence of the Claimant's disability:

7.2.1. Increased likelihood of being absent from work

7.2.2. The Claimant's actual absence from work

7.2.3. Reduced ability to carry out manual work

7.2.4. Decreased physical ability

7.2.5. Reduced ability to drive for long hours

7.3. Was the unfavourable treatment because of any of those things?

7.4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

7.4.1. A full and comprehensive consultation was carried out with all necessary information available to the Claimant.

7.5. The Tribunal will decide in particular:

7.5.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

7.5.2. could something less discriminatory have been done instead;

7.5.3. how should the needs of the Claimant and the Respondent be balanced?

8. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

8.1. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs, and if so did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

8.1.1. A practice of requiring Contract Managers to drive long distances on a daily basis, in excess of 4 hours per day. Substantial disadvantage: reduced ability for the Claimant to perform her role (and hence increased risk of dismissal).

8.1.2. A practice of requiring Contract Managers to provide cover for cleaners in one-cleaner contracts. Substantial disadvantage: reduced ability for the Claimant to perform her role (and hence increased risk of dismissal).

8.1.3. A practice of leaving "at-risk" employees without resolution for extended periods of time. Substantial disadvantage: increased stress and risk to health.

8.1.4. A practice of inflexibly only paying employees statutory sick pay, even when absent for a disability-related reason. Substantial disadvantage: reduced pay.

8.1.5. A practice of not ensuring that Contract Managers are provided at all times with iPad, iPhone, and/or laptop. Substantial disadvantage: increased cost to the employee; decreased ability to perform the role (due to increased burden on the employee in e.g. recording attendance onsite).

8.1.6. A practice of requiring Contract Managers to drive to workplaces rather than using public transport. Ms Mikuc had specifically told the Claimant that she could not take public transport (in conversation on 6 February 2020). Substantial disadvantage: decreased ability to perform the role, increased risk of dismissal.

8.2. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

8.3. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

8.3.1. Removing the requirement for her to drive such long distances on a daily basis.

8.3.2. Disapplying the requirement to provide cover for cleaners in one-cleaner contracts.

8.3.3. Ensuring that "at-risk" employees and specifically the Claimant would have their situation clarified within a shorter space of time, and in any event before the expiry of six months from the beginning of consultation.

8.3.4. Paying employees who are absent for a disability-related reason and specifically the Claimant full pay where it was deemed appropriate (i.e. taking a flexible and individualised approach to pay when absent for a disability-related reason).

8.3.5. Ensuring that Contract Managers and specifically the Claimant were provided at all times with iPad, iPhone and/or laptop.

8.3.6. Permitting the Claimant to travel by public transport.

8.4. Was it reasonable for the Respondent to have to take those steps and when?

8.5. Did the Respondent fail to take those steps?

9. <u>Remedy for unfair dismissal</u>

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

9.2. What financial losses has the dismissal caused the Claimant?

9.3. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

9.4. If not, for what period of loss should the Claimant be compensated?

9.5. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

9.6. If so, should the Claimant's compensation be reduced? By how much?

9.7. Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

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

10. Remedy for discrimination or victimisation

10.1. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

10.2. What financial losses has the discrimination caused the Claimant?

10.3. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

10.4. If not, for what period of loss should the Claimant be compensated?

10.5. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

10.6. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

10.7. Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

10.8. Should interest be awarded? How much?

11. It was agreed that all issues on remedy except the "Polkey" issues at paragraphs 9.5, 9.6 and 10.7 would be deferred until after our judgment on liability.

12. We heard evidence from the Claimant and her daughter, Zoe Douglas. On behalf of the Respondent we heard from Liam Coton and Maya Mikuc. We had a bundle of 200 pages. We should record that the case was very poorly prepared by both parties. It became evident at the start of the hearing that no proper disclosure exercise had taken place by either side. We adjourned until the following day to enable a revised bundle to be produced. This was done, but additional documents were produced and added to the bundle by agreement at various stages during the hearing. It was far from satisfactory but there was fault on both sides and we were satisfied that neither party was disadvantaged by the late production of documents.

FACTS

13. According to its response to this claim the Respondent "operates as a bespoke soft service solutions provider to a diverse portfolio of clients throughout the UK". Its main function is the provision of cleaning services to offices, banks and retail premises. It employs around 2,200 people across in the UK and its head office is in Aberdeen.

14. The Claimant was employed as an Area Contract Manager from 2 October 2017, covering the South East Region. There were two Area Contract Managers covering the region, from the south coast to the east coast including Norfolk. London was managed separately. Responsibility for the cleaning contracts was divided between the two Contract Managers. The Claimant's contracts were mainly around the M25. She had around 75 cleaners and on-site supervisors who reported to her. She would visit a number of sites every day, involving a large amount of driving. The Claimant was provided with a company car, which she was also allowed to use for personal use. The amount of driving varied but the Claimant would regularly drive around 200 miles, or 6-7 hours, a day. The Claimant's line manager in the early part of 2019 was Liam Coton, Operations Manager.

15. On 25 July 2019 the Claimant had a heart attack while at work. She did not realise that was what it was at the time, and it was not diagnosed until 31 July. She was then admitted to hospital until 5 August, where she had angioplasty but it was not successful. When she was discharged she was told she needed a three-month recovery period off work. She informed the Respondent about this and was issued with monthly sick notes.

16. We have not seen a copy of the Claimant's contract but it is not in dispute that it provided for sick pay of one week's full pay, one week's half pay and then Statutory Sick Pay for any additional sick leave up to 28 weeks in total. The Claimant was paid sick pay in accordance with the contract.

17. On 19 August 2019 Mr Coton emailed the Claimant as follows:

> "Hi Grace
>
> As discussed, I will be visiting you tomorrow for a Welfare visit to see how you are doing and give you support in your recovery.
>
> As we discussed, I will be collecting the car to return to Warrington so it can be booked in for the repair work to be done.
>
> I will also collect the laptop, lPad and phone as the company will be taking on a temporary relief Area Cleaning Supervisor to cover some but not all of your sites to ease the workload on Tina and myself whilst you recovery from her (sic) heart attack. This will allow the relief to be shown how to do audits and have access to the site contacts from the phone and will leave you in peace to aid a quick recovery without any stress of what is happening within your region.
>
> I am looking forward to seeing you tomorrow, let me know if you need me to bring anything for you."

18. Mr Coton did visit the Claimant on 20 August. No written record was made of the visit or the conversation. The Claimant's car, laptop, iPad and phone were all collected.

19. Around this time the Respondent employed an Area Cleaning Supervisor called Kate to cover the Claimant's work.

20. The Claimant says, and Mr Coton accepted in cross-examination, that Mr Coton told the Claimant during that meeting on 20 August that she would be going back to own area of work when she returned.

21. On 19 September 2019 Jenna Callaghan, HR Advisor for the Respondent, sent the Claimant a letter as follows:

> "Dear Grace
>
> **RE: MIDLANDS/ SOUTH/ REGION RESTRUCTURE — AT RISK**
>
> I hope this letter finds you well.
>
> Due to the need for greater accessibility to management by employees engaged within the Midlands/ South region and increased response rates for clients we are proposing a restructure of the current management set up. Please review the enclosed document pack fully for more information. I am therefore confirming that it is possible that your position is at risk and you should regard the receipt of this letter as forewarning of that potential redundancy.
>
> Liam Coton, Account Manager will meet with you formally to discuss the contents of the document pack and to discuss alternatives whereby your employment could be protected. I would also ask you to personally consider and put forward alternative proposals and suggestions at the consultation meeting which you feel are relevant to the aim of avoiding redundancy.
>
> The consultation period officially commences on 23 September 2019 with additional meetings being held as appropriate. Please bring this full pack to the first consultation meeting, which Liam will arrange with you directly to ensure a mutually convenient date and time. You are entitled, if you so wish, to be accompanied by a fellow employee. If you wish to exercise this right, then I would point out it is your responsibility to make the necessary arrangements.
>
> I appreciate that this news will cause you concern and I am available to discuss all aspects of the situation with you."

22. The letter enclosed a document entitled "Business Case – Proposed Restructure of Midlands/ South Region". This explained the proposal for all cleaners in the region to be line managed by three Area Supervisors who would also provide cleaning cover support when required. They would be provided with vans "fully kitted out with cleaning equipment and materials as well as machinery". The two existing Contract Manager roles would be "fully redundant". The redundancy process was to be managed by Maya Mikuc. A

job description for the Area Cleaning Supervisor was also enclosed, which said that the role would report to "Contract Manager". Ms Mikuc's evidence to the Tribunal was that this was a mistake and it should have said Account Manager. According to the document the hours for the new roles would be 1pm to 9pm Monday to Friday instead of 9am to 5pm. A form was enclosed for the Claimant to express an interest in the role.

23. The Claimant's evidence was that she could not have done the role of Area Supervisor because of her heart condition, which meant she could not drive a van because of the heavy steering, and in particular she could not lift heavy machinery. She also considered it would have been a demotion, not least because of the requirement to providing cleaning cover where required. Although as a Contract Manager before her heart attack the Claimant would on rare occasions cover for cleaners where it was not possible to find alternative cover, since her heart attack she was less physically able to do so. She would also have lost the use of her car.

24. There was no mention of salary in the "at risk" letter or enclosures, but when the role of Area Supervisor was advertised in November 2019 it was at salary of £26,000 a year, which was around £4,000 less than the Claimant's salary. The "mistake" of saying the role would report to a Contract Manager was repeated in the advertisement.

25. By letter dated 3 October 2019 the Claimant was invited to a welfare meeting with Mr Coton on 9 October. The meeting took place in Chatham. The Claimant said straight away that she felt the Respondent sending her the "at risk" letter was adding pressure on her while she was recovering. She asked that the Respondent stop harassing her and let her recover. Mr Coton said he would speak to HR on her behalf. The Claimant was asked to sign an Occupational Health consent form and she did so. At that stage the Claimant was booked in for a procedure to insert a stent on 22 October. Mr Coton asked what the Claimant's recovery period was likely to be after the procedure and the Claimant said she could not give an answer at that time.

26. The Claimant submitted a grievance on 18 October 2019. She complained about the fact that her car had been taken away for repairs and not returned to her despite her having an entitlement to use it for personal use. She also complained about receiving the "at risk" letter, saying, "I feel the company have not taken my illness and the fact that I am to stay stress free into account when they issued this letter". She said she felt that her position was not truly redundant and there was an intention to demote her to the role of Area Supervisor. She also asked for an explanation as to why she was not on full pay.

27. The Claimant attended the hospital for the procedure on 22 October, but it could not go ahead because tests showed that her arteries were too blocked. The Claimant was referred to a different cardiologist and told to await further appointments. She was booked in for an MRI on 27 November 2019.

28. The Claimant's evidence was that she met her GP in early November 2019. She said it was on 4 November, but having seen the contemporaneous emails we find it must have been 1 November. The Claimant's uncontested evidence was that her GP said she was fit to return to work after the end of the recovery

period, on 14 November, but suggested that she limit driving to a maximum of 4 hours a day. She had told him that her weekly mileage was around 800-1000 miles and he said she should halve that. He also said she should not carry out any manual labour.

29. The same day, 1 November 2019, the Claimant emailed Mr Coton, copying in Ken Ellis, Director of the Respondent, to say she would be fit to return from 14 November. On 4 November the Claimant informed HR. Jenna Callaghan from HR responded asking if the Claimant would be returning in her full capacity or on a phased return. The Claimant responded:

> "My Doctors have advised a phased return to work due to the amount of driving involved
> I have an MRI Appointment on the 27th November which will determine what coronary treatment,
> Or operation is suitable to myself"

30. A grievance hearing took place on 13 November 2019, chaired by Alba Garcia, Operations Manager. During the meeting Ms Garcia asked the Claimant if she was fit to return and the Claimant said "yes, I have no choice, this is too stressful".

31. On the same day, 13 November, the Claimant returned to her GP to obtain a fit note. The fit note recorded the Claimant's condition as "Acute myocardial infarction". It advised that the Claimant "may be fit for work taking account of the following advice". It said that the Claimant may benefit from a phased return to work, amended duties and workplace adaptations, and that this would be the case until 31 December 2019. The note also said "Requires follow up review". The note was passed to the Respondent.

32. On 14 November 2019 the Claimant returned to work and had a return to work meeting with Mr Coton. It is not in dispute that there was a discussion about the Claimant's health and it was agreed that the Claimant would be returning on a "phased return", whereby she should not drive more than 4 hours a day and should not carry out any manual labour. The Claimant's understanding was that this was to be the case until 31 December per the GP fit note, but Mr Coton said in his evidence that he took it to be an indefinite situation, until the Claimant informed the Respondent of any change to her situation.

33. The Claimant was told at the meeting that Kate, the Area Supervisor who had been covering the Claimant's work, would continue to have responsibility for the same contracts. The Claimant was assigned a new set of contracts, mostly Co-op and other banks, formerly overseen by Tina Whistler, the other South East Contract Manager. Ms Whistler had, by this time, been suspended following a client complaint. Many of the contracts to which the Claimant was assigned were "one cleaner" contracts, which meant that it was more difficult to cover absences. The Claimant expressed during the meeting that she was unhappy about being allocated this new set of contracts.

34. The contracts covered a wide geographical area including some in London, as well as Peterborough, Bury St Edmunds, Cambridge and Norwich. It is not in dispute that in order to visit some of those sites the Claimant would have a round trip of 8 hours or more from her home in Rochester. Mr Coton's evidence

was that the decision about the allocation of contracts was made by Ken Ellis. He said the Claimant would not have been expected to visit the sites that involved an 8-hour round trip and other people would cover them, but he did not say that that was ever communicated to the Claimant and there is no evidence that it was. He also accepted that given the Claimant's health she should not have been allocated those contracts. Although it was a smaller list of contracts to those she was previously responsible for, he accepted it was a wider geographical area. He said he "would have" discussed that with Ken Ellis, but "we were told that was it".

35. Maya Mikuc, another Account Manager who took over line management of the Claimant in late November 2019, also said in her oral evidence that the Claimant would not have been expected to travel to the sites that were furthest away, but she did not know whether that had been communicated to the Claimant.

36. The Claimant gave evidence, which was not challenged, that she expected the consultation about the restructure to start after she returned to work. She said when she came back on 14 November she asked Mr Coton if they could get on with it. He said he would speak to Ken Ellis and he believed it was Maya Mikuc dealing with it.

37. In the evening on 14 November 2019 the Claimant emailed Mr Coton, copying in Ken Ellis and Jenna Callaghan, asking for confirmation of the contracts for which she was responsible. The Claimant listed what she understood had been allocated to her. Mr Coton accepted that the Claimant's list was correct and that he did not reply to her email.

38. On 15 November 2019 a hire car was delivered to the Claimant to use for work. Unlike her company car, it did not have any tracking device that could monitor driving time and distance until December.

39. The Claimant's evidence was that she tried to limit her driving in accordance with the medical advice, but "the workload took over". She said she had some control over how much driving she did, but she still had to get to each site and she went to Norwich, which was at least an 8-hour round trip, a couple of times. She said she tried to take more breaks. The Claimant did not, however, do any manual labour. She did not do any cleaning if a cleaner was unable to attend.

40. The Claimant also gave evidence that she was concerned about being allocated areas of high concern where the Contract Manager had just been removed due to complaints. She said in her witness statement:

> "Taking into consideration That Tina was facing an SOR Complaint and possible dismissal from the Client regarding Standards along with the hours invested into the specification I could not see where i could make improvements on Tinas performance and wondered how long it would be before I was facing the same problem this created anxiety and extra pressure for me not to mention growing concerns over my job security."

41. Our impression of the Claimant was that she was the type of person who, in general, does not like to make a fuss and simply gets on with things, even if detrimental to her own health.

42. On 18 November the Claimant was meant to be given her IT equipment back and arranged to meet Mr Coton in a service station. She was unable to attend due to an accident on the motorway. She asked for the equipment to be posted to her. This did not happen until 7 December.

43. On 19 November the Claimant was allocated two additional contracts, including one in Milton Keynes. On 20 November she emailed Mr Coton and Ken Ellis raising concerns about this on the basis that she was not meant to be driving more than 4 hours a day and this had already been stretched to 6 hours or more. She said "I cannot afford to add any more hours driving on a daily basis as this would be detrimental to my current health status". She said that her doctors had said she should not drive more than 500 miles a week. She asked them to reconsider the decision to allocate the contract to her. Mr Coton replied the same day saying that he had discussed with Ken and they decided not to give her the two additional contracts.

44. On 21 November Ms Mikuc called the Claimant and said she was now the Claimant's line manager. The Claimant's unchallenged evidence was that for the following three weeks Ms Mikuc would often call her shortly before 5pm asking her to deal with issues on contracts that were allocated to Kate.

45. Also on 21 November the Claimant was sent a letter from Ms Garcia with the outcome of her grievance. The letter said that the Claimant's grievance about her car being taken away was partially substantiated, but noted that the car had since been returned to her. The point about sick pay was rejected on the basis that the Claimant had been paid as per her entitlement. The remainder of the points raised about the restructure were not addressed on the basis that "the consultation process has not been completed".

46. On 6 December 2019 the Claimant emailed Ken Ellis, copying in Mr Coton and Ms Mikuc, asking for clarification about who her line manager was because at first it was Mr Coton, then changed to Ms Mikuc and now she was told she was reporting to Maria Formosa, another Account Manager. In the email the Claimant said that her portfolio had been completely changed and "whilst I was not happy about the change I have accepted the situation". She also complained about some IT problems that were making her job more difficult. Ken Ellis replied confirming that from 6 December the Claimant's line manager would be Maria Formosa.

47. On 11 and 12 December 2019 the Claimant and Mr Coton exchanged emails about holding the first "at risk" meeting on 13 December. The Claimant's evidence was that the meeting took place at 11am on that day, and that Mr Coton said straight away that he had been told by Ken Ellis that morning not to go ahead with the meeting. They therefore had an informal conversation instead. The Claimant's evidence, which was unchallenged and we accept, was that Mr Coton asked her if she would be interested in the position of Area Supervisor and she said no, and queried why the Respondent should offer her a position involving lifting heavy machinery given her health status. Mr Coton told her she should hold on and wait and see what happens.

48. Mr Coton's evidence in his witness statement was that no meeting with the Claimant took place on 13 December because his wife was critically ill in

hospital and he was working from home. In his oral evidence, however, he accepted it was possible the meeting had taken place, but said he could not remember it. We found the Claimant's evidence entirely credible, it was not challenged, and we accept the meeting took place as she described.

49. We should note at this juncture that the Respondent's witness statements were unsatisfactory in a number of respects. They appeared to be almost wholly "cut and pasted" from the grounds of resistance, and large sections of the statements were identical to each other. Both witnesses signed the statements during the hearing and confirmed the truth of their contents, but then frequently gave oral evidence that was inconsistent with parts of the statements. Ms Mikuc was taken to one sentence of her statement which she said she had not written, did not understand, and wished to be deleted. It was obvious to us that the witness statements were written by the Respondent's representatives and simply presented to the witnesses, who did not read them carefully, if at all.

50. Shortly before Christmas 2019 the Claimant was allocated a further contract in Cambridge.

51. By early January 2020 the Respondent had recruited another Area Supervisor, Jean. Ms Whistler had either been dismissed by this time or it was clear she was not returning.

52. On 6 January the Claimant attended an appointment with Dr Petzer, consultant cardiologist. He advised that she needed an operation to insert a defibrillator. He explained that this was potentially life-saving for the Claimant. He also explained there were risks in terms of her ability to drive because if the device issued a shock, depending on the type of shock she would have to stop driving for 6 months or 2 years. The Claimant decided to go ahead with it. She informed the Respondent shortly after the appointment, and sent them a copy of the consultant's letter.

53. During January 2020 the Claimant was allocated a number of additional contracts. In an email of 17 January, sent to another Director, Niel McLaren, and copied to Ms Mikuc, the Claimant asked for a handover for some of the new contracts. She also said she had an appointment with her cardiologist on 30 January to discuss her upcoming operation. She said he had estimated 8 weeks' absence after the operation.

54. The Claimant was due to have a meeting with Ms Mikuc in Cambridge on 27 January. It was a training meeting but the Claimant was also due to have a consultation meeting about the restructure straight afterwards. Ms Mikuc cancelled the meeting early that morning.

55. On 31 January the Claimant informed the Respondent that her operation was booked for 13 February 2020.

56. On 6 February the Claimant had a telephone conversation with Ms Mikuc during which she explained about the rules on driving with the defibrillator. It is not in dispute that Ms Mikuc said something along lines of "fuck fuck fuck, how are you going to do your job if you can't drive". In its response to the claim the Respondent had denied that Ms Mikuc made this comment and Ms Mikuc also "vehemently denied" it in her witness statement, but in her oral evidence she

immediately accepted making the comment or something along those lines. The Claimant's evidence was that that she said to Ms Mikuc she would be able to travel by public transport and Ms Mikuc responded by saying Andron would not allow her to do that. Ms Mikuc denies saying that. It is unnecessary for us to resolve that factual dispute in light of our conclusions below.

57. Around this time the Claimant also informed Ms Mikuc that her operation date had been put back to 13 March. She also emailed HR to confirm in writing the impact of the defibrillator on her ability to drive.

58. It is not in dispute that Ms Mikuc told the Claimant, either during the conversation on 6 February or on another occasion around that time, that the Claimant's absence for her operation would covered by Kate and Jean, the two newly recruited Area Supervisors.

59. On 11 February Ms Mikuc told the Claimant over the telephone that the Respondent would be recruiting a further Area Supervisor to cover the Claimant's work during her absence, and she asked the Claimant to train this new person. Ms Mikuc also confirmed during the call that the Claimant's role was still at risk. The Claimant was extremely unhappy about this. She outlined her concerns in an email of 12 February, pointing out that Kate had taken over the Claimant's work during her last absence and she was concerned she would not have a position to return to. She said she was disappointed that they would apply this additional pressure and stress.

60. The rescheduled "at risk" consultation meeting was due to take place on 18 February. Ms Mikuc's evidence was that sometime between 11 and 17 February a decision was made to rescind the Claimant's "at risk" status. She said she would have informed the Claimant about this on 18 February.

61. On 17 February the Claimant went off sick with flu, so the meeting on 18 February did not take place. Ms Mikuc accepted in her evidence that the Claimant should have been informed she was no longer at risk but this did not happen.

62. The Claimant says that while she was off sick she reflected on everything that had happened since her return to work. She felt that her phased return to work had been disregarded, there had been no Occupational Health referral, the Respondent had increased her workload and they had not resolved the "at risk" situation. She said this was very stressful and not good for her health.

63. On 21 February 2020 the Claimant resigned by email sent to a number of people including Ms Mikuc, Ken Ellis, Mr Coton and Jenna Callaghan:

> "Good afternoon All
>
> It is with Disappointment that l Grace Rouse feel that l have no other choice but to terminate my employment with Andron Facilities Management
> l have requested Verbally on several Occasions that you update me on my current Employment status le: at Risk of Redundancy issued on the 19th September 2019
> Both to Maya Mikuc and to Ken Ellis and still to date have no resolution

> Recent events Telephone conversations previous actions and lack of response to my correspondence confirm that the company and its representative have not taken my illness Seriously the continued added pressure and stress is a very unhealthy position to be in and is making me ill
>
> I am about to enter into a recovery period for Cardio Surgery and cannot have the added pressure and stress wondering if I have a secure position to return to given my current employment status
>
> In view of the above I feel that it is in my healths best interest to Resign with immediate Effect as of Friday 21st February 2020"

64. Jenna Callaghan replied on 24 February as follows:

> "I was surprised to receive your letter of resignation on 21" February 2020 with immediate effect.
>
> I am now writing to ask whether this is really what you want to do. I am concerned there could be some underlying issues in respect of your employment with us, which we need to address. From my understanding, Maya has attempted to make contact with you over the last few weeks to advise of an update on your employment with us. I would still encourage you to take part in this, please advise of a suitable date and time which would work for you.
>
> As you are aware, the Company has certain obligations in relation to you and your employment with us which include the right to follow the correct grievance procedures (copy can be found within the Employee Handbook). I would like to take this opportunity to remind you of the importance of airing any concerns which you may have, and to resolve matters through the formal process.
>
> If you wish to raise a formal grievance then we would kindly request you put this in writing to us within 5 days, namely by 28'" February 2020 at the latest, and arrangements can be made for you to be invited to a formal meeting in line with our procedures.
>
> If you wish to reconsider your decision to resign, then please let me know within the next 5 days, and by 28'" February 2020 at the latest.
>
> If you decide not to retract your resignation then we will respect your decision and process the termination of your employment and forward any monies which may be outstanding."

65. The Claimant maintained her resignation.

THE LAW

66. Section 15 of the Equality Act 2010 ("EqA") provides, so far as relevant:

> **15 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.
> …

67. Pursuant to section 20 EqA, where an employer has a provision, criterion or practice ("PCP") that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not apply if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to (paragraph 20 of Schedule 8 EqA).

68. Section 21 provides that an employer discriminates against a disabled person if it fails to comply with a section 20 duty in relation to that person.

69. Section 95(1)(c) of the Employment Rights Act 1996 ("ERA") provides:

> **95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—
> …
> (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.

Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

70. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

70.1. There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

70.2. The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.

70.3. The employee must leave in response to the breach.

70.4. The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(Western Excavating (ECC) Ltd v Sharp [1978] ICR 221; WE Cox Toner (International) Ltd v Crook [1981] ICR 823)

71. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606 and clarified in subsequent case-law as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

72. Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (Morrow v Safeway Stores Ltd [2002] IRLR 9).

CONCLUSIONS

73. Given that the Claimant relies on the alleged discrimination as part of the conduct she says led to a breach of the implied term, we address the complaints under the EqA first.

Discrimination arising from disability (section 15 EqA)

74. Mr Munro for the Respondent confirmed in closing submissions that the Respondent accepts the limitations on the Claimant's ability to work listed in paragraph 7.2 of the list of issues above arose in consequence of the Claimant's disability.

75. We consider that the allegations of unfavourable treatment are all closely linked. They all form part of the Claimant's overarching complaint that the Respondent wanted her out of the business, and instead of undergoing the consultation process they began to implement the new structure and left the Claimant's employment status unresolved.

76. Mr Munro submitted that the consultation was paused at the Claimant's request, so she could have no complaint about being left "at risk" for an extended period. The Claimant disputes that and says that although she objected to the being notified that she was at risk during her sick leave, and asked to be left alone at that time, once she was back at work she was keen for the matter to be resolved. She believes that the Respondent deliberately avoided the consultation with her and effectively implemented the new structure without conducting any consultation.

77. The Respondent also sought to argue that there was never any intention to make the Claimant redundant, and that it was simply proposing a change in job title. Mr Munro argued that the Claimant should have realised that there was no intention to demote her or remove her from employment at all.

78. We consider both of those arguments by the Respondent are wholly disingenuous. The Claimant was clear that she did not wish to engage in consultation while she was off sick, but there is nothing to suggest that she objected to it once she was back. Even on the Respondent's own evidence, two consultation meetings were arranged and then cancelled by them, so they cannot have been treating the process as "paused" as submitted by Mr Munro.

79. As for the suggestion that there was never any intention to make the Claimant redundant, this is completely contrary to the "at risk" letter and enclosures, which made it clear that the two Contract Managers would be replaced by three, implicitly lower level, Area Supervisors. The Respondent must have realised,

especially given the physical demands of the Area Supervisor role, that the Claimant was very unlikely to want the role.

80. We also consider that the Claimant had good reason to believe that the Respondent was implementing the new structure regardless of any consultation. The other Contract Manager was suspended and then dismissed, and in the meantime two Area Supervisors were recruited. By deciding to recruit a third Area Supervisor during the Claimant's absence for her operation the Respondent was effectively putting the new structure in place. The previous decision to leave the Claimant's former area of work with Kate also suggests a desire on the Respondent's part to establish a permanent structure with Area Supervisors allocated to particular contracts.

81. We do not accept the Respondent's evidence that they decided shortly before the Claimant's resignation to rescind her at risk status. If they had made such a decision there was no reason to delay in telling the Claimant. They did not even tell her about this decision after she had resigned expressly because her at risk status had not been resolved.

82. We consider it likely that the Respondent fully intended to make the Claimant redundant from the outset, i.e. at least from 19 September 2019, knowing that the Area Supervisor roles were not suitable, but they were reluctant to progress the consultation process in circumstances where they might have been criticised for not supporting a disabled employee, and there was a possibility that the Claimant would have to leave for medical reasons in any event. They therefore took no active steps towards consulting her, but simultaneously implemented the structure they had planned.

83. Taking into account all of the evidence we find on the balance of probabilities that the Respondent may have hoped that the Claimant would leave for medical reasons, but it had decided if that did not happen they would dismiss her, whether because of redundancy or capability. We accept that the Respondent pre-determined the outcome of the restructuring exercise and decided that the Claimant would be dismissed (para 7.1.1), that the Respondent failed to permit the Claimant to return to her original role on 14 November 2019 (para 7.1.2), that the Respondent pushed the Claimant out of her role by recruiting and retaining Area Supervisors to cover her area, and moving the Claimant to an area where her colleague had been dismissed due to a client complaint (para 7.1.3), that they left the Claimant "at risk" for an indefinite period (para 7.1.5) and they failed to take steps, adequately or at all, to reassure the Claimant (para 7.1.6). It is not in dispute that the Respondent did not uphold the Claimant's grievance in full (para 7.1.4). This was all part of a continuing act of unfavourable treatment that lasted until the Claimant's resignation.

84. We find that the reason the Respondent did not conduct the consultation process, and predetermined the outcome by implementing the new structure regardless, was because they considered either the Claimant would leave, because of her reduced ability to work, or it was obvious she was not suitable for the Area Supervisor roles because of her health limitations, so there was no prospect of her being retained. As for not upholding the Claimant's grievance in full, this was another means of avoid conducting the consultation. Ms Garcia concluded that the consultation was ongoing and therefore she could not comment on this aspect of the grievance. All of this conduct was, whether

directly or indirectly, because of the Claimant's reduced ability to work, i.e. the things that arose in consequence of her disability.

85. The Respondent relies on the justification defence and purports to rely on a legitimate aim as follows: "A full and comprehensive consultation was carried out with all necessary information available to the claimant". As a statement that is obviously not correct. It is the Respondent's own case that the consultation was put on hold at the Claimant's request, and it is not in dispute that two consultation meetings were cancelled by the Respondent. In any event it is not an "aim". It cannot provide a defence to the unfavourable treatment we have found proved.

86. This complaint therefore succeeds.

Failure to make reasonable adjustments (section 20 & 21 EqA)

8.1.1. A practice of requiring Contract Managers to drive long distances on a daily basis, in excess of 4 hours per day. Substantial disadvantage: reduced ability for the Claimant to perform her role (and hence increased risk of dismissal).

87. It was not seriously disputed that the Respondent had such a practice. We are satisfied that it was a normal part of the Claimant's job to travel to all of the sites she oversaw at least once a month and some of the sites were considerably more than two hours' drive from her home so she was often required to drive in excess of 4 hours a day.

88. Nor is it disputed that the Claimant's heart condition meant that driving more than 4 hours a day presented a medical risk to her. We had very little in the way of medical evidence to assist us with the consequences of the Claimant's condition and the medical advice that she received, but she gave evidence about what she was told by the consultants and by her GP, and none of that evidence was challenged. It is also a matter of common knowledge that stress and over-work are risk factors for someone with a heart condition. We therefore accept that the Claimant was put at a substantial disadvantage by the practice of requiring someone in her role to drive long distances on a daily basis. She was faced with the choice of either risking her health or not fully performing her role in circumstances where she had been told her job was at risk.

89. We also find that the Respondent knew the Claimant was likely to be placed at the disadvantage. On the Respondent's own evidence they agreed to limit the Claimant's driving to 4 hours because of the risks to her health. The Claimant also specifically mentioned the medical advice, which was not questioned at the time or since, in an email of 20 November 2019 to Mr Coton and Mr Ellis. The problem was that the agreed restrictions to her driving did not happen in practice. Not only was she allocated contracts more than two hours' drive from her home, which she believed she was required to visit and no-one told her otherwise, but her workload was steadily increased after her return to work so it was simply not realistic for her to limit her own driving to four hours a day.

90. We find that the Respondent could easily have taken steps to avoid the disadvantage by implementing its own decision to limit the Claimant's driving to four hours a day, and it was reasonable for the Respondent to do so. This

would have required communicating to the Claimant what they now contend was the position, namely the other managers would conduct the site visits for those sites further than two hours from the Claimant's home, or they could have allocated to the Claimant only contracts that were less than two hours away. They could also have allocated the Claimant contracts that were easily accessible on public transport and ensured that she used public transport.

91. We consider it was reasonable for the Respondent to have to take those steps from the point of the Claimant's return to work on 14 November 2019 up until the end of her employment. They failed to take those steps, so this complaint succeeds.

8.1.2. A practice of requiring Contract Managers to provide cover for cleaners in one-cleaner contracts. Substantial disadvantage: reduced ability for the Claimant to perform her role (and hence increased risk of dismissal).

92. The evidence about this was not wholly clear. Mr Coton did say in his evidence that Contract Managers might be expected to cover for cleaners if there was no alternative, but the Claimant's evidence was that in fact after her return to work she never did this because she was adamant she should not be performing any manual labour. Even if the Respondent had a practice of requiring Contract Managers to do this work, the Claimant was not put at a substantial disadvantage because she never did so after returning to work on 14 November and no-one ever raised any issue with her about this.

8.1.3. A practice of leaving "at-risk" employees without resolution for extended periods of time. Substantial disadvantage: increased stress and risk to health.

93. There is no evidence that the Respondent had such a "practice". We accept this is what happened with the Claimant but her circumstances were unusual. The specific treatment of the Claimant is the basis for her other complaints.

8.1.4. A practice of inflexibly only paying employees statutory sick pay, even when absent for a disability-related reason. Substantial disadvantage: reduced pay.

94. It is not in dispute that the Respondent had such a practice. It is also obvious that it put the Claimant at a substantial disadvantage because of her disability because she was off sick for a lengthy period; someone without her disability would be less likely to have lengthy periods of sickness absence. The Respondent would also have known of that disadvantage. We do not accept, however, that it would have been a reasonable adjustment to disapply the normal policy and pay the Claimant full pay, which is what she contends. The purpose of the EqA is to ensure that disabled employees can remain in work where reasonable adjustments can be made. Simply paying the Claimant more money would not contribute to that aim. In any event this complaint is out of time because the Claimant's period of sick leave ended on 14 November 2019 and she did not contact ACAS until more than three months later. The Claimant has not put forward any reasons for extending the time limit and we would not consider it just and equitable to do so.

8.1.5. A practice of not ensuring that Contract Managers are provided at all times with iPad, iPhone, and/or laptop. Substantial disadvantage: increased cost to the

employee; decreased ability to perform the role (due to increased burden on the employee in e.g. recording attendance onsite).

95. We are not satisfied that there was any such practice. This was simply something that happened in the Claimant's case. The Claimant does not take issue with the fact that her IT equipment was passed to Kate during her sickness absence. Her complaint is about it not being returned sooner and that happened because the Claimant was unable to meet Mr Coton on 18 November. Any further delay in posting the equipment to the Claimant was not pursuant to any practice; there is no evidence of it being more than inefficient management, possibly contributed to by the fact that Mr Coton's wife was unwell around this time.

8.1.6. A practice of requiring Contract Managers to drive to workplaces rather than using public transport. Ms Mikuc had specifically told the Claimant that she could not take public transport (in conversation on 6 February 2020). Substantial disadvantage: decreased ability to perform the role, increased risk of dismissal.

96. We are not satisfied there was such a practice, or alternatively the Claimant was not disadvantaged. The question of public transport only came up as a hypothetical situation if the Claimant was unable to drive in the future. The Claimant was never in the situation of needing to use public transport and was never prevented from using public transport.

97. The reasonable adjustments complaint therefore succeeds only in respect of the PCP of requiring the Claimant to drive more than four hours a day.

Unfair dismissal

98. Paragraphs 5.1.1, 5.1.2, 5.1.5 and 5.1.6 all form part of the overarching complaint that the Respondent failed to carry out a consultation process and implemented the new structure. We have already made findings about this above, which we adopt here. As for the specific allegation of failing to respond to the Claimant's request for an update on her status (para 5.1.1), we are satisfied that the Claimant did ask for an update on her employment status on 13 December 2019 during the meeting with Mr Coton and on 11 February 2020 over the telephone with Ms Mikuc. On 13 December she was told to wait and see what happens. On 11 February she was simply told her job remained at risk. Two consultation meetings were cancelled by the Respondent. We therefore accept that the Respondent failed to provide any substantive response to her requests for an update on her employment status.

99. As for paragraph 5.1.3, we consider there is overwhelming evidence that the Respondent did not take the Claimant's illness seriously. The most telling aspect of the evidence was the complete failure to seek any medical information or advice, whether via an Occupational Health referral or otherwise. On the face of it the Respondent accepted what the Claimant told them about the medical advice she had received, but they did absolutely nothing to comply with it. The Claimant worked long hours and the job involved driving very long distances. She had had a heart attack while at work. The Respondent's case was that it did not consider it appropriate to proceed with the Occupational Health referral until after the Claimant's operation. That might have been a legitimate stance if the procedure on 22 October 2019 had gone ahead, but the

Respondent knew that it had not taken place and when the Claimant returned to work on 14 November she was awaiting further tests and possible treatment. It is obvious to us that an employer in these circumstances should have been very concerned to ensure that the Claimant's return to work was not a risk to her own health or to anyone else's safety. Instead the Respondent conducted no risk assessment and made no enquiries about her fitness other than by speaking to the Claimant herself. As we have already said, the Claimant was the type of person who wanted to get on with things and because of the circumstances of her job being at risk was likely to downplay her reduced abilities, so it was all the more important for the Respondent to seek independent medical advice. Even based on the information the Respondent had from the Claimant, they did not implement the agreed phased return. Quite the opposite, they changed her work area completely, gave her a larger geographical area to cover, and assigned her contracts that were inherently more stressful to manage because of the difficulties covering absences and the history of complaints. They then steadily increased her workload. They did withdraw two of the additional contracts, on 20 November 2019, but in January the Claimant's workload was increased substantially. The only conclusion we can reach is that the Respondent did not take the Claimant's illness seriously.

100. As for paragraph 5.1.4, we have already found that the Respondent failed to arrange a return to work on reduced driving.

101. As for paragraph 5.1.7, we have upheld the section 15 EqA complaints and one of the reasonable adjustments complaints.

102. We are satisfied that the conduct we have found proved cumulatively amounted to a breach of the implied term of trust and confidence. The Respondent neglected its responsibilities as regards the Claimant's health and acted so as to make it impossible for the Claimant to continue working without serious risk to her health. Its conduct was either calculated to do so, on the basis that the Respondent was deliberately pushing her out of the business, or it was likely to do so. The Respondent does not argue that it had reasonable and proper cause for this conduct.

103. We are also satisfied that the Claimant resigned in response to the breach. The Respondent has not put forward any other reason for her resignation. The Claimant expressly mentioned in her resignation email the failure to resolve her "at risk" status and failure to take her illness seriously. Those are, broadly, the two matters that constituted the breach of the implied term. We accept that they were the principal reasons for her resignation.

104. The Claimant clearly did not affirm the contract before resigning. She tolerated the failure to make reasonable adjustments longer than she should have done for her own health, but she raised concerns about this on more than one occasion. The Respondent gave the impression that the consultation was in progress, and was about to commence, but kept delaying it. The Claimant was entitled to decide around mid-February 2020 that enough was enough.

105. The Respondent does not argue that the Claimant's dismissal was for a potentially fair reason.

106. The unfair dismissal complaint therefore succeeds.

107. The “Polkey” issue was not pursued by the Respondent. There is no basis on which we could find that the Claimant would have been fairly dismissed in any event. Indeed it was the Respondent’s case that they rescinded the Claimant’s “at risk” status and following her operation they would have made adjustments as necessary to facilitate her return.

Wrongful dismissal

108. It is not in dispute that the Claimant was not paid in lieu of notice. This complaint therefore also succeeds.

Employment Judge Ferguson

Date: 21 November 2022